ILLINOIS STATE
BAR ASSOCIATION

ASSEMBLY MEETING
Sheraton Grand Chicago
Chicago, Illinois

December 10, 2016
9:00 a.m.

AGENDA

1. Call to Order
   Vincent F. Cornelius, President

2. Report of the Secretary
   Albert E. Durkin, Secretary

   A. Report of the Notice of the Meeting / Quorum Call

   B. Review of Rules of Procedure

   C. Approval of Minutes of the June, 2016 meeting (attached)

3. Introduction of Past Presidents
   Vincent F. Cornelius, President

4. Remarks
   Honorable Lloyd A. Karmeier, Chief Justice, Illinois Supreme Court

5. Report of the ISBA Mutual Insurance Company
   Jon DeMoss, President

6. Report of the Agenda and Program Committee
   Honorable Celia Gamrath, Chair

7. Report of the Task Force on Future of Legal Services
   Timothy Moran and Lisa Nyuli, Co-chairs

   The Assembly will be requested to approve the final Report and Recommendations of the Task Force. Please refer to attached materials. Assembly member James Reilly has formally requested that the Assembly consider the impact of the Illinois Legal Aid Online and Access to Justice Initiative on the practice of law (an excerpt from Assembly member Reilly's communication is also attached).

8. Report and Recommendations on the Uniform Bar Exam
Daniel Thies, Chair, Standing Committee on Legal Education, Admission & Competence

The Assembly will be asked to approve the Committee's final Report and Recommendations on the Uniform Bar Exam. Please refer to attached materials.

9. ABA Model Rule 8.4(g)
Charles Northrup, General Counsel

The Assembly will be requested to consider taking a position on the recently amended ABA Model Rule 8.4(g), prohibiting discrimination and harassment by lawyers in conduct related to the practice of law. Please refer to attached materials.

10. Report of the Assembly Finance Committee
Curtis B. Ross, Chair

A. 2015-2016 Fiscal Year Audit (will be sent separately prior to the meeting)

B. 2015-2016 ISBA Year-end Financial Statements (attached)

11. Election of Representatives to ABA House of Delegates

Two "At Large" delegates to the ABA House of Delegates, one from Cook County and one from the area outside of Cook County, are to be elected.

Joseph Bisceglia duly filed for the Cook County position and John Thies duly filed for the position outside Cook County. Therefore, they will be declared elected to those positions.

12. Report of the Illinois Bar Foundation
Elizabeth A. Kaveny, President

13. Legislation
Umberto S. Davi, Chair

A. ISBA Sponsored Legislation

The Assembly will be requested to approve the proposed ISBA Legislative Package for 2016. Please refer to attached materials.

B. Report of Special Committee on Collaborative Law
Kelli E. Gordon, Chair

The Assembly will be requested to approve legislation and an amendment to the Rules of Professional Conduct regarding collaborative law in the family law field. Please refer to attached materials.

C. Family Leave Insurance Act

The Assembly will be requested to approve this legislation. Please refer to attached materials.

D. LAWPAC Appointments

President Cornelius will announce his appointments to the vacant LAWPAC Trustee positions. The appointments require Assembly confirmation.

Informational Reports

A. Lawyers' Assistance Program
B. Professional Conduct Opinions (Attached)
C. ISBA Election Notice (Attached)
D. Lawyers' Trust Fund

Special Note: Pursuant to the action of the Assembly on the 2016-17 ISBA Budget, a luncheon has not been scheduled for this meeting.

ILLINOIS STATE
BAR ASSOCIATION

Assembly Meeting
December 10, 2016

Agenda Item 2C
Minutes
(061816)

ILLINOIS STATE
BAR ASSOCIATION

ASSEMBLY MEETING
The Westin O'Hare
Rosemont, IL

June 18, 2016

MINUTES

1. Call to Order – Umberto S. Davi, President

President Davi convened the meeting and welcomed the Assembly members.

President Davi asked the Assembly for a Moment of Silence and respect for those victims of the tragic events in Orlando, Florida.

President Davi then introduced the officers of the ISBA in attendance: Vincent F. Cornelius, President-elect; Honorable Russ Hartigan, Second Vice President; James McCluskey, Third Vice President; and Third Vice President-elect David Sosin.

2. Report of the Secretary – Sonni C. Williams, Secretary

A. Report on the Notice of the Meeting

Secretary Williams announced a quorum was present for this meeting. She further reported that proper notice of the meeting agenda had been timely mailed in accordance with Assembly Rules, but that the Notice of Meeting was not.

On Motion made, seconded, and carried, the Rules were suspended pursuant to Assembly Rule 9 with respect to proper meeting notice.

B. Review of the Rules of Procedure

C. Introduction of Newly Elected Members of the Assembly

D. Approval of the Minutes

On Motion made, seconded, and carried, the minutes of the December 12, 2015, Assembly meeting were approved.

3. Report of the Agenda & Program Committee – Sam Cannizzaro, Chair

Committee Chair Cannizzaro summarized the purpose, membership and procedures of the Assembly Agenda and Program Committee. He recognized and thanked the members of the Committee for their service: Imani Drew, Nancy Easum, Mathew Huff; and Tamika Walker.

Upon the recommendation of Committee Chair Cannizzaro, motion made, seconded and carried, the Assembly agenda was approved.

4. President's Report – Umberto S. Davi

President Davi expressed his thanks to the Association, its officers, and his family for the honor of serving as the Association's 139th President. He briefly commented on his travels around the state as an ambassador to other bars, the judiciary, and the public. He noted how much he had learned from the lawyers of the state and his deep pride in being a lawyer.

President Davi noted his most memorable activity was speaking on behalf of the Association at the memorial service for Illinois Supreme Court Justice Thomas Fitzgerald.

President Davi also remarked on the efforts of the Law Related Education Committee in bringing information about the judiciary and lawyers to the public. He noted a number of activities undertaken by the LRE Committee and encouraged all Assembly members to consider participating in those activities. He also referenced the Association's proposal concerning Rule 711, which is currently pending at the Illinois Supreme Court. He noted his enjoyment over the past year with working with the Association officers and other Association leadership, and extended heartfelt congratulations to incoming President Vincent Cornelius.

President Davi then made special reference to a "Statement of the Illinois State Bar Association," provided to the Assembly members at the beginning of the meeting, concerning recent comments from a U.S. presidential candidate about U.S. District Judge Gonzalo Curiel.

On motion made, seconded, and carried, the following "Statement of the Illinois State Bar Association" was adopted by the Assembly:

The Illinois State Bar Association has a long and proud history of defending judicial independence and of supporting the Rule of Law. The recent political attacks on U.S. District Judge Gonzalo Curiel threaten to undermine these core foundations of our democracy. We recognize that individual judges are in no position to defend themselves from these attacks.
The ISBA strongly denounces the claim that Judge Curiel cannot rule impartially because of his Mexican heritage. In Illinois, our Code of Judicial Conduct governs the ethical conduct of judges and provides guidelines for determining whether a judge should recuse himself or herself or be disqualified from hearing a specific case for cause.

Candidates for political office should understand and appreciate the damage these attacks can have on the independence and integrity of our judiciary. This independence is essential for an effective and orderly justice system. Our citizens are the beneficiaries of a fair and impartial administration of justice consistent with the Rule of Law.

The ISBA and state bars throughout the country share a manifest responsibility to vigorously defend and support our system of justice and the precept of judicial independence. We must remain vigilant in collectively addressing this paramount principle that protects the fabric of our society.

5. Awards Presentations

President Davi thanked the many volunteers upon whom the Association depends. He called forward President-Elect Cornelius to assist in the award presentations. He then introduced and called forward the following individuals for special recognition and to receive Association awards for their exemplary contributions:

Board of Governors Award – Sarah J. Taylor (Carbondale);

Board of Governors Award – Robert T. Park (Rock Island);

Board of Governors Award – The Family Law Collating Committee of Mathew A. Kirsh, Jennifer A. Shaw, David H. Levy, William J. Scott, and Richard W. Zuckerman;

Diversity Leadership Award – Shira D. Truit (Belleville);

Mathew Maloney Tradition of Excellence Award – Annemarie E. Kill (Chicago);

Elmer Gertz Human Rights Award – Cindy G. Buys (Carbondale);

John C. McAndrews Pro Bono Service Award, Small Firm - Drendel & Jansons Law Group (Batavia);

John C. McAndrews Pro Bono Service Award, Corporate Law Dept. – United Airlines;

John C. McAndrews Pro Bono Service Award, Individual – Roger Benson (Kankakee);

Joseph R. Bartylak Memorial Legal Services Award – Lisa A. Colpoys (Chicago);

Excellence in Legal Education Award – John Marshall Law School Domestic Violence Legal Clinic;

Roz Kaplan Government Service Award – Alan Spellberg;

Sexual Orientation and Gender Identity Committee Community Leadership Award – Roger V. McCaffrey Boss (Chicago);

Richard H. Teas Legislative Support Award – Richard W. Zuckerman;

Young Lawyer of the Year Award, Cook County – Erin Wilson (Chicago);

Young Lawyer of the Year Award, Outside Cook County – Karoline Castens (Alton);

Law Student Division Public Service Award – Kimberly-Claire Seymour;

Austin Fleming Newsletter Editor Award – Jeffrey M. Simon (Chicago).

6. President-Elect's Report – Vincent F. Cornelius

President-Elect Cornelius addressed the Assembly and noted it was his great pleasure to do so. He spoke of his gratitude to the officers he was able to learn from when moving up the line of presidential succession: Umberto Davi, Rick Felice, and Paula Holderman. He was particularly taken with President Davi's efforts as an emissary for lawyers and the Association. He also recognized the importance of President Holderman's emphasis on keeping the Association relevant for its members, especially younger members of the bar.

President-Elect Cornelius noted that his emphasis on young lawyers played a significant role in holding the Annual meeting in Illinois, and that he would continue the work of the Task Forces on Law School Debt and Law School Curriculum. He also noted the establishment of a Council on Law School Deans as a forum for their input on Association efforts regarding law students transitioning to the practice of law. He expressed his excitement about a new Association microsite for young lawyers, constructed with input from the Young Lawyers Division and with the goal of providing meaningful services and information to young lawyers.

President-Elect Cornelius then identified a number of additional areas of focus for his presidential year including: various initiatives concerning inclusion and diversity; bringing the attention of the bar to issues surrounding implicit bias; and the continued monitoring of threats to lawyers from nonlawyer service providers.

7. Report of the ISBA Mutual Insurance Company – Jon DeMoss, President

President Davi called upon Jon DeMoss, President, ISBA Mutual Insurance Company, to address the Assembly.

President DeMoss thanked the Assembly for the opportunity to address it, and commented on the very close relationship between Association and the ISBA Mutual over the years. He further noted the completed relocation of the ISBA Mutual corporate headquarters to the 8th floor of 20 South Clark, just one floor below the ISBA offices, and opportunities for the Association to use the ISBA Mutual space for Association activities.

President DeMoss went on to describe the ISBA Mutual's ongoing support for the Association's Free CLE member benefit and Fastcase. He also noted the good year the ISBA Mutual had including: maintaining its "A rating with a stable outlook" from AM Best, and issuing a 10% dividend to all policyholders for the tenth year in a row.

Finally, President DeMoss announced that at the end of the year he would be stepping down as President of the ISBA Mutual.

President Davi congratulated President DeMoss on an exemplary career supporting Illinois lawyers as Association President, Association Executive Director, and President of the ISBA Mutual.

Motion made to express the profession's appreciation via formal resolution for President DeMoss' many years of service, which President Davi concurred and accepted.

8. 2016-17 Proposed Budget – Curtis Ross, Chair, Assembly Finance Committee

President Davi called upon Assembly Finance Committee Chair, Curtis Ross to address the Assembly.

Chair Ross thanked the Assembly Finance Committee and the Board of Governors Budget and Audit Committee for their hard work during the budget process.

Chair Ross noted the budget presented to the Assembly had been approved by the Board and achieves several goals. It improves member services, finances significant capital expenditures, and implements a planning process that takes into account operating surpluses for the next three years. He noted that the finances of the Association are excellent and that the Association is in its best financial condition in many years. The proposed operating budget reflects an anticipated surplus of approximately $573,000 which includes ISBA Mutual contributions of approximately $310,000. Chair Ross thanked the ISBA Mutual and its President Jon DeMoss for their continued support of important ISBA member services.

Chair Ross highlighted some significant budget items. He noted capital expenditures of approximately $1.7 million related to the maintenance and upgrade of the 50 year old Illinois Bar Center in Springfield, and that these expenses would be drawn from long term reserves. In addition to continued member services like Fastcase and Free CLE, Chair Ross noted anticipated new member services including: a public member directory, upgraded e-commerce portals on the Association website, and an online practice management center. In terms of expenses, he noted projected increases in personnel expenses, some related to filling three new staff positions.

Motion made and seconded to approve the 2016-2017 budget.

The Assembly discussed the proposed budget. A number of issues and questions were raised, including: whether the anticipated budget surplus could be used for the IBC capital improvements; whether consideration was given to obtaining a loan for IBC construction costs, whether the increase in administrative expense was comparable to others bars, and efforts to address credit card and bank service charges. In response, Chair Ross, ISBA Director of Finance Archer, and ISBA Executive Director Craghead noted: the budget surplus would be used to replenish long term reserves, a loan for construction was considered but determined not to be financially sound, administrative costs (primarily staff compensation) was researched in relation to other associations and found to be comparable, if not slightly below comparables, and that credit card charges are periodically reviewed with the most recent renegotiation completed last year.

Motion carried to approve the 2016-2017 budget.

9. Proposed Bylaw Amendment (Elections) – Celia Gamrath, Cook County

President Davi called upon Celia Gamrath, Assembly member, Cook County, and former Member of the Board to address the Assembly concerning two governance related matters.

Member Gamrath thanked the Assembly for the opportunity to raise some governance issues. Member Gamrath first commented on the time and effort spent by the Board at its May meeting in appointing approximately 49 members to fill vacant Assembly seats. She went on to discuss and present a proposal to amend the Association bylaws to eliminate the requirement that the Board fill vacant Assembly seats and to establish a new procedure for filling vacant seats.

Motion made and seconded to amend the Association bylaws and Election Procedures to establish a new procedure for filling Assembly vacancies as reflected in the materials attached to the agenda.

After discussion, motion made, seconded, and failed to bifurcate the proposal into two votes: (1) to eliminate the Board requirement of filling Assembly vacancies; and (2) the establishment of the new vacancy filing procedure as specified in the agenda materials.

After further discussion, motion made, seconded and carried to call the question.

Main motion to amend the Association bylaws and Election Procedures to establish a new procedure for filling Assembly vacancies as reflected in the materials attached to the agenda carried.

Member Gamrath next introduced an informational item concerning whether 40 geographical Assembly seats should be replaced with 40 section representative seats (one from each section). It was suggested that such a change might bring greater practice area expertise to the Assembly, and reduce the likelihood of vacancies. Member Gamrath invited Assembly members to provide her with comments.

The Assembly engaged in a brief discussion of the issue. Some points raised included: (1) the complexity of the details of implementing such a structural change; (2) a show of hands of current Assembly members who also serve on section councils; (3) the need for the Assembly structure to enhance the diversity of thought on issues; (4) the need to address disaffected younger lawyers seeking out leadership opportunities; (5) the need to eliminate the barrier between the Thursday and Friday section council activities during the Annual and Mid-Year meetings and the Assembly on Saturday.

Member Gamrath concluded by noting that any additional developments in this area would be reported to the Assembly.

10. Associate Member Dues – Curtis Ross, Chair, Assembly Finance Committee

President Davi called upon Assembly Finance Committee Chair, Curtis Ross to present a proposal from the Standing Committee on Bar Services and Activities to rename and expand the "Law Office Administrators and Legal Assistants" membership category along with an increase of the category's dues from $55 to $99. Chair Ross also noted that the Board of Governors approved the proposal.

Motion made and seconded to amend the bylaws as proposed by the Bar Services Committee.

After discussion, a motion to amend the main motion was made and seconded to include a reference in the listed examples of "legal assistants" at bylaw section 1.1(i)(2) of "other persons involved in law office management."

[Under the amendment, section 1.1(i)(2) would read in amended part "Legal assistants, *such as paralegals, legal secretaries, court personnel, or persons involved in law office management,* consisting of nonlawyers…" (amendment in italics)".]

After further discussion, motion made, seconded, and carried to call the question.

Motion to amend the main motion carried.

Main motion as amended carried.

11. Report on Legislation – Richard D. Felice, Chair

President Davi called upon ISBA Legislative Director James Covington to address the Assembly on legislative activities.

Director Covington reported that the past legislative session was a successful one for the ISBA, and directed the Assembly's attention to five specific legislative developments. These included: the adoption of the Revised Uniform Fiduciary Access to Digital Assets Act, effective immediately; a rewrite of the Limited Liability Company Act, effective July 1, 2017; changing standards with respect to child support, effective July 1, 2017; a clean-up bill for last year's Marriage and Dissolution of Marriage Act, effective January 1, 2017; and a rewrite of the Parentage Act's provision regarding artificial reproduction. Director Covington also highlighted possible future action on court filing fees, both in the civil and criminal areas. He also commented on the Association's historic support for juvenile justice initiatives, and the adoption of three juvenile justice bills this past year.

Finally, in response to a question from the floor, Director Covington noted that there had been no legislative movement or action concerning a services tax.

12. Election of Assembly Agenda and Program Committee Members

President Davi announced three seats were available on the Assembly Agenda and Program Committee that needed to be filled by election. Two seats were available from Cook County, and one seat was available from outside Cook County. All seats have a two year term.

From Cook County, Celia Gamrath and Anthony Iosco were nominated.

Motion made, seconded and carried to close nominations. Candidates Gamrath and Iosco were declared elected.

From Outside Cook County, Lindsay Roalfs and David Schaffer were nominated.

Motion made, seconded, and carried to close nominations. After election by secret written ballot, Lindsay Roalfs was declared elected.

13. Report on Illinois Bar Foundation – Elizabeth Kaveny, President

President Davi called upon IBF Third Vice-President Deanne Brown to address the Assembly.

Third Vice-President Brown thanked the Assembly for the opportunity to address it and noted that the IBF had recruited 50 new or upgraded Fellows this past fiscal year. She also noted that now nonlawyers, companies, and vendors could become Fellows. She also noted a new program opportunity where contributors can now designate in which Appellate District they would like their contribution to be used.

Third Vice-President Brown provided a description of the good works of the IBF, including the distribution of Access to Justice Grants. She also referenced an upcoming IBF reception in Collinsville. Finally, Third Vice-President Brown officiated at drawing for the 50 new or upgraded Fellows. The prize was an iPad pro. President Davi announced the winner: Katherine Conroy.

14. Resolutions

A. Retiring Assembly Members

A Resolution in Honor of Retiring Members of the Assembly was read by the Chair Assembly Rules and Bylaws Committee:

Resolution in Honor of
Retiring Members of the Assembly
June, 2016

Be it resolved that the Illinois State Bar Association, through its duly authorized officers and representatives, express its gratitude and appreciation to the following retiring members of the Assembly for their dedicated and important service over a period of years to the Association, the profession, and to our system of justice. They are:

Steven Amjad
Robert J. Anderson
Steven A. Andersson
Patrice Ball-Reed
Luke A. Behme
Terry Brady
Sean D. Brady
Thomas A. Bruno
Elvis C. Cameron
Sam F. Cannizzaro
Nikki Carrion
Anthony V. Casaccio
Lynn Cavallo
Joel Chupack
Mark Churchill
Kimberly Cook
Donald M. Craven
Richard J. Curran, Jr
Dion U. Davi
Kim Davis
Gina A DeBoni
Kathie B Dudley
Sarah Duffy
Angela Baker Evans
Pablo Eves
Howard W. Feldman
Richard D. Felice
John M. Fitzgerald
Eugene F. Friedman
Jennifer W. Hammer
Robert Handley
Jim Hansen
Mark Jeep
Michele M. Jochner
Stephanie S. Johnson
Henry D. Kass
Amy L. Keys
John Kim
John F. Knobloch
Eli Korer
Theodore G. Kutsunis
George Leynaud
Joseph F. Locallo, III
Michael R. Lucas
Adam Margolin
Grace Mata
Colleen McLaughlin
Heather McPherson
Ronald D. Menna, Jr.
Michele Miller
Julie A. Neubauer
Daniel E. O'Brien
J. Damien Ortiz
Frank A. Perrecone
David Rabinowitz
Krysia Ressler
Ennedy Rivera
Susan W. Rogaliner
Maren Ronan-Kantas
Rhonda L. Rosenthal
Anthony E. Rothert
Richard A. Russo
Donald L. Shriver
Deborah Jo Soehlig
Tom Speedie
Letitia Spunar Sheats

Timothy J. Storm	*Richard L. Turner, Jr*	*Mary M. Williams*
Michael S. Strauss	*David J VanderPloeg*	*Mark E. Wojcik*
Steven D. Titiner	*John A. Wasilewski*	*Daniel K. Wright*
Jared Trigg	*Cory White*	*Bernie Wysocki*
Shira Truitt	*Dick B. Williams*	

B. 2013-2014 President

A resolution honoring ISBA President Umberto S. Davi was read by President Elect Cornelius:

ILLINOIS STATE BAR ASSOCIATION

Resolution in Honor of
President Umberto S. Davi

WHEREAS, Umberto S. Davi served in 2015-16 as the one-hundred-thirty-ninth President of the Illinois State Bar Association;

WHEREAS, he formed a Special Committee to examine Illinois Supreme Court Rule 711 and championed the Committee's recommendation that the Rule should be expanded to allow law students to gain practice experience under the supervision of private practitioners;

WHEREAS, he oversaw the successful launch of IllinoisBarDocs, which brings a low-cost library of fully automated legal forms to ISBA members;

WHEREAS, he organized an important meeting of ISBA leadership and the deans of Illinois' Law Schools to discuss and explore the recommendations put forth in the Final Report of the ISBA's Task Force on Law School Curriculum and Debt;

WHEREAS, he worked with Judge Robert Anderson, president of the Illinois Judges Association, to expand the joint ISBA/IJA "Courtrooms in the Classroom" project beyond the schools, bringing civics education to adult groups such as the VFW and the Jaycees;

WHEREAS, he began a much needed update of our historic Springfield headquarters that includes ADA-related upgrades and renovation of aging HVAC, electrical, and plumbing systems;

WHEREAS, he continued Past President Richard Felice's successful Solo and Small Firm Practice Institute by having four separate day-long CLE seminars in Rockford, Fairview Heights, Bloomington, and Rosemont;

WHEREAS, he redoubled the ISBA's efforts to explore the implications of limited license legal technicians for practicing lawyers, consumers, and other stakeholders in the justice system;

WHEREAS, he presided over the first ever joint meeting of the governing boards of the State Bar of Wisconsin and the ISBA;

WHEREAS, he worked cooperatively with the Illinois Judges Association, Justinian Society of Illinois, and The John Marshall Law School to conduct The Distinguished Professional Services Joint Dinner where Chief Justice Rita Garman, Secretary of State Jesse White, and Susan Sher were honored;

WHEREAS, he participated in a formal session of the Illinois Supreme Court by offering remarks in memory of Hon. Thomas Fitzgerald;

WHEREAS, he led a successful member travel program to Sicily;

WHEREAS, he was a preeminent emissary of the ISBA through attendance at a multitude of affiliated bar events;

THEREFORE, BE IT RESOLVED that the Board of Governors hereby expresses its appreciation and admiration for the many accomplishments of Umberto S. Davi in his service as President, and further that the Board expresses appreciation to Janet Davi who complemented the Presidential year through her style and grace.

15. Adjournment

THERE BEING NO FURTHER BUSINESS before the Assembly, on motion made, seconded and carried, the meeting was adjourned

Respectfully Submitted:

Sonni C. Williams
Secretary

Assembly Meeting
December 10, 2016

Agenda Item 7
Task Force on Future of Legal Services

2016

REPORT AND RECOMMENDATIONS

of the

ILLINOIS STATE BAR ASSOCIATION'S

TASK FORCE ON THE FUTURE OF

LEGAL SERVICES

REPORT AND RECOMMENDATIONS
OF THE
ILLINOIS STATE BAR ASSOCIATION'S
TASK FORCE ON THE FUTURE OF LEGAL SERVICES

(October 4, 2016)

Task Force on the Future of Legal Services

Timothy E. Moran, Chair
Chicago

Lisa M. Nyuli, Vice-Chair
South Elgin

Thomas Bruno
Urbana

Edward J. Burt
Oak Forest

Hon. John P. Coady (retired)
Taylorville

Kelli E. Gordon
Springfield

John J. Horeled
Crystal Lake

Kenya A. Jenkins-Wright
Chicago

Hon. Ann B. Jorgensen
Wheaton

Marron A. Mahoney
Chicago

Mark Marquardt
Chicago

Gerald W. Napleton
Chicago

John G. O'Brien
Arlington Heights

Hon. Jessica A. O'Brien
Chicago

Mary T. Robinson
Chicago

Richard L. Turner
Sycamore

Angelica W. Wawrzynek
Mattoon

Charles J. Northrup, Reporter
ISBA

EXECUTIVE SUMMARY

The Task Force on the Future of Legal Services was conceived and implemented by Presidents Felice and Davi in response to nationwide developments in the legal services marketplace. Its portfolio was broad. It has examined relevant aspects of a changing legal services marketplace such as the impact of technology on access to, and delivery of, legal services. It also reviewed judicial processes, changing consumer attitudes, nonlawyer legal service providers, and alternative business structures for law practices. What is clear to the Task Force is that it has just scratched the surface of the changes occurring with legal services. The pace of technological change that is driving so much of the developments in the legal services marketplace is rapid. By the time this Report is published, there will likely be new data to consider, new lawyer (and nonlawyer) business models to examine, and new ideas taking root. Notwithstanding that it is a snapshot of legal services in 2016, the Report will hopefully serve to educate the membership and to position both the membership and the Association to address and be successful in a new and changing legal services landscape.

Section II of this Report asks the question of where we are as lawyers in the legal services marketplace. It answers it broadly by introducing and discussing some of the core challenges, developments, and impacts affecting the legal profession. It addresses the economic challenges facing lawyers; it notes the reluctance of consumers to employ lawyers; and it addresses the technological change that is transforming the courts and the delivery of legal services. Above all, it stresses the importance for lawyers to adapt to the changing marketplace.

Section III of the Report provides detailed support for many of the challenges, developments, and impacts addressed broadly in Section II. The information in this Section not only informs the ultimate recommendations of the Task Force, but also serves to educate the membership about trends in the legal services marketplace which may not be readily apparent to lawyers busy practicing law. The available data presents a picture of an evolving legal services marketplace where the need and demand for legal services is on the rise, but demand for lawyers is not. It presents a description of consumer attitudes changed by the Internet and mass marketing of lawyer and judicial alternatives. It discusses alternative business models for both lawyers and nonlawyers. But it also recognizes the importance of traditional lawyer and judicial roles and expertise, and notes that legal services consumers value those roles and expertise. Although some of the data and information presented may be sobering, the Task Force believes it represents trends that appear likely to continue. The Task Force also believes it represents opportunities for lawyers and the Association to thrive and be successful.

Section IV presents a number of specific and realistic recommendations to be considered by the Association. Recommendations include: promoting a robust online consumer presence including a member directory that can be used by consumers to locate, review, and retain Association members; creating consumer education and resources about the law, lawyers, and judicial processes and resources; promoting continuing lawyer education and practice resources, particularly on technology and marketing issues; preserving and championing lawyer value in the

broader legal services marketplace; supporting greater efficiency in judicial processes for both consumers and lawyers; and establishing an Association Standing Committee on Future of Legal Services. The intended effects of these recommendations are multifaceted, but they include: ensuring or increasing consumer access to legal services; promoting the availability of Association members to provide a diverse range of legal services; enhancing consumer education about legal and judicial services; enhancing lawyer education and efficiency; and preserving the ability of the Association to monitor, assess, and quickly respond (if necessary) to new developments in the legal services field.

Finally, the Report concludes by recognizing that the legal services marketplace has changed, but that the Association is in a good position to help its membership thrive and succeed.

I. INTRODUCTION

"*I don't know what the future may hold, but I know who holds the future*." Ralph Abernathy.

It seems that given the many challenges which confront our esteemed profession, perhaps the above statement is no longer true. Or less true than it used to be. The legal profession is confronted with diminished revenues, increasing student debt, fewer lawyer jobs, increasing competition from nonlawyers, and rapidly developing technology which may possess the capacity to eliminate some of the roles currently filled by lawyers.

So, "who holds the future" for us? With determination, proactive thinking, business acumen, innovation, and our continued commitment to access to justice, we can continue to hold our future in our own hands. What it may look like is a different question.

The ISBA Task Force on the Future of Legal Services has been asked to explore various issues facing the profession now and in the forseeable future and, where possible, to provide recommendations to deal with them. In this report we attempt to do just that. However, to do so requires that we balance the historic distinction between the provision of legal services as a 'profession' with the growing and perhaps inescapable need to adapt our operating procedures to those of the enveloping business community. This is not to suggest that we are willing to surrender our identity as lawyers. Far from it. But we must recognize that changes in areas such as technology, efficiency and business development are changing the landscape of the profession. By acknowledging those changes and taking proactive steps at this juncture, the future may hold promise to sustain and perhaps even expand lawyers' ability to earn a living.

II. WHERE WE ARE (Part 1 – The Big Picture)

A. The Legal Profession is Facing Unprecedented Economic Challenges. According to IRS data, the income of solo practitioners has plummeted over the past generation. While lawyers in certain sectors of the legal economy do well, too many lawyers struggle with unemployment, unstable employment, and under-employment. Law schools are graduating more new lawyers than the current legal economy can absorb. Law school debt is limiting the number of career paths that are economically viable for new graduates. Technology and alternative legal services providers are reducing demand for lawyers who serve the general public. Corporate clients continue to exert pressure on law firms to increase efficiency and lower costs through methods such as insourcing, off-shoring, and automation.

B. A Significant Share of the Population is Reluctant to Use to Traditional Legal Services When Faced with a Legal Problem. Ironically, at a time when many lawyers are looking for clients, a significant number of individuals, families, and small enterprises resist seeking the services of a lawyer or pursuing formal legal remedies. While costs (and fears about costs) are prohibitive factors for many, others simply do not understand that their problem has a legal dimension. Even for those who do understand the legal nature of their problem, large numbers express a preference to resolve it through informal means, to take no action at all, to

seek help from a non-attorney third party, or to represent themselves in court. In the aggregate, this group is often referred to as the "latent legal market."

C. The Courts Are Being Transformed by Litigants Without Lawyers. The judicial system was built on an adversarial model of two parties, two lawyers, and one judge. However, the number of self-represented litigants has grown rapidly and shows every sign of continuing to grow. In many Illinois courtrooms, it is much more common to have two self-represented parties than two parties represented by lawyers. The court system is being compelled to take steps to level the playing field for self-represented litigants (*e.g.*, through use of standardized, plain language forms and process simplification), not only in pursuit of justice but as a matter of self-interest and self-preservation. As a result, the courthouses, courtrooms, and court processes of the future could look very different than those of today.

D. Technology is Reshaping the Delivery of Legal Services, and the Pace of Change Will Continue to Accelerate. Technology – specifically technology supporting the aggregation, organization, and transmission of information – has changed the way people work, shop, buy, sell, learn, socialize, travel, and recreate. Because much of the traditional work performed by lawyers is based on the aggregation (*e.g.*, libraries, case law databases, and law school coursework), organization (*e.g.*, books and journals), and transmission (*e.g.*, advising clients, drafting legal documents) of legal information, it is inevitable that the demand for legal services and the role(s) of the legal profession will change. Advances in artificial intelligence (*e.g.*, IBM's Watson) are already having an impact on the delivery of corporate legal services. As these systems become better and cheaper – a common pattern for emerging technologies – they will create new opportunities for lawyers and law firms to reduce costs and increase productivity. These technologies likely will also lead to the automation of more tasks traditionally performed by lawyers.

E. New Actors are Reshaping the Legal Marketplace. The mechanisms inherent in our free market economic system are relentlessly efficient at finding needs and filling gaps like the one between the traditional players in the legal profession (*e.g.*, solo and small-firm practitioners) and consumers who are reluctant to use them. Non-lawyer, for-profit companies that offer alternative ways of obtaining legal information, provide do-it-yourself legal solutions, and allow comparison-shopping for legal services (*e.g.*, Legalzoom, Avvo, and hundreds – perhaps thousands – of others) are in business to make money by exploiting a perceived need in the market. To the extent that the need is real and these new entities are able to meet consumers' demands for convenience, price-transparency, and "good-enough" solutions, they will become increasingly competitive with lawyers providing traditional legal services.

F. Adaptation to the Legal Economy of the Future Requires Skills Law Schools Don't (Often) Teach (Yet): The traditional path for lawyer success by getting a good legal education, learning how things are done from established practitioners, working hard, and building a book of business and positive reputation through word-of-mouth, networking, and personal connections may no longer be the sole or most effective approach. To adapt to a rapidly changing legal landscape, successful lawyers must have a working knowledge of **marketing** (to reach new clients); **technology** (to evaluate and use effective tools); **process analysis** (to increase efficiency and profitability); **data analysis** (to evaluate successful strategies and

accurately price services); and **supply-chain management** (to outsource tasks to lower-cost vendors), among a range of other interpersonal and business skills. Entities such as bar associations need to make these skills a focus of continuing legal education efforts.

G. The Legal Profession Must Do More to Understand Its Potential Customers. Businesses succeed by understanding their customers. While individual lawyers get to know individual clients, the institutions of the legal profession – bar associations, law schools, research institutions – need to expend more time, attention, and resources, to understanding and disseminating knowledge about the needs, hopes, fears, likes, and dislikes, of their existing and potential clients. These efforts must be multi-disciplinary, incorporating existing knowledge and research tools from economics, sociology, psychology, marketing, advertising, and user-experience ("UX") research to create better value propositions for potential clients through new engagement and service strategies.

III. WHERE WE ARE (Part 2 – The Details)

A. Current Legal Environment in Broad Context

Most lawyers today practice as lawyers have practiced for centuries. It is often referred to as a "bespoke" practice: a practice that produces highly customized products or services crafted specifically for individual clients.[1] This type of practice is often expensive for the client, and the number of clients served is necessarily limited by a lawyer's finite availability. The advent of new technologies, new consumer attitudes, and alternative legal services providers make the bespoke tradition of legal services delivery no longer the only available model for consumers.

If a "bespoke" practice represents all that is traditional, good, and valuable about lawyers' services, "commoditized" legal services represents the opposite. Respected legal commentator Richard Susskind explains that commoditized legal services are at the opposite end of an evolutionary scale beginning with traditional "bespoke" services. Commoditized legal services are an IT-based product readily available in the marketplace from a variety of sources at highly competitive prices and available for direct use by an end user, most often on a "do-it-yourself basis.[2] The current legal services marketplace is replete with examples of alternative legal services providers providing commoditized legal services. Such providers are increasingly advertised to the public through mass media. Lawyers' antipathy toward commoditized services is natural: it seems to devalue the practice of law, and it will drive the price of legal services down.[3]

Another term describing the movement of legal services away from lawyers is "decomposition." The decomposition (or deconstruction) of legal work is based upon the idea that representing a client or handling a case is made up of hundreds of individual tasks. As commentator Susskind observes: "Sometimes, by decomposing legal work and viewing it with the eye of a systems analyst…some fairly fundamental reconfiguration or reorganization of the tasks can be introduced which of itself might bring greater efficiency."[4] Many large law firms have turned to automation (*e.g., document review, e-discovery*), outsourcing (*to cheaper labor markets or non-lawyer providers*), "insourcing" (*i.e., handling more matters internally*) and

other strategies to increase efficiency and reduce costs at the insistence of their business and corporate clients. The occurrence of decomposition is more than academic theory or anecdote. The 2016 Georgetown Report on the State of the Legal Market notes that: "The increased market share of outside vendors reflects a proliferation of non-traditional providers of legal and legal related services. […] such non-traditional providers have now established a firm foothold in several service areas once dominated exclusively by law firms."[5] Although often seen as a "big law" issue, the key point widely applicable to all lawyers is that lawyers' actions in "handling a case" are being subjected to a kind of analysis and reworking that would have been inconceivable a generation ago, made possible in part by advances in information technology, globalization, and analytical capabilities.

Finally, a term describing the plethora of changes affecting the legal profession and legal services marketplace is "creative disruption." Creative disruption, a term not particularly endearing to those being disrupted, describes a legal marketplace where "lawyers will increasingly face competition not only from other lawyers, but from nonlawyer providers."[6] Professor Laurel Terry, notes that "[A]mong other things, this theory [of creative disruption] posits that 'disruptive' new entrants are likely to come into a market when consumers are underserved (because they cannot afford the existing services or product) or overserved (because they are paying for more product or services than they want or need)."[7]

The above concepts, while broad, provide some context for developments and trends in the legal services marketplace. They are supported by available data, which is discussed in detail below.

B. Statistical Observations/Support

1. Legal Services Need and Demand

Legal services remain a necessary and essential element of an ordered society founded on the rule of law. Most of society's personal, business, and governmental relationships are tempered by law. Experience shows that as long as business and personal relationships continue to be governed by orderly processes of law, as long as conflicts and disputes continue to arise, and as laws become more complex, there will be a need for legal services and lawyers.

Recent social science research has attempted to quantify legal needs. The American Bar Foundation's 2013 Community Needs and Services Study found that 66% of a random sample of adults in a middle-sized American city (population 350,000 to 450,000) reported experiencing at least one civil justice situation in the previous 18 months.[8] These civil justice situations mostly dealt with issues involving employment, money, insurance, and housing.[9] The statistics reflect legal needs from across the socio-economic spectrum, although the need for such services was less for higher income individuals.[10] These statistics on legal needs are borne out in an earlier study of low income Illinoisans as well. The 2005 study, The Legal Aid Safety Net: A Report on the Legal Needs of Low-Income Illinoisans, found that 49% of low income Illinois households reported one or more legal problems in 2003.[11] According to that Study, that 49% extrapolated to approximately 383,000 households experiencing over 1.3 million legal problems in 2003.[12]

Quantifying the actual *demand* for legal services is more difficult than identifying the *need*. One indicator of demand for legal services is reflected by the actual expenditure of resources on legal services. (As touched on above, the difference between the societal need for legal services and what is actually spent for legal services is a reflection of unmet legal needs, sometimes referred to as the "latent legal market" or the "justice gap.") According to the US Census Bureau, in 2013 Americans spent $255 billion on legal services.[13] Of this amount, roughly sixty-six percent or $169 billion was spent by businesses, although this business spending figure comes with a caveat. According to the 2015 Georgetown Report, this figure represents an inflation adjusted drop of 25.8% in business spending on legal services for the ten years between 2004 and 2014, although in actual dollars such spending increased during that period from 159.4 billion to 168.7 billion.[14] The 2015 Georgetown Report notes that the law firms surveyed expect the trend to continue as work is shifted in-house and to non-law firm vendors.

Demand for legal services is also reflected in consumers' use of nontraditional legal services providers such as LegalZoom. Reliable statistics may be difficult to come by for this usage, but according to figures published in 2011 SEC filings by LegalZoom, it had served 2 million customers.[15] According to those same 2011 filings, LegalZoom customers placed 490,000 orders for legal services in 2011.[16] Another entrant in the legal services marketplace is Avvo, which claims to have answered 7.5 million legal questions.[17] It is important to note that these entities are perhaps the most widely known examples of nontraditional service providers, and that many, many others are seeking to gain a foothold in the legal services marketplace. Online providers in the aggregate have doubles their revenues since 2006.[18]

Demand for legal services also is reflected in case filings. As detailed below, hundreds of thousands of legal matters proceed through the Illinois courts every year. In addition, demand for arbitration services remains high and continues to grow. The largest non-profit provider of arbitration services in the US claims 150,000 to 200,000 filings a year, with filings growing from 203,084 in 2013 to 223,751 in 2014.[19] MODRIA, an online dispute resolution platform, claims to have resolved 60 million disputes, 90% through automation.[20]

Finally, another measure of demand for legal services that should not be overlooked is the extent to which legal aid organizations are handling cases and providing legal services. This type of demand is also likely reflected in the pro bono efforts of the Illinois bar, which in 2015 totaled 2,055,987 hours (a slight increase from 2014, but less than the hours reported in 2011, 2012, and 2013).[21]

2. Lawyer Demand

In contrast to widespread need, and healthy overall demand, for legal services, the demand for lawyers is falling. Indicia of lawyer demand can be found in many sources.

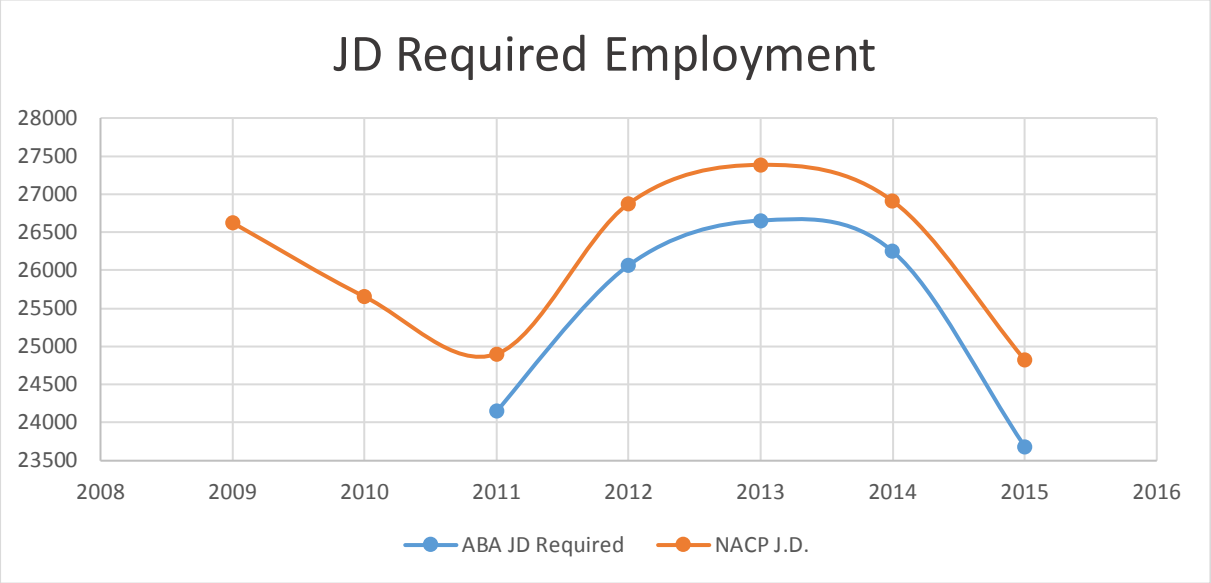
a. Lawyer Employment Data

The US Bureau of Labor Statistics' job outlook for legal jobs between 2014 and 2024 estimates a 6% growth rate (roughly 43,000 jobs) during that 10 year period.[22] However, this

number may be somewhat suspect, as the economy has continued to absorb approximately 26,000 law school graduates a year in jobs requiring a J.D.[23] Also inconsistent with the Bureau's statistics, according to the 2016 Georgetown Report, the number of lawyers at responding firms grew by 1.4% in 2014 and 1.5% in 2015.[24]

Statistics from the National Association of Law Placement and the ABA over the last six years show an uneven hiring history. According to the NALP, full-time jobs requiring a J.D. increased in 2012 and 2013, but were down in 2010, 2011, 2014, and 2015.[25] The average number of JD required jobs obtained per year over these five years was 26,168.

ABA statistics show similar new lawyer placement data for the last five years as well as the same trends. According to its statistics, full-time long-term jobs requiring a JD increased in 2011, 2012, and 2013, but decreased in 2014 and – significantly – in 2015.[26] The average over these five years is 25,360 JD required jobs.



b. Law Firm Services

The 2016 Georgetown Report, albeit a survey of the nation's largest lawfirms, reports demand for law firm services remained flat in 2015 after very modest growth (0.5%) in 2014.[27] In addition, the 2016 Georgetown Report also notes that demand in law firm services has remained flat since 2009.[28]

c. Lawyer Productivity

Demand for lawyers can also be seen in statistics reflecting lawyer productivity and income, most often evaluated through data on billable hours. From the 2016 Georgetown Report, the productivity trend measured in billable hours has been generally downward for five plus

years.[29] In addition, firm realization rates (defined as the percentages of work performed at a firm's standard rates that are actually billed and collected from clients) have also continued to decline since 2005.[30]

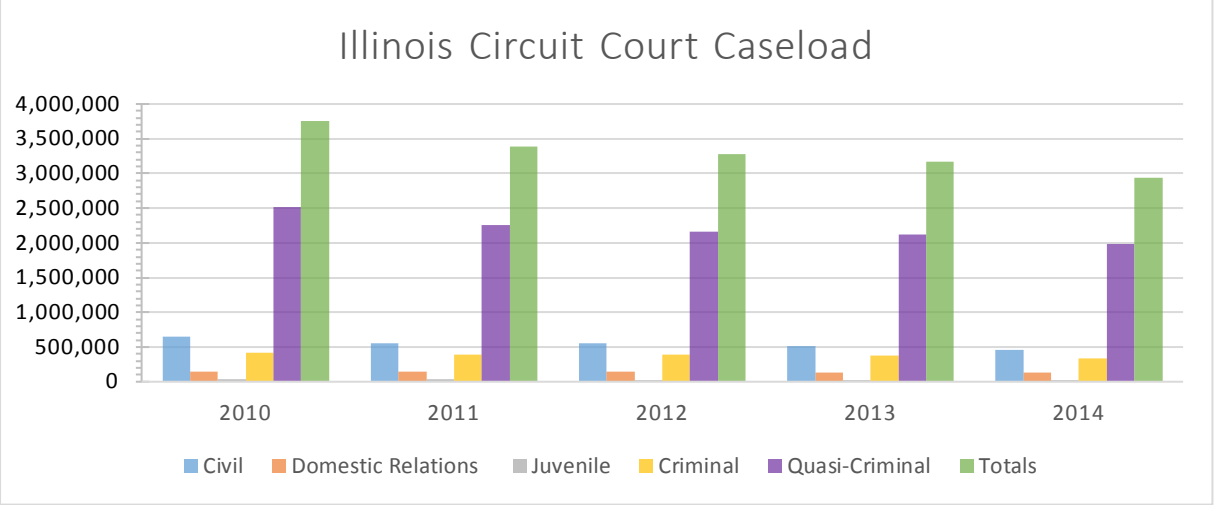
Illinois specific statistics on lawyers' billable rates and income remain imprecise. Based upon two ISBA surveys, one in 2004 and a second in 2014, median income for lawyers has essentially remained flat or even decreased. According to the ISBA's 2004 Membership Law Firm Economic Benchmarking Survey, the median income range of solo practitioners was $80,000 to $89,999.[31] In the ISBA's 2014 Compensation and Benefits Survey, the base salary for solo practitioners was $70,000.[32] Comparison of other law practice categories reflected the same generally flat income growth.

3. Courts

a. Filings

Lawyers and the courts exist in a symbiotic relationship. A healthy and well respected judicial system reflects well upon lawyers, but it also provides lawyers the natural base in which to practice their trade. Respect and use of the judicial system is an obvious source of potential work for lawyers.

According to the Annual Reports of the Illinois Courts from 2001 through 2014, case filings have experienced an overall decline, albeit not a steady one. There were 4,071,743 cases filed in 2001, compared to 4,455,546 cases filed in 2007; 3,757,112 filed in 2010; and 2,930,986 in 2014.[33] There has been virtually no shift in the types of cases filed over that same time span, meaning that each type of case has seen comparable reductions in filings. According to the 2014 Annual Report, there were 457,444 civil cases filed in 2014, down from 643,740 in 2010.[34] Domestic Relations filings were 133,641 in 2014, down from 147,642 in 2010.[35] There were 22,058 Juvenile cases filed in 2014, down from 30,602 in 2010.[36] Criminal cases decreased to 338,313 in 2014, down from 418,812 in 2010.[37] There were 1,979,530 Quasi-Criminal cases filed in 2014, down from 2,516,286 in 2010.[38]



Echoing Illinois' court statistics, the 2016 Georgetown Report described demand growth in litigation (about 1/3 of all practice activities) as negative in 2015, as it has been since 2009.[39] The Report attributed the reduction in litigation to e-discovery and the use of nontraditional providers for discovery work. (Conversely, the Report noted modest growth due to a resurgence of transactional activity, mostly in corporate, tax, and real estate.)

b. Self-represented litigants

The number of Illinois residents appearing in court without a lawyer continues to grow, surpassing one million litigants last year. The increase in the number of self-represented litigants is not unique to any one circuit, county, or case type. In fact, in 2015, over half of Illinois' 24 judicial circuits reported that 70% or more of litigants in civil matters were self-represented. Data collected by the Administrative Office of the Illinois Courts also shows that in five different case types—Dissolution, Municipal, Small Claims, Orders of Protection, and Family—50% or more of litigants statewide are self-represented.[40] Order of protection cases were the most likely to have a self-represented litigant (88%), followed by Family (75%) and Small Claims (73%).[41] Civil cases above $50,000 (Law cases) were the least likely to involve a self-represented litigant (31%).[42] Preliminary data listed in the 2014 Annual Report of the Illinois Courts indicated that 66% of all disposed cases involved at least one self-represented litigant and that 72% of all persons reported to be self-represented were defendants.[43]

A comparison of preliminary data compiled by the Court Statistics Project from preliminary Illinois Circuit Courts data suggests that Illinois may be among the states with higher rates of Self Represented Litigants ("SRL"). Examples include:

- Compared with 5 other unnamed states, Illinois' 88% rate of SRLs for Order of Protection cases is second
- Compared with 5 other unnamed states, Illinois' 31% rate of SRLs in Law cases appears the highest
- Illinois' 66% rate of SRLs in all Civil Cases is higher than Indiana, Missouri, and Texas
- While there is no comparison state, Illinois' 73% rate of SRLs in Small Claims cases appears to be significant

While there are no specific comparison numbers for Illinois, the average of 5 unnamed states for Dissolution and Divorce cases at 49%. Illinois shows a SRL rate in the related category of Family cases at 75%.[44]

4. Consumer Attitudes and Expectations

The objective data above does not exist in a vacuum. Unfortunately, the risks of speculating or attributing undue importance to anecdotal evidence makes determining the causes or contributing factors difficult. Nevertheless, some information and analysis about the legal services marketplace provides reasonable insight for the objective data discussed above. This

information and analysis helps lay the foundation for the Task Forces' recommendations to the Association.

a. Consumer Attitudes

As noted above, there is a continuing consumer demand for legal services but that demand does not seem to be fueling demand for lawyers. Studies show that consumers prefer to avoid seeking out third-party assistance for personal or business problems. The 2013 American Bar Foundation's Community Needs and Services Study found that 69% of respondents facing a "civil justice situation" employed self-help or turned to their own social network.[45] Similarly, according to a 2015 study by the National Center for State Courts, 56% of consumers noted they would prefer to handle a legal problem on their own without a lawyer.[46] These studies are borne out by very large percentage of self-represented litigants appearing in Illinois courts, which, as noted above, ranges from 66% in all civil cases, including 75% in family cases.

Why such a large percentage of consumers avoid third-party assistance is instructive. According to the 2013 American Bar Foundation Study, 46% of those respondents who had experienced a civil justice situation saw no need for third-party assistance, 24% believed assistance would not help, 17% felt it would cost too much, and 9% didn't know where to seek out help.[47] Consistent with the 2013 American Bar Foundation study, perceptions of cost reported in the 2005 Illinois Legal Needs study on low income respondents reported that 26% of respondents felt lawyers would cost too much.[48] In addition, the 2015 NCSC Study reported that 33% of respondents agreed with the statement that "hiring a lawyer is usually not worth the cost."[49]

For those amenable to seeking assistance from a third-party, the issue of cost is an important, but nuanced, one. Some consumers are willing to sacrifice "bespoke" quality service for an inexpensive and convenient alternative.[50] However, such attitudes are not universal. As reflected above, only roughly a quarter of respondents cited cost as a factor in not seeking out legal services. At least one study from 2007 found that consumers were willing to pay a premium for quality service (based upon consumer ratings – see discussion below).[51] While it may be that consumers are becoming increasingly comfortable with nonlawyer legal information solutions at lower prices, consumer decisions about legal services will likely be dependent on a variety of factors such as the ability to pay, but also the service's perceived importance and quality.

What may be more determinative than cost in consumers' attitudes about purchasing legal services is convenience and consumer knowledge. Here too, the Internet and mobile applications have changed existing consumer patterns for the selection, purchase, and delivery of just about every conceivable good or service: books (*Amazon.com*), movies (*Netflix*), restaurants (*Yelp*), hotels (*Hotels.com*), personal transportation (*Uber*), garage-sale items (*Craig's List*), household services (*Angie's List*), tax-preparation services (*TurboTax*), groceries (*Instacart*), friendship (*Facebook*), networking (*LinkedIn*), news (*Twitter and other aggregators*) – the list goes on and on and on and will likely never stop. For lawyers, commentators Richard Granat and Stephanie Kimbro note: "The proliferation of 'lawyerless' legal services underscores the

importance to the legal community of identifying, and responding to, what consumers want from lawyers. The dominant theme of extensive research on that question is better customer service."[52]

Commentators Granat and Kimbro note additionally that "From the consumers' perspective, the system for delivering legal services must be redesigned to…creat(e) a new value proposition" that involves services offering them convenience, flexible hours, multiple channels of communication, faster completion of services, fixed fees, and more control.[53] One stand-out example of this new consumer reality is a move toward online reviews. The 2007 study cited above noted 79% of respondents reported that online consumer reviews had a significant influence on purchases in the legal field.[54] More recent data supports consumer buying habits tied to the internet. According to Lawlytics, 81% of consumers perform online research before they make a purchase, 85% read online reviews, and 79% say they trust online reviews.[55] Although this research is not legal specific, Task Force members confirm prospective clients' use of reviews and other online resources before meeting with lawyers.

b. Attitudes about Lawyers

In contrast to what is probably an understandable consumer preference to avoid third-party assistance in legal matters, are the clear benefits consumers believe lawyers can bring to a legal problem. According to research conducted by the National Center for State Courts, 91% of respondents believe that if you have a lawyer you will win your matter, 80% believe if you have a lawyer you may not need to go to court, 75% believe lawyers can help you save time and money by resolving issues quickly, and 87% are confident they can find a good lawyer if needed.[56]

c. Attitudes about the Courts

In general, the courts remain well respected. According to the 2013 American Bar Foundation study, 85% of respondents believed the courts are an important means to enforce rights and 80% believed they are fair.[57] These high marks are reflected in the Illinois Supreme Court's own 2015 Circuit Court User Survey, which showed 78% of circuit court users felt judges made sure people's rights were protected.[58] Perceptions of fairness and trust were somewhat lower. That same Study showed 60% left the courthouse with more trust in the courts, and 67% trusted the courts to reach a fair result for all involved.[59]

Consumers' positive perceptions about the courts' protection of rights and fairness are not entirely reflected in perceptions of court efficiency. In both the America Bar Foundation and National Center for State Courts studies, approximately 55% of respondents felt that courts should only be used as a last resort.[60] According to the National Center for State Courts, 55% of those with direct experience of the courts believed they were inefficient, intimidating, and expensive.[61] Notably, Illinois courts fared better on efficiency issues than is reflected in the national surveys. For example, 72% of respondents felt that their business was completed in a reasonable amount of time and approximately 75% felt that necessary forms were available and easy to understand.[62]

5. Alternative Legal Services Providers

a. Legal Services

Perhaps the most visible change in the legal services marketplace over the last five to ten years has been the explosion of nonlawyer legal service providers. New, Internet-enabled companies are emerging to take advantage of gaps and inefficiencies in the traditional legal services marketplace. According to commentators Granat and Kimbro, in a marketplace where the consumer preference is not to seek out third-party assistance "a legal information solution can often substitute for the work of a lawyer. Intelligent legal documents and smart web advisors often provide a low-cost, just-good-enough solution to many legal problems without the need to incur higher legal fees. This is the new reality that the legal profession faces."[63]

These nonlawyer legal services providers aspire to serve as the vital connectors between legal consumers and legal information (and sometimes lawyers). They attract legal services consumers by meeting their needs and expectations, offering features like free or low-cost legal consultations; fixed and transparent fees; do-it-yourself legal documents; on-demand assistance from a lawyer; and referrals for extended legal services to independent lawyers who may be pre-screened and subjected to user reviews. Prominent examples include: Avvo, which claims on its web-site to offer immediate access to legal advice to help the client understanding the nature and severity of their legal problem, clarity as to potential costs of consulting with a lawyer ("Advice session $39;" "Document Review starting at $149."), and quality assurance via "1 million client and peer reviews" for the lawyers in their directory; LegalZoom, which began as a do-it-yourself document preparation site, and offers consumers the opportunity to complete legal documents for a set price, and, like Avvo, offers access to attorneys to provide additional or follow-up services "at a price you can afford;" and RocketLawyer, whose web site claims that its services have helped generate "3,000,000+ legal documents," answered "30,000+" legal questions, and served 900,000 businesses. As the Task Force can attest, these are just a few of the better known and advertised services currently available to consumers.

These new Internet enabled companies augment, organize, and fill gaps in the existing legal services marketplace, and possess many commercial advantages compared to lawyers in the traditional retail legal marketplace. They exist on a national scale; are aggressively marketed via mass media; have the resources to create highly recognizable brands; have access to massive amounts of (non-lawyer) capital; have expertise in marketing, IT, design, user experience, data analytics; and remain unregulated. Although specific companies may come and go, these advantages will likely remain and they will contribute to these companies influencing the legal services marketplace.

b. Dispute Resolution

Consumers also hold positive views of alternative dispute resolution, especially in relation to the courts. According to the 2015 National Center for State Courts survey, 55% of respondents believe that alternative means of dispute resolution, like mediation, are faster, cheaper, and more responsive than the courts to the needs of the people being served.[64] In addition, the NCSC survey revealed that respondent's "first impulse is to choose ADR over the

court system by a margin of 64% to 30%. Women, younger, wealthier, and college educated Americans appear much more likely to choose ADR, with college educated women prefering ADR by an astounding 52 percentage points (72 to 20 percent.)."[65] Perceptions that ADR is a valuable alternative and less burdensome than court litigation is borne out in Illinois, albeit court-annexed ADR. According to two surveys conducted by the Illinois Supreme Court's Alternative Dispute Resolution Coordinating Committee, 56% of judges found court-annexed mediation to be very helpful in achieving settlement while 60% found that mediation expedited resolution of cases.[66] Similarly, a survey of lawyers found that 52% felt mediation was helpful in achieving settlement and expediting resolution of the case.[67]

Given the attitudes expressed above, dispute resolution is likely being impacted by the same growing consumer expectations for cheaper, faster, and "just as good" as are impacting lawyers.

C. Technology

At the center of the change affecting the legal services marketplace is rapidly developing technology. It is driving consumer expectations as well as efficiencies within law practices, the courts, and nonlawyer legal services providers. It is proving to be disruptive but it is also providing opportunities for many lawyers. Understanding these technological developments is critical if the legal profession wishes to capitalize on those opportunities and to avoid or minimize uncontrolled and unaddressed disruption.

1. Technological Change & the Legal Profession

The extent of the technological transformation the legal profession will experience in the next 20 years is difficult to predict. One way to get a sense of that potential is to look backwards. Consider the case of a lawyer who was admitted to practice in 1996 and will retire in 2036. The chart below captures the primary technologies this lawyer has had at her disposal at the different stages of her career. The *known* changes to the technological context have already allowed for her to increase the speed and accuracy with which she aggregates, organizes, and transmits information. While some may feel wistful for a simpler time, few lawyers would voluntarily forego the convenience and power offered by the tools currently at their disposal.

1996	2016	2036
✓ Telephone ✓ USPS & Overnight Shipping ✓ Voicemail ✓ Books & journal articles ✓ Personal computer ✓ Laptop computer ✓ Word processing software ✓ Computer "bulletin boards"	✓ Smartphone + apps ✓ Email ✓ Sharing PDF documents ✓ Texting ✓ Tablets ✓ 100% Internet connectivity ✓ Automated documents ✓ Online legal research tools	?

✓ Paper files	✓ Knowledge management systems ✓ Case management systems ✓ E-filing ✓ Firm-wide filesharing systems	

2. Moore's Law and Exponential Changes in Computing Power

The rapid increases in computational power enshrined as "Moore's Law" are a key driver of technological change. Named for pioneer semiconductor researcher Gordon E. Moore, Moore's Law "reflects the regularity that the number of transistors can be fitted onto a computer chip doubles every eighteen months to two years. For over forty years, computers have been growing at a similarly exponential rate."[68] Intel, the largest computer chip maker, "has projected that Moore's Law will extend until at least 2029," at which point methods such as optical computing or quantum computing can continue to allow for similarly rapid progress.[69] Researchers have determined that "the computing capacity of information, which they define as the communication of information through space and time guided by an algorithm, is growing by approximately 58% a year" – or doubling close to every 18 months.[70] The "spatial capacity for storage" of information has been growing at 23% per year, or doubling every 40 months.[71]

To put these numbers into context for a layperson, all of this means that "the computational power in a cell phone is 1,000 times greater and a million times less expensive than all the computing power housed at MIT in 1965."[72] This trend shows no sign of slowing: "[a]ssuming that computers continue to double in power, their hardware dimension alone will be over two hundred times more powerful in 2030."[73]

3. Sustaining vs. Disruptive Technologies

The hypothetical lawyer admitted in 1996 has seen the application of this increasing computational power in action. Most lawyers have had similar experiences in their professional lives dealing with the technologies listed in the "2016" column. Many of these technologies are sustaining – i.e. technologies that support existing processes but in ways that are more efficient or less costly. Microsoft Word has replaced the IBM Selectric. Telephones now fit in a pocket. Online research saved a trip to the library. Email replaced snail mail.

The legal profession is also experiencing the effects of disruptive technologies – "those technologies (or systems, techniques, or applications) that do not simply support or sustain the way a business or sector operates; but instead fundamentally challenge or overhaul such a business or sector."[74] One of the disruptions the law has already begun to see is the movement toward greater commoditization of legal services, discussed earlier. Writing in 2010, Paul Kirgis predicted that "[t]ransformative change in the legal profession will come with widespread commoditization of actual legal guidance, as opposed to static information or rote processing."[75] This disruptive transition to technology-powered provision not just of legal information, but also sophisticated legal guidance, is already underway.

4. Watson, Esq.: The Implications of Advances in Artificial Intelligence

Artificial intelligence (AI), or cognitive computing, "refers to computers learning how to complete tasks traditionally done by humans. The focus is on computers looking for patterns in data, carrying out tests to evaluate the data and finding results."[76] This means that "[w]hat makes artificial intelligence stand out is the potential for a paradigm shift in how legal work is done."[77]

Many think of Watson when they hear about AI. IBM's Watson became famous in 2011 when it defeated the best human players on *Jeopardy*. Watson is an artificial intelligence system that takes advantages of the increasing speeds and capacity in hardware and software, and has the added advantage of "connectivity," allowing it to search vast stores of data available through the internet. Law professors John McGinnis and Russell Pearce observe that "*Jeopardy* is a game of complexity and breadth, requiring players to disentangle elements that seem unique to human understanding, including jokes, rhymes, and language games."[78]

The fact that Watson was able to outperform humans at a game like *Jeopardy* has profound implications for its applicability to more serious tasks. Indeed, Watson is currently being used in fields as diverse as medical research, financial planning, retail, and national security. The technology, which IBM describes as a "platform that uses natural language processing and machine learning to reveal insights from large amounts of unstructured data," can help computers learn "to think, read, and write. [Machine intelligence is] also picking up human sensory function, with the ability to see and hear."[79] A recent story in the *Guardian* reported that computer-generated copy is being used to generate sports and businesses reports that are indistinguishable from those written by human journalists.[80] Not only does machine learning allow for computers to perform tasks typically assumed to be only capable of completion by humans, but "algorithms can now analyze . . . data quickly and efficiently, gleaning patterns and lessons that a human would not be able to discern."[81]

How has AI impacted law? At a recent competition on how to make use of Watson, the winning entry centered on the legal field, using Watson to search for relevant evidence in data and predict how helpful the evidence will be to winning the case.[82] Watson-like systems and tools are already being deployed to assist law firms and their clients with new levels of information and analysis. Lex Machina "mine[s] litigation data, revealing insights never before available about judges, lawyers, parties, and patents, culled from millions of pages of IP litigation information. [They] call these insights Legal Analytics®, because analytics involves the discovery and communication of meaningful patterns in data."[83] Counselytics offers "cognitive augmentation. [Their] aim is to tackle the entire cognitive genome, enabling enterprises to process and manage large amounts of legal content in fast, efficient, and cost-effective ways."[84] And Ravel Law, a legal search, analytics, and visualization platform, "enables lawyers to find, contextualize, and interpret information that turns legal data into legal insights. Ravel's array of powerful tools – which include data-driven, interactive visualizations and analytics – transforms how lawyers understand the law and prepare for litigation."[85] Machine learning has helped

outside of the law firm context as well, allowing self-represented litigants to solve disputes on their own with the assistance of AI technologies in both Australia and Canada.[86]

It is important to recognize that while automated systems may not be able to perform a particular task or answer a particular question today, there is no assurance that it will not be able to do so in five or ten or twenty years. "Intelligent machines will [continue to] become better and better, both in terms of performance and cost. And unlike humans, they can work ceaselessly around the clock, without sleep or caffeine. Such continuous technological acceleration in computational power is the difference between previous technological improvements in legal services and those driven by machine intelligence."[87]

Overall, Watson's ability to understand natural language queries, search all relevant sources of information (statutes, judicial opinions, law review articles, other case-related documents, etc.), and use its predictive powers to provide the most relevant answers/information will have profound implications for the role of lawyers in the future. Ubiquitous devices with Watson-like capabilities could be the Siri of the next generation, and they could very well populate the "2036" column in the hypothetical lawyer's toolbox.

5. What Computers Can't Do

Despite the increasing sophistication of machine learning, human lawyers will continue to play the prominent and indispensable role in the legal system. In their role as client counselors, lawyers provide emotional reassurance as well as experience- and knowledge-based professional guidance. Negotiation and litigation are also areas in which human lawyers are not easily replaced by even the most sophisticated technologies.

It is also important to note that the legal profession plays a critical role in the larger social context. As Canadian lawyer and futurist Jordan Furlong has written: "[Lawyers] serve critical functions in society: we provide dispassionate representation and advocacy in dispute resolution; we facilitate countless significant social and business transactions; and we're capable of providing tremendous and unique value to clients of all stripes — value that commands a premium price."[88] Lawyers act as "highly esteemed servants of the community and the building blocks of a meaningful and civilized society. No one is going to outsource or automate a way around that."[89]

6. Implications of Technology-Driven Legal Services

One major consequence of the technological innovations described above is that regulating the legal marketplace, including preventing the unauthorized practice of law (UPL), becomes more complicated. As Furlong describes:

> First, as market regulators and UPL enforcers, we find ourselves stymied by the unconventional nature of new providers. Some are based outside our physical jurisdiction (LPOs), some are arguably not "practicing law" (e-discovery providers), and some meet latent market needs to an extent that we might find

> politically risky to shut down entirely (LegalZoom). Mostly, though, there are just too many new entities to deal with all at once. It was one thing for a regulator with limited funds to prosecute a single paralegal or self-help publisher at a time; it proves another to take on entire, multi-jurisdictional, investor-powered industries.[90]

Beyond these initial questions, regulators also face other practical quandaries in enforcing UPL regulations. If in ten years it is possible to create an "app" (or whatever such tools will be called in 2026) on a portable device with a Watson-like ability to distill the world's knowledge to answer a series of legal questions based on specific facts, who would be committing the unauthorized practice of law? Would it be the company that built the app or the company that built the underlying technology? What if both of those companies were based in Moldova?

While a natural reaction from lawyers and the organized bar may be to attempt to throw up as many regulatory barriers as possible to prevent new technologies from infiltrating the legal marketplace, such efforts are likely to have limited utility in the long run. First, lawyers will want to make use of these technologies in their own practices to promote greater productivity and reduce costs. Second, McGinnis and Pearce argue, "the global nature of machine intelligence will continue to put pressure on the U.S. market for legal services, regardless of the laws of the United States. The message here is that the machines are coming, and bar regulation will not keep them out of the profession or much delay their arrival."[91]

The legal profession faces a future in which machines will not only be able to access and analyze unlimited amounts of information, but may also be able to "think" and to recognize and respond to human emotional cues. With respect to the later possibility, the Task Force would certainly seriously question the utility, benefit, and especially wisdom of machine generated legal advice or administration of justice. Someday, someone will have to decide those questions, but it is not today and it is not the Task Force. For now we need only realize that these advances will certainly shape the work of lawyers in 2036.

D. Lawyer Value

In a world of commoditized legal services, decomposition, alternative legal service providers, and even AI, the commercial reality remains that high quality legal service charged at reasonable prices will be in demand by many consumers.[92] As such, it is incumbent on the legal profession to embrace its own virtues. Lawyers have a special role in the provision of legal services to the public, and with good reason. Whether it is a lawyers' education, training, mandated professional responsibility, or legal judgment, lawyers have value. Lawyers should not be reluctant to weigh in when business trends or regulatory proposals undermine the legal profession's role of protecting the rights of the public. However, lawyers must recognize the changes occurring in the legal services marketplace and accommodate these changes when consistent with the virtues and values of the profession.

1. Officers of the Court

Only lawyers may practice law. This is a right granted solely by the Supreme Court and rightfully guarded by the legal profession. Its purpose is to safeguard the public from "the mistakes of the ignorant and the schemes of the unscrupulous," as well as the protection of the judicial system itself in the administration of justice.[93] Although many who seek to profit from the provision of legal services may contend otherwise, the restrictions placed on the practice of law do not exist as a protective measure to serve the parochial interests of the bar.[94]

A threshold issue, made increasingly blurry by technology and the ready access to legal information, is defining the practice of law. That, however, is not easy. In Illinois, there is no rule or regulation or statute that defines it. The Court itself often notes that there is no "mechanistic formula" for defining what is, and what is not, the practice of law.[95] The same is true in many other jurisdictions. Nevertheless, some common principles can be identified:

1. Acting in a representative or advocacy capacity in connection with legal proceedings
2. Drafting documents intended to affect or secure legal rights
3. Negotiating legal rights or responsibilities for a specific person or entity
4. Expressing or preparing legal opinions
5. Providing professional legal advice or services where there is a client relationship of trust or reliance
6. Applying of legal principles and judgement with regard to the circumstances or objectives of another which require the knowledge and skill of a person trained in the law.

See Appendix

Given its importance in protecting rights of citizens, either through representation of clients or as a vital part of the justice system, the practice of law is appropriately and highly regulated by the Court. All facets of the legal profession are regulated, ranging from law school admission and curriculum, to character & fitness and passage of the bar examination. Upon licensure too, all aspects of a legal practice, from competency to business practices, from conflicts of interest to advertising, are subject to strict and enforceable ethical rules. All of these have the single purpose of protecting the public and ensuring the proper administration of justice.

2. Public Protection

At the core of lawyer virtue and value are the protections lawyers provide to their clients through adherence to the Rules of Professional Conduct. In turn, these ethical duties owed by lawyers to clients and the courts play an important role in analyzing what services and activities should be reserved to only those licensed to practice law. The more vital the protection, the more important it is to restrict authorization for performing the service to licensed attorneys, or, at minimum, to implement regulatory measures that would impose and enforce comparable duties for those who will be authorized to enter the field.

a. Client Protection

The evidentiary attorney-client privilege allows clients to talk to their lawyers frankly and openly, without fear that someone will be able to force the lawyer to reveal what the client has shared. The purpose of this privilege is to enable a person to consult freely and openly with an attorney without any fear of compelled disclosure of the information communicated.[96] The privilege has been described as being essential "to the proper functioning of our adversary system of justice."[97] The privilege is available only if there is an attorney-client relationship. The importance of the protection of the privilege may vary depending on what service the attorney is providing, from a criminal defense to a spouse seeking custody of his or her children to a real estate closing. But if authorization to perform certain legal services is not accompanied by adoption of measures that would protect communications, clients who use the services of those not licensed as attorneys will have to be exceedingly careful how much they reveal to the non-lawyer.

Whether or not the attorney-client privilege applies, those who are licensed to practice law owe their clients a very broad duty of confidentiality that will not encumber those who do not have the license. Unlike the privilege, which protects only communications between lawyers and clients made for the purpose of providing legal services and intended to remain confidential, the professional duty of confidentiality generally precludes lawyers from revealing any information relating to the representation of the client except as necessary to carry out the representation or as authorized by the client.[98] Information covered by this rule is not limited to matters considered private or confidential. It includes all information learned, with very limited exceptions (e.g., disclosure which is reasonably necessary to prevent the commission of a crime or reasonably necessary to defend charges made against the lawyer).[99] The attorney-client privilege protects against others forcing an attorney to reveal communications made in confidence. The professional duty of confidentiality prevents lawyers from voluntarily revealing or using what they have learned in representing a client. When considering whether non-lawyers should be allowed to perform services typically performed by lawyers, it is crucial to identify exactly what duties of confidentiality will apply if the service is performed by someone not bound by the Rules of Professional Conduct and whether the scope of those duties will sufficiently protects clients' interests.

The conflict rules governing lawyers severely restrict a lawyer's ability to undertake representations actually or potentially adverse to a client or a former client.[100] There are many facets to the application of those rules, but for purposes of this Report, it is sufficient to observe that lawyers are required to keep careful records of who their clients are, to look for potentially diverging interests, and to be fully forthcoming with clients about the potential of adversity when proposing to continue a representation once a concern has been identified. Conflict rules are particularly important in protecting the interests of clients in adversary proceedings, but they are often equally important in transactional matters where an agent could favor the interests of one client over another in guiding both through a structuring of terms or resolution of differences. Also important to clients is the principle that lawyers must use independent judgment, and when retained or paid by persons or entities other than the client, lawyers must take direction only from the client.[101] Moreover, as with other fiduciaries, lawyers may not benefit themselves to the detriment of a client in conducting any representation or in otherwise interacting with clients.[102]

The above protections are especially important in the provision of legal services in many consumer oriented fields. Lawyers must look to the clients' needs, without regard to whether a

particular legal option will lead to additional revenue to the lawyer or a business associate. In unregulated undertakings by nonlawyers, a pervasive concern is that the nonlawyer recommended solutions (e.g., a living trust, loan modifications) are often made without regard to the particular circumstances of any individual consumer and without knowledge or consideration of whether other options would be more advantageous to the client, but rather are made because it is in the best interest of the nonlawyer.

b. The Courts

As with the ethical duties owed to clients, lawyers' ethical duties to tribunals are critical in preserving the integrity of adjudicatory proceedings. The importance of those duties must be weighed in considering the wisdom of authorizing others to provide representation in such proceedings, and/or in structuring regulatory measures if such authorization is granted.

Lawyers have elevated duties to courts, and the smooth administration of the justice system depends in large part on lawyers honoring those duties. They include the obligations to avoid presenting claims that are not grounded in fact or law, to expedite litigation, to be truthful in all statements to the court, to avoid presenting evidence that is false, to take reasonable measures to remediate upon learning that evidence previously presented or statements previously made were false, to obey procedural rules, and to comply with obligations under discovery rules and orders.[103] The duties apply equally in court proceedings, in proceedings before administrative tribunals, and in arbitrations.[104]

From one vantage, those obligations might appear clear and obvious, basic obligations that anyone could and would be expected to abide. However, lawyers who regularly engage in litigation recognize how many nuanced and difficult choices have to be made to properly balance their duties to the court with their obligations to clients. Moreover, lawyers are painfully aware that their duties to courts will be enforced rigorously, not only by the courts, but by disciplinary authorities. Typically, false statements to a tribunal will result in some suspension of a lawyer's license.[105]

To the extent that nonlawyers are allowed to participate in some fashion in providing legal-related services, the effective administration of justice and the goal of evening the playing field requires that there be measures in place sufficient to hold non-lawyer representatives to the same norms as lawyers. Tribunals must be able to expect the same dedication to candor and willingness to abide by rules and procedures for proceedings to be conducted efficiently and justly, and fairness demands that all sides in a dispute operate under the same expectations and face the same consequences for failure to obey.

As demonstrated above, as a public trust, the practice of law is highly regulated. For a profession with the ability to affect the rights (and sometimes liberty) of others, this substantial level of regulation is necessary and welcome. As such, ideals like professional independence, safeguarding client information and materials, and restrictions on the extent to which a lawyer may allow self-interest to influence interactions with clients have real and important meaning which must be accommodated in any discussion of altering the forms of lawyer practice or allowing non-lawyers to provide services traditionally deemed to involve the practice of law.

3. **Alternative Business Practices**

As the legal environment evolves, many commentators have suggested changes to various aspects of legal services regulation, addressed to both lawyers and nonlawyer legal service providers. For lawyers, new ideas about firm management and funding, and forms of practice abound. For nonlawyer legal service providers, the essentially unregulated marketplace has allowed various form of providers to flourish. For the Task Force, specific analysis of all these developments was well beyond its scope and resources. Nevertheless, some of the more salient developments are outlined below.

a. Alternative Business Structures for Lawyers

Many bar associations are examining "Alternative Business Structures" (ABS) as a response to futures challenges. Because the Association has previously commented on such structures, the Task Force does not feel compelled to take a position in this Report. It is nevertheless an important and controversial issue that the Association needs to be aware of and continuously monitor.

ABS generally refers to: active investment, management or ownership of law firms by non-attorneys; passive investment in law firms by nonlawyers; or operation of a law practice as a multi-disciplinary practice (MDP), allowing provision of non-legal in addition to legal services. To date, only two jurisdictions in the United States allow any form of ABS: the District of Columbia, which allows a nonlawyer who performs professional services for a law firm to hold a financial interest in it and to exercise managerial control; and the state of Washington, which allows Limited License Legal Technicians to own a minority interest in law firms.[106]

Outside of the United States, ABS's can be found in varying forms. Law firms may be owned by nonlawyers in several European nations, with restrictions in some. Italy limits the percentage of non-attorney ownership in law firms to 33% and Spain limits it to 25%.[107] England places no limitation on the percentage on nonlawyer ownership of law firms, but non-lawyers who wish to be owners must pass a "fitness to own" test, and firms must show that they have effective systems in place to comply with rules of professional conduct.[108] MDP's are permitted in Australia, where firms may incorporate, share receipts and provide legal services with others who are not legal practitioners.[109] Wales also permits MDP's, as do some Canadian provinces.[110]

Proponents of ABS's emphasize that being able to tap into additional sources of capital will bring benefits such as: modernization; increased cost-effectiveness; and introduction of innovative management structures. The purpose of ABS's, like many alternative service providers argue, is to ultimately increase access to justice.

The 'increased access to justice' argument was raised in the case of *Jacoby & Meyers, LLP v Presiding Justices of the Appellate Divisions of the Supreme Court of New York*, decided July 15, 2015, wherein New York's RPC prohibiting non-attorney equity ownership in law firms was challenged on first and fourteenth amendment grounds.[111] In this case, plaintiff argued in favor of nonlawyer investment in its law firm to raise capital to expand operations, hire

additional staff, and acquire new technology, etc., all designed to pioneer efforts to provide "quality legal services at a reasonable cost to economically challenged individuals who would otherwise have no access to the legal system."[112] Plaintiff argued further that the traditional avenues of capital – partner contributions, retention of earnings, and commercial bank loans - have become too expensive, and thus prohibiting outside investment jeopardized plaintiff's commitment to providing low-cost legal services to the poor. In rejecting the challenge, the court ruled that the law did not restrict 'speech' as alleged, but instead dealt with conduct. "Rather, J&M seeks nonlawyer equity investors as a means to commercial end… to engage freely with non-lawyers in conventional commercial conduct – conduct that 'manifests absolutely no element of protected expression."[113]

Those who oppose nonlawyer investment, ownership or management of law firms by nonlawyers dispute both that, the current avenues for raising capital are in fact too expensive or are in some way outmoded, and that there is any direct connection between raising additional capital and increasing low cost services to address the affordability gap.

More importantly, opponents of ABS's emphasize the potential impact on "core values" of the legal profession, including that non-attorney investment, ownership, or management will bring pressure to a law practice to ensure an appropriate return on investment, or generate greater profit, that may not be consistent with a lawyer's best judgment of what may be the most appropriate service for the client. The impact of this pressure may be less individualized care, less professional loyalty to the client, a reluctance to take on unpopular causes on behalf of a client, a reluctance to perform pro bono work, or even the provision of substandard or incomplete service.

Finally, opponents of nonlawyer investment, ownership, or management may, at some point in the future, bring increased non-Court regulation of the legal profession, further eroding the independence of the legal profession as a whole.

b. Unbundling

Unbundled legal service is a lawyer's provision of legal services on a single or limited portion of a client's matter. It can take the form of: advising a client on discrete aspects of a transaction or proposed course of conduct, advising a client how to respond to proposals or the arguments of an adverse party, reviewing or drafting pleadings to be filed by the client, or attending and participating in depositions or court hearings. It contrasts with a traditional representation where a lawyer handles all aspects of a client's matter.

Many states' futures efforts recognize unbundling (or limited scope representation) as one opportunity for lawyers to successfully navigate the changing legal marketplace.[114] Providing unbundled services satisfies consumer needs and expectations while also allowing lawyers to provide high value services to a broader market of legal consumers. Clients engaging with lawyers on an unbundled basis may even foster more traditional representations. The availability of unbundling may also have a positive impact on court efficiency by having better prepared self-represented litigants appear in court.

As far back as 2011, when it was the subject of a joint ISBA, CBA, and IJA Report and subsequent rule proposal filed with the Illinois Supreme Court, a number of compelling needs supported unbundling.[115] The primary reason was the growing nation-wide trend of self-represented litigants in the trial courts. At that time the trend was attributed to a number of things including: an inability of legal consumers (including middle class consumers) to afford lawyers, decreasing funds for government legal aid, and a preference for self-representation encouraged by the availability of non-traditional legal assistance such as online legal information and forms. Since that time, the numbers of self-represented litigants is being better documented and has grown. Studies confirm a consumer preference to handle matters on their own without the assistance of lawyers (and even without the courts when possible). In addition, the pressure from, and apparent success of, alternative providers who purport to offer do-it-yourself forms and information also continues to expand.

Fortunately, Illinois was an early adopter of rules designed to facilitate unbundled legal services. In June 2013, the Illinois Supreme Court amended a number of procedural and ethical rules to facilitate unbundling. The amendments address such issues as appearances, withdrawals, client agreements, signature requirements for pleadings, and communications between opposing lawyers and clients.[116] Since adoption of the rules, the use of unbundled services remains a bit unknown. From earlier studies it seems clear that the public is interested in using such services and that it was important for lawyers to offer the option.[117] In addition, as of 2014, approximately 46% of Illinois lawyers reported that they had realized some revenue from unbundles services.[118]

c. Illinois Supreme Court Rule 711

Another example of expanding the availability of legal services may be accomplished under Association proposed amendments to Supreme Court Rule 711. The Task Force fully supports the Association's proposal.

Currently, S. Ct. Rule 711 enables certain law students to perform services for legal aid bureaus, legal assistance programs, certain organizations, certain clinics, public defenders, and public (governmental) law offices. Under the rule, law students are permitted to perform services, much like a lawyer would perform for a client, including appearing in the trial courts, courts of review and administrative tribunals.[119] The Association's proposed amendments to Rule 711 would enable law students to engage in private practice, much like their counterparts who are able to engage in practice through legal aid or public practice. These amendments will enhance the chance for those who pass the bar exam following graduation from law school to be *practice-ready*, to benefit the handling of cases in Illinois courts and the people who rely upon the disposition of those cases. In addition, allowing law students to engage in many practice related activities, under the supervision of a licensed lawyer, will potentially help provide legal services to underserved communities across the state.

d. Courthouse Facilitators

Facilitating access to lawyers and encouraging them to explore alternative ways of practicing is clearly not the sole means to meet consumer need and demand for legal services. The

ability of individuals facing family, housing, financial and personal safety crises to access the legal system and understand and safeguard their rights is vital to achieving economic self-sufficiency and promoting community stability. The Task Force recognizes that doing more to help people who need to resolve important civil legal issues but who don't have lawyer representation is an obligation in service to the public interest.

In this regard, the U.S. Department of Justice established the Office for Access to Justice (ATJ) in March 2010. In addition, the Illinois Supreme Court Commission on Access to Justice was created by the Illinois Supreme Court in June 2012 to "promote, facilitate and enhance equal access to justice with an emphasis on access to the Illinois civil courts and administrative agencies for all people, particularly the poor and vulnerable."[120] A simple but important aspect of this access is ensuring the practical ability of consumers, unfamiliar and likely intimidated by the courthouse and its procedures, to navigate their local courthouse. The Task Force applauds such efforts and highlights a few examples below.

i. Illinois JusticeCorps

Self-help centers frequently serve as the sole point of access for court users navigating the court system on their own. One aspect of access to justice is providing procedural and navigational assistance to people without lawyers, in the courthouses. In 2009, the Chicago Bar Foundation ("CBF") started the Illinois JusticeCorps as a pilot program at the Daley Center in Chicago. In 2014, the CBF transitioned the program to the Illinois Bar Foundation ("IBF") for administration. It is a program through which trained college and law students act as guides to make courthouses more welcoming and less intimidating for people without lawyers. It is funded by a grant from AmeriCorps, the Access to Justice Commission, the IBF and the CBF.

Currently, JusticeCorps members are working in courthouses in: Bloomington-Normal, Champaign-Urbana, Chicago, Edwardsville, Galesburg, Joliet, Kankakee, Markham, Rockford and Waukegan. JusticeCorps assistance allows people to accomplish the purpose of their visit more efficiently. Members receive thorough training, including about the activities in the courthouse, available resources and the difference between legal information and advice.

Full-time JusticeCorps Fellows make a 1700-hour commitment. Student volunteer positions require a 300-hour commitment over the course of the academic year. Benefits to the members are that they are members of AmeriCorps, a national network of service programs that recruit and train volunteers to meet critical community needs while they earn money for education; Illinois JusticeCorps Fellows receive a modest living allowance and may be eligible for healthcare and childcare assistance; after completion of the hourly commitment, volunteers will receive an Education Award for education expenses or loan repayment; and great professional skills development, work experience and professional references

The Task Force believes that gaps in service provide an opportunity for Illinois lawyers, particularly newly licensed lawyers, to expand the JusticeCorps model; i.e. to provide certain, basic legal services for the individuals in the courthouse setting.

ii. Lawyer In The Lobby (or Library)

In some counties, lawyers volunteer in a clinic type setting in the courthouse, to provide consultations to members of the community in a variety of civil legal topics, including collections, bankruptcy, landlord/tenant matters, wills, probate, small claims, and child support matters. The lawyers are located in the courthouse at a designated time and place, and will offer free assistance.

In some counties, the assistance is available only to litigants who meet low income guidelines; in others, the service is available to anyone. Here too, this is an example of types of programs that the Task Force believes can meet a number of legal service issues with benefits extending to lawyers and consumers.

e. Limited License Legal Technicians (LLLT's)

If this Task Force owes its genesis to any single event, it would be the Washington State Supreme Court's authorization of LLLT's. This event was viewed, rightly or wrongly, as an attack on lawyers' traditional roles and economic livelihoods. In brief, the program seeks to vest specially trained nonlawyers with some of the powers previously reserved to lawyers in an effort to achieve greater access to justice for the underserved. A number of states are reportedly looking at the concept, and representatives of the Washington State Bar Association addressed the Association Assembly in June, 2015. Because of its central place in the formation of the Task Force, the Task Force, in conjunction with the Association's Family Law Section Council, reviewed the LLLT program.

However, in many ways the focus on LLLT's seems to be a distraction from other issues and programs that are likely more significant in terms of improving the overall legal services marketplace. In contrast to a LLLT program, similar but more viable nonlawyer alternatives already exist in Illinois in some fashion. Many Illinois law schools have established legal clinics that use law students to provide forms of legal assistance (document preparation and some limited courtroom assistance), so a group of individuals performing LLLT like functions currently exists in many parts of the State. In addition, with the assistance of the IBF, law schools have created legal internships, providing funding for new lawyers to assist indigents and gain valuable practice experience. Also, although not discussed in depth in this Report, there are numerous well-trained paralegals from a number of respected programs, under the supervision of lawyers, already in use throughout the state. Are these types of programs the complete solution to access to justice and legal marketplace issues? Clearly not. Certainly more needs to be done and more can be done.

Moreover, the the LLLT program does not appear to be a good solution to the challenges facing the legal profession or legal marketplace. There appears little empirical support at this time to believe that adding another "low cost," nonlawyer layer of legal services will achieve the intended goal of providing greater access to legal services to an underserved population. The needs of the underserved who cannot afford to pay for legal services are likely not going to benefit from the implementation of a for-profit LLLT program. It also appears that the impetus behind the Washington State program is in part due to the absence of lawyers in more remote parts of the state. Illinois does not share that issue to the same extent given the geographic diversity of population centers with large legal communities and even law schools. In addition, given the rise of internet based alternative legal services that provide forms and do-it-yourself

services (both for-profit and non-profit), the economic viability of LLLT's may be in doubt. Finally, the Task Force believes there is a real possibility for consumers to be misled by unsupervised LLLT's attempting to perform services they are neither qualified nor authorized to perform. As such, the resources of the Association cab best be used to concentrate on improving already-existing types of legal services delivery methods, rather than supporting new for-profit and unsupervised programs such as LLLT's.

IV. WHERE DO WE NEED TO BE (AND HOW DO WE GET THERE)?

The data, information, and trends outlined above do not spell the end of lawyers. Far from it. Demand for legal services is high. Consumers also recognize the value of lawyers for certain legal services. But lawyers are facing greater competition from nonlawyer legal service providers. Traditional practice will survive, but for many consumers a traditional practice is becoming less and less of what they want and, perhaps more importantly, what they are willing to pay for.

The Task Force believes that the current and future legal services marketplace presents opportunities for lawyers. In order for lawyers to thrive, and provide the services and important public protections that the public demands, the Task Force recommends that the Association educate, engage, and compete as follows. It must educate the public and its members about the availability, benefits, and downsides of various forms of legal services. It must engage in the promotion of a healthy and efficient legal services marketplace. And finally, it must be ready to leverage its unique position and status to compete with others in the legal services marketplace for the benefit of its members and the public. While the Task Force is not Pollyannaish about the Association's resources, the bar is nevertheless in a position to influence a changing legal services environment. With those broad objectives in mind, the Task Force believes the Association should embrace the following goals and recommendations:

A. ***Embrace and Capture the Latent Legal Market***: Each year tens of millions of Americans face legal problems and either do nothing or attempt to help themselves without professional advice. Much of this reluctance to seek out professional advice is based upon consumer beliefs about cost, convenience, and even the existence of a legal problem. Lawyers and the organized bar need to use emerging technologies to educate, grow, and ultimately serve these potential customers. To meet this goal, the Task Force recommends the Association:

1. Establish a robust online presence for consumers through the Association's website. Components of the consumer website should include the already existing Lawyer Referral Service, but also an online consumer member directory (currently under construction). The consumer website (or specifically designated webpages on the Association website) should include consumer education, information, and resources about the law, lawyers, and judicial processes. It could also act as a potential clearinghouse for pro bono lawyers and otherwise inform members of the public about existing legal aid and self-help resources.

2. Promote the availability of lawyer services (including unbundled services) through consumer education and outreach via the consumer website or other appropriate media, potentially including expansion of the "Ask a Lawyer Day" service, kiosks, and the availability of simple flat fee services.

3. Educate members about new forms of providing legal services (such as unbundling) as well as changing consumer preferences, expectations, and needs.

4. Support the availability of lawyer supervised legal services that may provide a more cost effective alternative to traditional lawyer services, such as the use of 711's, paralegals, law school clinics, and others.

5. Develop and support community partnerships whereby legal services are made known and available to consumers with particularized need.

6. Consider the development of, and support for, broader cost effective consumer access to legal services such as "legal services plans," for example, prepaid legal service plans or legal insurance.

7. Consider legislative efforts to provide consumers' cost relief for the purchase of legal services such as tax deductions.

B. ***Preserve and Champion Lawyer Value***: Often lost in the changing legal services marketplace is lawyer value in terms of the services they offer: quality legal information, client protections, and individualized legal advice. While not demonizing the place or value of nonlawyer supported legal services for some legal consumers, the benefits of these services should be promoted to legal consumers. To meet this goal, the Task Force recommends the Association:

1. Educate and promote lawyer value to consumers through the Association's consumer website as well as other forms of mass and social media as appropriate.

C. ***Support Technological Efficiency***: In today's law practice environment, lawyers must be technologically competent. Technological competence impacts all aspects of practice management, marketing, document preparation, litigation services, and client communication. The organized bar is in a unique position to keep its membership apprised of new developments in technology and their benefits. To meet this goal, the Task Force recommends the Association:

1. Provide meaningful continuing legal education programs to Association members on technological developments in the areas of business practices, marketing, and other law related activities.

2. Provide, or otherwise make available, to the membership law practice management resources and services.

3. Support and promote the use and availability of appropriate technology to facilitate remote legal services and long distance client collaboration and communication.

D. ***Support Public Protection in the Area of Legal Services***: The legal profession and the organized bar have long held a prominent place in protecting the public from those who would prey on it in the delivery of legal services. To meet this goal, the Task Force recommends:

1. Educate the public through the Association's consumer website (or specifically designated webpages on the Association website) about the legal marketplace, including any restrictions (regulatory or practical) on the types of services available from lawyers and nonlawyer service providers.

2. Continue to provide an online avenue for consumer complaints about nonlawyer service providers, to work with regulatory agencies, and to take judicial and legislative action in the public interest where appropriate.

E. ***Monitor and Utilize Regulatory Processes***: The organized bar is well positioned to bring information, insight, and perspective to discussions and activities shaping the legal services marketplace. The bar should recognize this position and seek to have its voice heard through applicable regulatory processes whenever appropriate to serve the interests of its members and the public. To meet this goal, the Task Force recommends:

1. Monitor developments in the legal marketplace, particularly those related to alternative legal service providers, lead generators, the availability of court sponsored legal forms and information, and other matters.

2. Take all appropriate action when developments affecting the legal profession or legal marketplace may have an impact on the Association membership.

F. ***Support Judicial Efficiency***: The legal profession and the courts exist in a symbiotic relationship. Consumer perceptions of a court system that is inefficient, expensive, and burdensome reflects poorly on the legal profession. As the availability and popularity of alternative dispute resolution mechanisms grow, and the rise of self-represented litigants continues, the organized bar should help change any negative perceptions of the courts, as well as support the courts in addressing systemic barriers to greater public use. To meet this goal, the Task Force recommends:

1. Continue to support an independent judiciary and full funding of the courts

2. Support and promote the judiciary's use of teleconferences and videoconferences for routine matters in order to save time and resources for lawyers and litigants.

3. Support and promote statewide e-filing in civil cases.

4. Support and promote the availability and use of standardized forms developed by the courts and not-for-profit organizations.

5. Support and promote the use of courthouse facilitators or informational kiosks, under the supervision of the courts or lawyers, to assist self-represented litigants and other legal consumers.

6. Consider and support the establishment of specialty courts to expedite less complex legal matters.

7. Educate the public through the Association's consumer website (or specifically designated webpages on the Association website) about the availability of resources for self-represented litigants, including information on limited scope representation, use of standardized court forms, courthouse navigators, specialty courts, and technology.

G. *Recognize and Support Adaptation*: The greatest danger to the legal profession is the failure to adapt. The ability to adapt requires lawyers to recognize that the forces reshaping the legal marketplace are the same forces that are reshaping much of our economy and our society – the rapid pace of technological change, globalization, and new channels for information. The Association is uniquely positioned on behalf of its diverse members to observe, evaluate, and to provide insight, response, and leadership concerning the changing profession and marketplace. To meet this goal, the Task Force recommends:

1. Establish a Standing Committee on the Future of Legal Services. The purpose of the Standing Committee would be to monitor developments and activities in the legal marketplace, including both the private and public sector as well as the actions of other bar associations. It would continue to consider such issues as ABS's and opportunities to partner or leverage nonlawyer legal service providers. The Standing Committee would monitor the Association's compliance with Report goals and recommendations and provide a forum for member comments and concerns. The Committee would be responsible for a quinquennial survey on the membership's economic, marketing, and business health. The Committee would be made up of no more than 10 members (including one Association officer), plus a chair, with representatives from the judiciary, legal aid, corporate in-house, law firms of all sizes, solo practitioners, and others as may materially contribute to the work of the Committee. The Committee should meet no less than three time a year and report to the Board and Assembly every year on its activities and matters of interest.

V. CONCLUSION

The Task Force on the Future of Legal Services hopes that this Report has raised the awareness of its readers about the realities and opportunities facing the legal profession now and in the future. The Task Force strongly believes in the importance of lawyers in American society as guardians of individual rights and the justice system, as well as lawyers' obligations to ensure public access to that system and the full protection of its laws. The Task Force further believes that the Association is well positioned to help its members continue to provide valuable and important services to the public. Finally, the Task Force hopes that the recommendations laid out in the Report will serve the interest of the public, the Association, and its members in the changing legal services marketplace.

VI. APPENDIX

Interpreting the Practice of Law

CASE NAME/CITATION	TYPE OF ACTION	FINDINGS	ELEMENTS OF UPL
People ex rel ISBA v People's Stock Yards State Bank **1931** IL Supreme Court 344 Ill 462*Bank*	Original proceeding seeking contempt of court for UPL	Bank which, through its legal department, manages estate matters, conducts real estate transactions, drafts wills, prepares deeds, etc. in engaging in UPL	Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill
People ex rel CBA v Barasch **1961** IL Supreme Court 21 Ill2d 407	Original proceeding seeking contempt of court for UPL	Non-attorney attempting to settle personal injury matter for another, and who operates service providing real estate transactions, handling traffic fines, etc. is engaged in UPL	The practice of law involves not only appearance in court in connection with litigation, but also services rendered out of court, and it includes the giving of advice or the rendering of any service requiring the use of legal skill or knowledge
CBA v Quinlan & Tyson **1966** IL Supreme Court 34 Ill2d 116	Suit to enjoin UPL	Real estate brokerage firm is not engaged in UPL by filling in the blanks on 'preliminary or earnest money' contract, as this coincides with the job the broker was hired to do. However, it is engaged in UPL if it draws or fills in deeds,	The legal problems often depend upon the context of in which the instrument is placed, and only a lawyer's training gives assurance that they will be identified or pointed out. Drafting and attending to the execution of instruments relating to real estate titles are within the practice of law, and the fact that standardized forms are usually employed does not detract from this.

		mortgages or other legal instruments	
Herman v Prudence Mutual Casualty Co **1969** IL Supreme Court 41 Ill2d 468	Suit for damages and injunctive relief UPL	Sufficient allegations that employees of insurance company advised insured not to consult attorney, and fraudulently explained consequences of release, stated cause of action for UPL	The State requires minimum levels of education, training and character before granting a license to practice law. Its purpose in doing so is the protection of the public, not primarily for the protection of attorneys
Kittay v Allstate Insurance Co **1979** IL App Ct, 1st Dist 78 IllApp3d 335	Class action seeking damages and injunctive relief for UPL	No UPL where insurance company utilizes employee-attorneys to defend insureds.	Statute prohibiting corporations from practicing law makes an exception in the case of any litigation in which the corporation may be interested by way of the issuance of any policy of insurance
In re Yamaguchi **1987** IL Supreme Court 118 Ill2d 417	Disciplinary proceeding for aiding UPL	Aiding UPL where attorney allowed his signature to be placed on blank complaint forms used by non-attorney to file assessment appeals.	It is not the tribunal involved (e.g., a court or administrative agency), but the character of the work which is determinative of whether the practice of law is involved. The completion of form valuation complaints did not involve mere factual data, but instead, was setting forth the results of legal analysis of the facts which he deemed justified a tax reevaluation
In re Discipio **1995** IL Supreme Court 163 Ill2d 515	Disciplinary proceeding for aiding in UPL	UPL where attorney engaged disbarred attorney to interview potential clients, and execute medical authorization forms. Respondent previously worked with now-disbarred attorney, and his relation continued after disbarment	The definition of "practice of law" defies mechanistic formulation. It is the character of the acts themselves that determine the issue. The focus of the inquiry must be on whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent. While the forms might be handled by a clerk under other circumstances, in this case, it is reasonable to expect that the disbarred attorney was called upon by potential clients to explain statutory references therein
Perto v Board of Review **1995** IL App Ct, 2nd Dist 274 IllApp3d 485	Allegation of UPL in Unemployment Compensation case	No UPL where employer's non-attorney agent replied to Dept of Employment Security	The legislature has authorized the representation of participants in proceedings before the department by any duly authorized agent. However, in IL only licensed attorneys are permitted to practice law, and the legislature has no authority to grant a non-attorney

			the right to practice law even if limited to an administrative agency. The ultimate authority to regulate and define the practice of law rests with the supreme court. Holding is limited to the facts of this case, where the fact-based response did not necessitate legal knowledge or skill, and thus was not the practice of law
In re Howard **1999** IL Supreme Court 188 Ill2d 423	Disciplinary proceeding for engaging in UPL while suspended	UPL where suspended attorney met with clients, accepted fee advances, exercised professional judgment with regard to cases, and advised the clients	The practice of law encompasses not only court appearances, but also services rendered out of court, and includes the giving of any advice or rendering of any service requiring the use of legal knowledge. It is the character of the respondent's activity that determines whether the practice of law has occurred, not the reasoning behind it
U.S. v Johnson **2003** U.S. Ct of App, 7th Circ 327 F.3d 554	Rule to show cause for UPL	UPL where paralegal service marketed certain courses of action to criminal defendants, and thus interfered with attorney-client relationship	Considering the serious threat that the unauthorized practice of law poses both to the integrity of the legal profession and to the effective administration of justice, resort to the court's inherent authority to sanction for conduct which abuses the judicial process is warranted In IL, the practice of law includes, at a minimum, representation provided in court proceedings along with any services rendered incident thereto
Colmar, Ltd. V Fremantlemedia North America **2003** IL App Ct, 1st Dist 344 IllApp3d 977	Action to vacate arbitration award for alleged UPL violation	No UPL where out-of-state attorney represented defendant in arbitration action	The context in which out-of-state activities are performed by a lawyer must be analyzed, because proper representation of clients often requires a lawyer to conduct activities in other states, and such activities should be permissible so long as they arise out of or are otherwise reasonably related to the lawyer's practice in the state of admission. While there is a procedure for out-of-state attorney to obtain *pro hac vice* permission to appear in court, there is no corresponding procedure for representation in arbitration proceedings.
King v First Capital Financial Services	Class action under the Attorney Act and Consumer	No UPL where mortgage company prepared documents	Issue of first impression. *Pro se* exception to corporation practice of law applied where mortgage

2005 IL Supreme Court 215 Ill2d 1	Fraud and Deceptive Practices Act alleging UPL	for use in its own mortgage business, and charged a fee therefor	company prepared documents for its own use, regardless that a fee was charged. No claim that any harm was suffered by improper preparation of documents; no claim that fees were not fully explained; no claim that borrowers believed mortgage company was acting as their attorney. Exception does not apply to third party document preparers not a party to the transaction. No private cause of action for damages exists under the Attorney Act
Downtown Disposal v City of Chicago **2012** IL Supreme Court 2012 IL 112040	Action to dismiss petitions for administrative review signed by non-attorney corporation officer as violation of UPL	"Nullity Rule" whereby UPL violations automatically result in dismissal of an action should not be applied automatically. Reversed and remanded to allow corporation to obtain counsel.	The filing of the petitions for administrative review by a non-attorney is UPL. It is not the simplicity of the form that is important, but the fact that an appeal was pursued on behalf of a corporation. A corporation must be represented by an attorney to mitigate the problems which arise when the interests of stockholders or officers do not mesh. However, before applying the "nullity rule", the court should consider whether the non-attorney's conduct is done without knowledge that the action was improper, whether the corporation acted diligently in correcting the mistake by obtaining counsel, whether the non-attorney's participation is minimal, and whether the participation results in prejudice to the opposing party.
People v Contractor's Lien Services, Inc. **2013** Cir Ct of Cook County, Chancery Divn 08 CH 46900	Action for injunctive relief for violations of the Consumer Fraud and Deceptive Business Practices Act as UPL	Consent Order entered enjoining defendant from engaging in UPL	Prohibited acts of UPL: offering or providing legal advice regarding the preparation of mechanics lien or mechanics lien notice on behalf of another person or entity for a fee; offering to prepare a mechanics lien or notice for a fee; preparing a mechanics lien or notice for a fee; reviewing, prior to recordation, a mechanics lien or notice for a fee; offering to foreclose a mechanics lien for a fee; foreclosing a mechanics lien for a fee; originating, owning, operating, maintaining, or controlling any website that offers to

			prepare a mechanics lien or notice for a fee

ENDNOTES

[1] Richard Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services*, Oxford University Press, p.29 (2008)).
[2] Susskind, *The End of Lawyers?* Oxford University Press p.31-32 (2008).
[3] Susskind, *The End of Lawyers?* Oxford University Press p.33 (2008).
[4] Susskind, *End of Lawyers?*, *pp*. 43 – 44.
[5] 2016 Report on the State of the Legal Market, Georgetown Law Center for the Study of the Legal Profession, p. 10.
[6] Laurel S. Terry, *Globalization and Regulation in The Relevant Lawyer: Reimagining the Future of the Legal Profession*, 158 (Paul Haskins, ed., 2015).
[7] *Id*.

[8] Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, American Bar Foundation, p. 4 (2014).
[9] *Id*., p. 7.
[10] *Id*., p. 8.
[11] The Legal Aid Safety Net: A Report on the Legal Needs of Low Income Illinoisans, p. 14 (2005).
[12] *Id*.
[13] 2015 Report on the State of the Legal Market, Georgetown Law Center for the Study of the Legal Profession, p. 7, footnote 16.
[14] 2015 Report on the State of the Legal Market, Georgetown Law Center for the Study of the Legal Profession, p. 7.
[15] LegalZoom.com, Inc, Form S-1 Registration Statement, US Securities and Exchange Commission (filed May 10, 2012); https://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm.
[16] *Id*.
[17] Lorelei Laird, *Avvo Founder Tells Lawyers to 'get rid of UPL' if They Want Innovation and Access to Justice*, ABA Journal August 3, 2015;
http://www.abajournal.com/mobile/article/avvo_founder_tells_lawyers_to_get_rid_of_upl_if_they_want_innovation_and_to/.
[18] Catey Hill, *Don't Buy Legal Documents Online Without Reading This Story*, Marketwatch November 27, 2015;
http://www.marketwatch.com/story/dont-buy-legal-documents-online-without-reading-this-story-2015-11-23.
[19] Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of* Rights, 124 Yale Law Journal 2813, footnote 28 (2015).
[20] www.modria.com/platform (last visited October 3, 2016); http://modria.com/product/.
[21] Illinois Attorney Registration and Disciplinary Commission, *Annual Report of 2015*, p.8.
[22] US Department of Labor, Bureau of Labor Statistics, Occupational Handbook – Lawyers,
http://www.bls.gov/ooh/legal/lawyers.htm, (website last visited October 3, 2016).
[23] See ABA and National Association of Law Placement data below in notes
[24] 2015 Report on the State of the Legal Market, Georgetown Law Center for the Study of the Legal Profession, p. 4.
[25] See National Association of Law Placement website and specific employment data by class, for example
http://www.nalp.org/uploads/NatlSummaryClassof2015.pdf.
[26] See American Bar Association, Section of Legal Education and Admissions to the Bar, Law Graduate Employment Data.
[27] 2016 Report on the State of the Legal Market, Georgetown Law Center for the Study of the Legal Profession, p. 3, and 2015 Report on the State of the Legal Market, Georgetown Law Center for the Study of the Legal Profession, p. 3.
[28] *Id*.

[29] 2016 Report on the State of the Legal Market, Georgetown Law Center for the Study of the Legal Profession, p. 5.
[30] *Id*.
[31] 2004 Membership Law Firm Economic Benchmarking Survey, Illinois State Bar Association (May 2004).
[32] 2014 Compensation and Benefits Survey, Illinois State Bar Association (2014).
[33] For years 2014 and 2010 see 2014 Annual Report of the Illinois Courts, Administrative Summary, p. 33; for year 2007 see 2007 Annual Report of the Illinois Courts, Administrative Summary, p. 27; and for year 2001 see 2001 Annual Report of the Illinois Courts, Administrative Summary, p. __.
[34] 2014 Annual Report of the Illinois Courts, Administrative Summary, p. 33.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] 2016 Report on the State of the Legal Market, Georgetown Law Center for the Study of the Legal Profession, p. 4.
[40] 2014 Annual Report of the Illinois Courts, Administrative Summary, p. 32.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] Sandefur, *Accessing Justice in the Contemporary USA*, American Bar Foundation, p. 11, 2014.
[46] National Center for the State Courts, National Survey 2015, p. 5 (prepared by gerstein/bocian/agne strategies (November 17, 2015).
[47] Sandefur, *Accessing Justice in the Contemporary USA*, American Bar Foundation, p. 11-13 (2014).
[48] The Legal Aid Safety Net: A Report on the Legal Needs of Low Income Illinoisans, p. 27 (2005).
[49] National Center for the State Courts, National Survey 2015, p. 5 (prepared by gerstein/bocian/agne strategies (November 17, 2015).
[50] Luz Herrera, *Training Lawyer-Entrepreneurs*, 89 Denver University Law Review, p. 895 (2013) citing Robert Capps, *The Good Enough Revolution: When Cheap and Simple is Just Fine*, WIRED (August 24, 2009)).
[51] comScore, *Online Consumer-Generated Reviews have Significant Impact on Offline Purchase Behavior*, November 29, 2007.)
[52] Richard Granat and Stephanie Kimbro, *The Future of Virtual Law Practice in The Relevant Lawyer: Reimagining the Future of the Legal Profession*, 89 (Paul Haskins, ed., 2015).
[53] *Id*. at 91.
[54] comScore, *Online Consumer-Generated Reviews have Significant Impact on Offline Purchase Behavior*, November 29, 2007.)
[55] Lawlytics, What Facebook's Directory May Mean for Law Firms, www.lawlytics.com/blog/should-lawyers-care-about-facebooks-directory.
[56] National Center for the State Courts, National Survey 2015, p. 5 (prepared by gerstein/bocian/agne strategies (November 17, 2015).
[57] Sandefur, *Accessing Justice in the Contemporary USA*, American Bar Foundation, p. 15, 2014.
[58] Results of the 2015 Illinois Circuit Courts Court User Survey, developed by the Illinois Judicial Conference Committee on Strategic Planning and the Administrative Office of the Illinois Courts p. 12.
[59] *Id*.

[60] National Center for the State Courts, National Survey 2015, p. 2 (prepared by gerstein/bocian/agne strategies (November 17, 2015).
[61] *Id*.
[62] Results of the 2015 Illinois Circuit Courts Court User Survey, p. 11.
[63] Richard Granat and Stephanie Kimbro, *The Future of Virtual Law Practice in The Relevant Lawyer: Reimagining the Future of the Legal Profession*, 89 (Paul Haskins, ed., 2015).

[64] National Center for the State Courts, National Survey 2015, p. 3 (prepared by gerstein/bocian/agne strategies (November 17, 2015).

[65] *Id*. at p. 3.
[66] 2014 Annual Report of the Illinois Courts, Administrative Summary, p. 8.
[67] *Id*.
[68] McGinnis & Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, Fordham Law Review, May 2014, 3043.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*. at 3044.
[73] *Id*.
[74] Richard Susskind, *The End of Lawyers?*, p. 99.
[75] Paul F. Kirgis, *The Knowledge Guild: The Legal Profession in an Age of Technological Change*, 11 Nev. L.J. 184, 190 (2010).
[76] *Id*.
[77] Julie Sobowale, *How artificial intelligence is transforming the legal profession*, ABA Journal, April 1, 2016.
[78] McGinnis and Pearce, 3045.
[79] Shivon Zilis, https://medium.com/@shivon/the-current-state-of-machine-intelligence-f76c20db2fe1#.ofseopnrx.
[80] http://www.theguardian.com/technology/2015/jun/28/computer-writing-journalism-artificial-intelligence.
[81] Ethan Katsch and Colin Rule, *What we know and need to know about Online Dispute Resolution*, South Carolina Law Review, 329, 330 (2016).
[82] McGinnis & Pearce, p. 3045.
[83] Lexmachina.com.
[84] counselytics.com.
[85] ravellaw.com.
[86] Stefanie Garber summarized these innovations in a recent article in Lawyers Weekly called "Artificial intelligence poised to close justice gap."
[87] McGinnis & Pearce *pp*. 3041 – 3042.
[88] http://www.law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-4/.
[89] *Id*.
[90] http://www.law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-2/.
[91] McGinnis and Pearce p. 3042 – 3043.
[92] Susskind, *The End of Lawyers?* Oxford University Press p. 32 (2008).
[93] *Downtown Disposal Services v. City of Chicago*, 2012 IL 112040, ¶ 14.
[94] Ill. S. Ct. Rules of Prof. Cond., Preamble, Comment [12].
[95] *Downtown Disposal*, 2012 IL 112040, ¶ 15.
[96] *Consolidation Coal Co. v. Bucyrus–Erie Co.*, 89 Ill.2d 103 (1982); *In re Marriage of Decker*, 153 Ill.2d 298, 309 (1992).
[97] *United States v. Zolin* (1989), 491 U.S. 554, 562, 109 S.Ct. 2619, 2626, 105 L.Ed.2d 469, 485.
[98] Ill. S. Ct. Rules of Prof. Cond., 1.6.
[99] Ill. S. Ct. Rules of Prof. Cond., 1.6(b) and (c).
[100] Ill. S. Ct. Rules of Prof. Cond., 1.7 and 1.9.
[101] Ill. S. Ct. Rules of Prof. Cond., 5.4(c).
[102] Ill. S. Ct. Rules of Prof. Cond., 1.8
[103] Ill. S. Ct. Rules of Prof. Cond., 3.1 through 3.5.
[104] Ill. S. Ct. Rules of Prof. Cond., 1.0(m).
[105] See discussion in *In re Schwartz*, No. 98 CH 60 (Report and Recommendation of Review Board, at 17-20.
[106] District of Columbia Rules of Professional Conduct 5.4(b); Wash. APR 28 (Limited Practice Rule for Limited License Legal Technicians). In addition to these adopted rules, the Indiana State Bar Association's Future of the Provision of Legal Services Committee recently recommended to the Bar's House of Delegates that it support allowing nonlawyers to own a nonvoting share of as much as 49% of a law firm. This recommendation was rejected.
[107] American Bar Association ABA Commission on the Future of Legal Services, *Issues Paper Regarding Alternative Business Structures*, p. 2 and 6 (April 8, 2016).
[108] *Id*., p. 6.
[109] *Id*., p. 5.
[110] *Id*.
[111] *Jacoby & Meyers, LLP et al v.Presiding Justices*, 118 F.Supp.3d 554, 2015 U.S. Dist LEXIS 92041.
[112] *Id*., p. 9.
[113] *Id*. p 20-21.

[114] *See* Futures Commission of the State Bar of Utah, Recommendation 1.C. (2015); Minnesota's Challenges to the Practice of Law Task Force, p. 16 (2015); State Bar of Michigan 21st Century Practice Task Force, p. 24 (2016); The Vermont Joint Commission on the Future of Legal Services, p. 47, (2015); ABA Report on the Future of Legal Services in the U.S. p. 30 (2016).
[115] See Limited Scope Legal Representation, Final Report, Findings and Recommendations, *Prepared by the Joint Task Force on Limited Scope Legal Representation* (May 19, 2011).
[116] Ill. S. Ct., M.R. 3140 (eff. July 1, 2013); Ill. S. Ct. Rs. 11(e), 13(c)(6),(7), 137(e), Ill. S. Ct. Rules of Prof. Cond., 1.2, 4.2, and 5.5 (eff. July 1, 2013).
[117] Ed Finkel, *Limited Scope Representation: Tales from the Trenches*, Ill. Bar J., (December 2015.)
[118] *Id*.
[119] Ill. S. Ct. R. 711 (eff. May 27, 1969).
[120] Illinois Supreme Court Rule 10-100.

ILLINOIS STATE
BAR ASSOCIATION

James T. Reilly Request
November, 2016

I would like an issue to be addressed and considered as part of Agenda Issue #7, Report of the Task Force on Future of Legal Services. Specifically, I would like to raise, as part of the discussion that we consider the role of the Illinois Legal Aid Online Program and the Access to Justice Initiative and their impact on the delivery of services by the private Bar. I would like to discuss the impact of these type programs with regard to our members' practices and, specifically, their incomes.

If you need further clarification or would suggest changes in the above language, please respond at your earliest convenience.

Very truly yours,

James T. Reilly
Assemblyman
REILLY LAW OFFICE LLC
7 Danny Dr., Ste. 1
Streator, IL 61364

Assembly Meeting
December 10, 2016

Agenda Item 8
Standing Committee on Legal Education, Admission & Competence

Final Report, Findings & Recommendations of the ISBA Standing Committee on Legal Education, Admission and Competence on the Adoption of the Uniform Bar Examination

Submitted to the ISBA Board of Governors on October 7, 2016

ILLINOIS STATE BAR ASSOCIATION

Standing Committee on Legal Education, Admission & Competence

*Daniel R. Thies, Chair
Chicago, IL

Allison K. Bethel, Vice Chair
Chicago, IL

Nancy Z. Hablutzel, Secretary
Durham, NC

Peter C. Alexander, Ex. Officio
Carbondale, IL

Greg C. Anderson
DeKalb, IL

Barbara B. Bressler
Glenview, IL

*Andrew C. Corkery
St. Louis, MO

*Jessica R. Durkin
Chicago, IL

Tarek A. Fadel
Chicago, IL

*Amanda E. Goldsmith
St. Louis, MO

Edward W. Huntley
Springfield, IL

Megan Moore
Springfield, IL

Heidi E. Ramos
Murphysboro, IL

Peter L. Rotskoff
Springfield, IL

*J. David Sanders
Carbondale, IL

Lawrence A. Stein
Chicago, IL

Stacey L. Tutt
Champaign, IL

*Wendy H. Vaughn
Rockford, IL

Lois Wood
East St. Louis, IL

Kent A. Gaertner
Wheaton, IL

Kimberly A. Furr
Springfield, IL

* Denotes member of the subcommittee responsible for drafting this report

TABLE OF CONTENTS

EXECUTIVE SUMMARY

President Vincent Cornelius of the Illinois State Bar Association charged the ISBA Legal Education, Admission and Competence Committee (the "Committee") to review the Uniform Bar Exam ("UBE") and to make a recommendation as to whether Illinois should adopt the UBE in place of the existing bar exam. Following several months of study, during which the Committee received written and oral comments from numerous members of the legal community, the Committee recommends that the Illinois Supreme Court adopt the UBE. The Committee believes that adopting the UBE will create a more flexible job market, lower the cost of bar admission, and enhance the bar exam's focus on ensuring that candidates are practice ready. Moreover, because the UBE allows states to adopt additional state-specific requirements for bar admission, including an additional state-specific exam, adopting the UBE will not compromise Illinois' ability to ensure candidates are knowledgeable about Illinois-specific law and procedure.

A. The Uniform Bar Examination

First administered in Missouri during February 2011, 25 jurisdictions, including New York, South Carolina, and the District of Columbia, have adopted the UBE.[1] Similar to the current Illinois bar exam, the purpose of the UBE is "to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law."[2] The National Conference of Bar Examiners ("NCBE"), the same company that already prepares the majority of the Illinois bar exam, also prepares the UBE for administration by state and territorial testing authorities twice per year during February and July.

The UBE has three parts: The Multistate Bar Examination ("MBE"), which is a 200 question multiple-choice exam taken in 6 hours; the Multistate Essay Examination ("MEE"), which consists of six 30-minute essay questions, and the Multistate Performance Test ("MPT"), which consists of two 90-minute performance essays. Candidates who take the UBE receive a portable score that can be submitted as part of an application to gain admission in other UBE states.[3] Under the UBE, each state continues to set its own passing score, meaning that a passing score in Massachusetts will not necessarily entitle a candidate to bar admission in Illinois. To obtain a portable UBE score, candidates must take all portions of the UBE in the same UBE jurisdiction and during the same administration.

Both the American Bar Association and the Conference of Chief Justices have adopted resolutions supporting the UBE. The Conference found that adoption of the UBE will make the bar examination process more efficient and less costly, provide recent graduates with greater mobility and flexibility in seeking employment, and better reflect the multijurisdictional practice of today's legal market.[4]

---

[1] National Conference of Bar Examiners, *Uniform Bar Examination*, http://www.ncbex.org/exams/ube/. South Carolina and New Jersey will begin administering the UBE in February 2017.
[2] *Id.*
[3] *Id.*
[4] *Id.*

B. Changes To The Current Illinois Bar Examination If The UBE Were Adopted

Crucial to any evaluation of the UBE is determining what would change as a practical matter. As outlined in this report, the content of the actual test administered would not change significantly, because Illinois already uses 87.5% (seven-eighths) of the UBE. Whereas the UBE has two MPT questions, the Illinois Bar Exam includes only one MPT question and requires candidates to complete three 30-minute Illinois-specific essays called the Illinois Essay Examination ("IEE"). Although Illinois would not administer the IEE if it adopted the UBE, any jurisdiction that adopts the UBE has the option of requiring candidates to complete a jurisdiction-specific educational component and/or pass a test on jurisdiction-specific law.[5] The additional test or course could be taken at a separate time from the two-day bar exam, and could be administered multiple times per year, or on demand through an online system. Jurisdictions have developed various models for fulfilling a state-specific law requirement, ranging from live courses to online instruction, both with and without online testing.

Many of these UBE state-specific options may provide a more rigorous test of Illinois-specific law than the current IEE. The three Illinois essay questions make up only about one-eighth of a candidate's total score on the current exam, and can test only a limited number of subjects. There is no requirement that a candidate achieve a passing score on this part of the test; instead, only the total score must be at a passing level. Moreover, a candidate can obtain partial credit by answering based on general principles of law, without knowing Illinois law. Thus, a candidate can pass while still scoring poorly on the Illinois essays. In other words, under the current system, nothing guarantees that candidates are knowledgeable about Illinois-specific law. By contrast, under many of the UBE alternatives, Illinois could require that candidates demonstrate adequate knowledge of Illinois-specific law before gaining admission.

If Illinois adopted the UBE, the MBE would still be graded nationally, and the Illinois Board of Admissions to the Bar would continue to grade the MEE and MPT using uniform model answers and grading materials from the NCBE. The scores would also continue to be scaled against the MBE scores of Illinois test takers. The current Illinois exam is scored on a 400-point scale with the minimum passing score of 266 (increasing to 268 in 2017), which applies to the entire exam. Even if Illinois adopted the UBE, the Illinois Supreme Court will maintain the authority to set the passing score.

C. Reasons to Adopt the UBE

Additional Employment Opportunities

Under the current system, licensed attorneys in other states can be admitted to the Illinois bar by motion after practicing for three years in another jurisdiction.[6] Candidates who have not practiced for three years, but have taken a bar exam within the last year, can also transfer their MBE scores to Illinois. If Illinois adopted the UBE, candidates would be able to use a UBE score earned in any other UBE jurisdiction to apply for admission to the Illinois bar for a period

[5] *See, e.g.*, *supra* note 1.

[6] Pursuant to Illinois Supreme Court Rule 705, "[a] person who, as determined by the Board of Admissions to the Bar, has been licensed to practice in the highest court of law in any USA state, territory, or the District of Columbia for no fewer than 3 years may be eligible for admission on motion." Ill. S. Ct. R. 705 (West 2014).

specified by the Illinois Supreme Court. The UBE does not permit a transfer of status, so admission in another state would not guarantee admission in Illinois, which could set its passing score higher than other UBE jurisdictions. Candidates who take the Illinois bar would also be able to transfer their scores to the 25 jurisdictions that have adopted the UBE, including the bordering states Missouri and Iowa.

Students are graduating with high debt and limited employment opportunities. By adopting the UBE, Illinois bar exam takers will theoretically have employment opportunities open up for them in 25 other jurisdictions in addition to Illinois.[7] Having a portable bar exam score is a significant benefit because lawyers who are licensed in more than one jurisdiction have a competitive advantage over lawyers licensed to practice in only one state. If Illinois adopts the UBE, Illinois lawyers may be able to become licensed more quickly and with less expense in the neighboring states of Missouri and Iowa, for example, which have already adopted the UBE.

Adopting the UBE would also benefit Illinois employers by increasing the pool of candidates for jobs in areas where lawyers are scarce, such as in rural parts of the state or in certain high-demand practice areas. These additional lawyers may in turn be better able to meet the legal needs of the public in these areas.

The UBE Will Better Test the Practice Readiness of Examinees

Two recent ISBA Committees—the Special Committee on the Impact of Law School Debt on the Delivery of Legal Services (the "ISBA Debt Committee") and the Special Committee on the Impact of Law School Curriculum and the Future of the Practice of Law in Illinois (the "ISBA Curriculum Committee")—recommended more practical training to ensure that candidates for the bar are practice ready. Adopting the UBE will help achieve that goal by adding an additional MPT question and thereby increasing the percentage of the bar exam devoted to testing practical legal skills.[8]

The UBE Allows More Rigorous Examination of a Candidate's Knowledge of Illinois-Specific Laws

Adopting the UBE may allow Illinois to implement a more rigorous state-specific requirement for bar admission than the current IEE. Such a requirement could ensure that each candidate has exposure to Illinois-specific law and cannot skate through the bar exam based only on knowledge of general principles of law. For example, Illinois could put into practice a separate Illinois-specific exam, a state-specific online course, additional required CLE during the first year of admission, or a required mentorship program. Implementing an additional CLE requirement would not only benefit new lawyers, but would also promote membership in the ISBA, the state's premier CLE provider. For instance, the ISBA could expand and tailor its current continuing legal education courses to meet any requirements set by the Illinois Supreme Court. With more exposure to the ISBA at an early stage of their career, candidates may continue to take advantage of the many benefits offered to new members. This in return could increase membership in the ISBA.

[7] A map showing the jurisdictions that have adopted the UBE is attached as Appendix A to this report.
[8] National Conference of Bar Examiners, *Multistate Performance Test*, http://www.ncbex.org/exams/mpt/.

Adopting the UBE Will Not Lead Foreign Lawyers to Enter Illinois to Take Jobs

The experience of other UBE states suggests that adopting the UBE will not lead to an influx of new lawyers. Instead, most states that have adopted the UBE see about as many attorneys transferring UBE scores out of the jurisdiction as in, and the overall numbers of transfers are small.[9] Although Illinois may be unique given the size and international importance of its legal job market, the threat that adopting the UBE will lead to a large number of foreign lawyers inundating Illinois is nonetheless small.

Any Disproportionate Impact on Minority Candidates is Not Likely Significant, But Should be Carefully Monitored

Current data suggests that minority students perform disproportionately worse on the bar exam as it currently exists.[10] It seems unlikely that the adoption of the UBE will significantly alter the current situation with respect to minority passage of the bar exam, given that it is so similar to the current exam. The Committee therefore recommends that after adopting the UBE, Illinois should collect data to study the possible impact on minority students.

D. Recommendations

After conducting extensive research, the Committee unanimously recommends the following:

- Illinois should adopt the UBE;
- Illinois should adopt additional requirements to educate and/or test candidates on Illinois-specific law, including one or both of the following:
    - Modify or expand minimum continuing legal education requirements in the first year of admission to include distinctions in Illinois substantive law and procedure;
    - Create an Illinois-specific exam to be administered periodically throughout the year for candidates taking the Illinois bar and for candidates seeking to transfer in a UBE score. Such an exam should likely be a multiple-choice exam, to ensure it is psychometrically sound and to facilitate the testing of a larger number of state-specific topics, but it could theoretically be something similar to the current IEE;
- Illinois should accept transferred UBE scores for up to three (3) years;
- Illinois should gather data related to the performance of minority candidates on the UBE, determine if the UBE adversely affects any group of minority candidates, and mitigate these affects, if any.

[9] A chart showing the transfer in and out of the UBE jurisdictions is attached as Appendix B.

[10] Ben Bratman, *Opinion: Why More States Should Not Jump on the Uniform Bar Exam Bandwagon*, JD Journal, June 17, 2015, *available at* http://www.jdjournal.com/2015/06/17/opinion-why-more-states-should-not-jump-on-the-uniform-bar-exam-bandwagon/.

INTRODUCTION

To gain admittance to practice law in Illinois, a new lawyer must pass the Illinois bar exam. Like the majority of states, Illinois' bar exam score is state-specific. That is, a passing score is valid only in the state where the test is administered, and nowhere else. If a candidate for admission wishes to practice in another state, the candidate generally must take and pass a separate state-specific bar exam. The time and cost connected with sitting for the bar exam, waiting for the results, and waiting to be sworn-in as an attorney creates a high burden for any attorney seeking to take advantage of job opportunities in multiple states. This burden is particularly heavy for young attorneys, who face high debt loads and a difficult job market.

A major focus of President Vincent Cornelius's year as president is serving the needs of young lawyers. As part of that focus, President Cornelius charged the Committee to undertake a comprehensive evaluation of the UBE, and to recommend whether Illinois should adopt it in place of the current bar examination. Consistent with that charge, this report compares the current Illinois bar exam with the UBE, evaluates the arguments for and against the UBE, and ultimately recommends that Illinois adopt the UBE.

The Committee's work builds on two previous reports prepared by the ISBA studying the impact of law school debt and the process by which we train new lawyers on the delivery of legal services in Illinois.[11] A major goal of these efforts was to explore ways to ensure that future law school graduates in Illinois are prepared for the realities of today's legal marketplace by attaining competency in core professional skills at a reasonable cost. Both of these reports highlighted the need to enhance the practical skills training that new lawyers receive while also decreasing the cost of joining the bar in Illinois. The Committee believes that its recommendations advance the goals articulated in each of these previous reports.

METHODOLOGY

During the summer of 2016, members of the Legal Education, Admission, and Competence Committee began researching information regarding the UBE. Each member was assigned a particular topic and prepared a short memo summarizing the results of his or her research. The Committee also held a hearing on August 16, 2016, at the ISBA's Chicago Regional Office. Prior to the hearing, a broad cross section of the legal profession in Illinois, including the deans of the Illinois law schools, members of the Illinois Board of Admission to the Bar, members of the Illinois Attorney Registration and Disciplinary Commission, and members of the National Conference of Bar Examiners ("NCBE") received personal invitations to testify at the hearing or submit comments or concerns to the Committee about whether the Illinois Supreme Court should adopt the UBE. The Committee received written and oral comments from most of the deans of the Illinois law schools and from members of the ISBA Young Lawyers Division. In addition, the Committee heard live testimony from Kellie Early of the NCBE.

[11] These reports were the *Report and Recommendations of the Special Committee on the Impact of Current Law School Curriculum on the Future of the Practice of Law in Illinois*, released in 2015, and the *Final Report, Findings & Recommendations on the Impact of Law School Debt on the Delivery of Legal Services*, released in 2013.

REPORT OF THE COMMITTEE

I. HISTORY OF THE UNIFORM BAR EXAMINATION

The NCBE prepares the UBE for administration by state and territorial testing authorities twice per year during the final weeks of February and July. The UBE is composed of the Multistate Bar Examination ("MBE"), the Multistate Essay Examination ("MEE") and the Multistate Performance Test ("MPT").[12] The purpose of the UBE is "to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law."[13] Candidates who take the UBE receive a score that is portable and that can be submitted as part of an application to gain admission in other states that have adopted the UBE.[14]

Missouri became the first jurisdiction to adopt the UBE in February 2011. Prior to adopting the UBE, the Missouri Board of Law Examiners (the "Board") met with the Missouri Supreme Court, deans of the law schools in both Missouri and Kansas, and one Illinois law school dean, in September 2009.[15] The principle concern that emerged from that meeting was "how can you license lawyers to practice in Missouri without testing their knowledge of Missouri law?"[16] Although this concern was legitimate, the Board concluded that adopting the UBE would not significantly diminish Missouri's ability to ensure that new lawyers were competent in Missouri law, as compared to the pre-UBE system. The Board noted that even before adopting the UBE, "it had become the Board's practice to craft questions that tested knowledge of general principles of law rather than details of Missouri law."[17] Despite examinees being instructed to answer the MEE questions according to Missouri law, moreover, "it was the Board's experience that Missouri law often was the same as the general rules of law with respect to the subjects tested on the MEE."[18]

Likewise, during 2014-15, New York undertook a comprehensive study of the UBE. Chief Judge Jonathan Lippman of the New York Court of Appeals appointed an Advisory Committee in November 2014 to study a proposal by the New York State Board of Law Examiners to fully adopt the UBE in New York.[19] After a thorough study, which included public hearings, stakeholder meetings, and focus groups, the Committee recommended that the Court of Appeals adopt the UBE along with two state-specific licensing components to be implemented for the July 2016 bar examination.[20] New York found that the UBE along with the two state-specific licensing components would "fairly assess competency, protect clients, adapt to the

---

[12] National Conference of Bar Examiners, *supra* note 1.
[13] *Id*.
[14] *Id*.
[15] Cindy L. Martin, *Local Law Distinctions in the Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake and Eat it Too)*, Bar Examiner, Sept. 2011, at 8, *available at* http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F142.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *See* New York Advisory Committee on the Uniform Bar Examination, *Ensuring Standards and Increasing Opportunities for the Next Generation of New York Attorneys*, April 2015, at 7, http://www.nycourts.gov/ip/bar-exam/pdf/FINAL%20REPORT_DRAFT_April_28.pdf [hereinafter New York Report] .
[20] *Id*. at 5.

geographic and economic realities of 21st century practice, and enhance candidate proficiency in New York law."[21]

As of July 2016, 20 jurisdictions, including the District of Columbia, have adopted the UBE. Four more states have approved its use beginning in 2017,[22] and Massachusetts is slated to begin administering the UBE in 2018.[23]

Jurisdiction	**Adoption**
Alabama	July 2011
Alaska	July 2014
Arizona	July 2012
Colorado	February 2012
Connecticut	February 2017
District of Columbia	July 2016
Idaho	February 2012
Iowa	February 2016
Kansas	February 2016
Massachusetts	February 2018
Minnesota	February 2014
Missouri	February 2011
Montana	July 2013
Nebraska	February 2013
New Hampshire	February 2014
New Jersey	February 2017
New Mexico	February 2016
New York	July 2016
North Dakota	February 2011
South Carolina	February 2017
Utah	February 2013
Vermont	July 2016
Washington	July 2013
West Virginia	July 2017
Wyoming	July 2013

Both the American Bar Association and the Conference of Chief Justices have adopted resolutions supporting the UBE. At their annual meeting on July 28, 2010, the Conference of Chief Justices adopted *Resolution 4 Endorsing Consideration of a Uniform Bar Examination*, where the Conference urged "the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination."[24] In 2016, the Conference adopted *Resolution 10 Urging Consideration of Implementation of Uniform Bar*

[21] *Id*. at 8.
[22] Connecticut, New Jersey, South Carolina, and West Virginia.
[23] *See* Appendix A.
[24] Resolution 4 of the Conference of Chief Justices, *Endorsing Consideration of a Uniform Bar Examination*, adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the 2010 Annual Meeting (July 28, 2010), http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F137.

Examination.[25] Resolution 10 found that adoption of the UBE will make the bar examination process more efficient and less costly, provide recent graduates with greater mobility and flexibility in seeking employment, and better reflect the multijurisdictional practice of today's legal market.[26]

On August 6, 2010, the ABA's Section of Legal Education and Admissions to the Bar adopted a *Council Resolution Endorsing Consideration of a Uniform Bar Examination*, where it also urged "the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination."[27] At the ABA's 2016 Midyear Meeting, the ABA adopted Resolution 109 urging each state and territory's bar admission authorities "to adopt expeditiously the Uniform Bar Examination."[28]

II. NUTS AND BOLTS OF THE UBE

Crucial to any evaluation of the UBE is determining what would change as a practical matter. As outlined below, the content of the actual test administered would not change significantly, because Illinois already uses many of the components of the UBE. A full review of the practical changes resulting from adoption of the UBE must also consider other aspects of the examination process.

A. Testing Format

The current Illinois Bar Exam takes place over a two-day period and consists of the MBE, MEE, MPT, and the Illinois Essay Examination ("IEE"). The following are given on the first day of the test: three IEE questions drafted by Illinois examiners (90 minutes total), one MPT task testing candidates' ability to perform a practical skill necessary for the practice of law (90 minutes), and six MEE essay questions (3 hours total). The MBE, a 200-question multiple choice exam, is administered on the second day. Test takers are allowed three hours in the morning and three hours in the afternoon to complete the MBE.[29]

The components of the UBE are very similar to the current exam. The UBE also takes place over a two-day time period, and also includes the MBE and six MEE questions. However, the UBE includes two MPT tasks, rather than the one MPT task on the current exam. The first day of the exam allots three hours to complete the two MPT tasks and three hours to complete the six MEE questions. The second day of the exam allots six hours to complete the MBE.[30]

---

[25] Resolution 10 of the Conference of Chief Justices, *Urging Consideration of Implementation of Uniform Bar Examination*, adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the 2016 Midyear Meeting (February 3, 2016), http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F194.

[26] *Id*.

[27] Council Resolution of the Section of Legal Education and Admissions to the Bar of the American Bar Association, *Endorsing Consideration of a Uniform bar Examination*, adopted by the Council of the Section of Legal Education and Admissions to the Bar (August 6, 2010), http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F141.

[28] Resolution 109 of the American Bar Association (February 2016), http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F193.

[29] *See, e.g.*, Ill. S. Ct. R. 704 (West 2014).

[30] *See, e.g.*, National Conference of Bar Examiners, *supra* note 1.

The critical difference between the current exam and the UBE is that the UBE has a second MPT question in place of the three IEE questions. Therefore, in terms of substance, the current exam and the UBE are 87.5% the same. If Illinois adopted the UBE, the change would be less dramatic than in a state that does not already utilize the MBE, MPT, and MEE.

Separate from the two-day bar exam, Illinois requires candidates to take the Multistate Professional Responsibility Examination ("MPRE"). The MPRE is a two-hour, 60 question multiple choice examination that is administered three-times per year outside of the bar examination.[31] It is required for admission to the bars of all but three U.S. jurisdictions.[32] Passing scores are established by each jurisdiction.[33] Adopting the UBE would have no impact on the administration of the MPRE.

Any jurisdiction that adopts the UBE has the option of requiring candidates to complete a jurisdiction-specific educational component and/or pass a test on jurisdiction-specific law.[34] Jurisdictions have developed various models for fulfilling a state-specific law requirement, ranging from live courses to online instruction, both with and without online testing.

B. Scoring/Grading

Each state that has adopted the UBE administers, grades, and scores the test.[35] In particular, the user jurisdictions independently:

- Decide who will be admitted to practice in the jurisdiction;
- Determine underlying educational requirements;
- Make all character and fitness decisions;
- Grade the MEE and MPT;
- Access candidate knowledge of jurisdiction-specific content through a separate test, course or some combination of the two;
- Accept MBE scores earned in a previous examination or concurrently in another jurisdiction for purposes of making local admissions decisions, if they wish;
- Set their own passing scores; and
- Determine how long incoming UBE scores will be accepted.[36]

The four components of the current Illinois Bar Exam are weighted as follows:

- MBE- 50%
- MEE- 26.7%
- MPT- 10%
- IEE- 13.3%

[31] *See, e.g.*, National Conference of Bar Examiners, *Multistate Professional Responsibility Examination*, http://www.ncbex.org/exams/mpre/.
[32] Maryland, Wisconsin and Puerto Rico do not require the MPRE.
[33] *See, e.g.*, National Conference of Bar Examiners, *supra* note 31.
[34] *See, e.g.*, National Conference of Bar Examiners, *supra* note 1.
[35] *Id.*
[36] *Id.*

As a multiple choice test, the MBE is graded nationally. The other parts of the current exam are graded by the Illinois Board of Admissions to the Bar and scaled using the MBE scores of Illinois test takers (to make the scores comparable from one exam administration to another). Graders use uniform model answers and grading materials provided by the NCBE to grade the MEE and MPT portions of the exam.

Under the UBE, the components of the exam would be weighted as follows:

- MBE- 50%
- MEE- 30%
- MPT-20%

If Illinois adopted the UBE, the MBE would still be graded nationally, and the Illinois Board of Admissions to the Bar would still grade the MEE and MPT using uniform model answers and grading materials from the NCBE. The scores would also continue to be scaled against the MBE scores of Illinois test takers.

The current Illinois exam is scored on a 400-point scale with the minimum passing score being 266. This passing score applies to the entire exam. Thus, a candidate can still pass with a weak score on one part of the exam, so long as the scores on the other parts of the exam are high enough to meet the comprehensive passing score.

Effective for the July 2017 bar examination, the Illinois Supreme Court approved an increase in the minimum passing score to 268.[37] The UBE would also be scored on a 400 point scale, and Illinois could continue to set its own passing score on the same scale. Passing scores in other UBE jurisdictions range from 260 to 280.

C. Cost to Candidates

The current cost of the Illinois bar exam is $500/ $700/ $1000, depending on when a candidate registers. There is no standard UBE application cost, because user jurisdictions control the application fees.

Most likely, the cost of applying for admission to the bar in Illinois would not change significantly with adoption of the UBE. Illinois currently spends about $106 per test taker to purchase test materials, and that cost would increase to about $114 under the UBE to account for the purchase of an additional MPT question.[38] However, Illinois would no longer need to pay for the development and grading of three IEE essays per test administration, likely offsetting the increased cost.

UBE jurisdictions also set their own fees for the transfer of a score from another UBE jurisdiction. Those fees in UBE jurisdictions currently range anywhere from $250 (New York) to

[37] Matthew Hector, *The Illinois Bar Exam Gets Tougher*, ILL. B.J., May 2015, *available at* https://www.isba.org/ibj/2015/05/lawpulse/illinoisbarexamgetstougher.

[38] Jack Silverstein, *Getting in Uniform*, Chicago Daily Law Bulletin, July 10, 2015, *available at* http://www.chicagolawbulletin.com/Archives/2015/07/10/Uniform-Bar-Exam-7-10-15.aspx.

$1,250 (Kansas). In many states, the transfer fee is the same as or more than the fee for sitting for the bar in that jurisdiction.

The largest portion of the current Illinois bar admission fee pays for the cost of undertaking the character and fitness review of each candidate. Because that cost will not vary with the adoption of the UBE, the overall cost to candidates will stay approximately the same.

D. Subjects Tested

The MEE may test on any of the following subjects: business associations (agency and partnership, corporations and limited liability companies), civil procedure, conflict of laws, constitutional law, contracts (including Article 2 of the UCC), criminal law and procedure, evidence, family law, real property, torts, trusts and estates, and Article 9 (secured transactions) of the UCC.[39] The MEE may also test the MBE subjects listed below. Not all of these topics appear on every administration of the exam.

The MBE tests the following subjects:[40] civil procedure (27), constitutional law (27), contracts (28), criminal law and procedure (27), evidence (27), real property (27), and torts (27).[41]

The IEE tests all of the topics appearing on the MEE, and may also test the following subjects: administrative law, commercial paper, equity, federal taxation, Illinois constitutional law, Illinois suretyship, personal property and Illinois civil procedure.[42]

Although these additional IEE subjects would not be tested on the UBE, there is still significant overlap between the substantive areas tested on the UBE and the current IBE.

The MPT is not a test of substantive knowledge. Instead, it is a test of practical skills designed to test the "ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish."[43] For each MPT task, candidates are given a closed set of materials, including cases, statutes, deposition transcripts, or exhibits. The candidates then have 90 minutes to use these materials to draft a brief, memo, complaint, pleading, letter, contract, or other legal document that lawyers are often called upon to complete. The UBE includes two such MPT tasks, rather than the one tested by the current exam.

E. Ease of Transferring into Illinois

Under the current system, licensed attorneys in other states can be admitted to the Illinois bar by motion after practicing for three years in another jurisdiction. Pursuant to Illinois Supreme

---

[39] See, *e.g.*, National Conference of Bar Examiners, *Multistate Essay Examination*, http://www.ncbex.org/exams/mee/preparing/.

[40] The number of questions on each exam is found in the parentheses.

[41] *See, e.g.*, National Conference of Bar Examiners, *Multistate Bar Examination*, http://www.ncbex.org/exams/mbe/preparing/.

[42] Ill. S. Ct. R. 704(d) (West 2014).

[43] *See, e.g.*, National Conference of Bar Examiners, *Multistate Performance Examination*, http://www.ncbex.org/exams/mpt/.

Court Rule 705, "[a] person who, as determined by the Board of Admissions to the Bar, has been licensed to practice in the highest court of law in any USA state, territory, or the District of Columbia for no fewer than 3 years may be eligible for admission on motion."[44]

Candidates who have not practiced for three years, but have taken a bar exam within the last year can also transfer their MBE scores to Illinois. Such candidates are required to take only one day of the current exam, including the administration of the IEE, MEE, and MPT.[45] Illinois will accept a scaled MBE score of 141 or more, provided that the candidate passed the entire bar exam in the jurisdiction in which the MBE score was earned.[46] The candidate must then pass the MEE, IEE, and MPT portions of the Illinois exam to be eligible for admission.

Candidates who take the Illinois bar may transfer to other states only as allowed by the other states' rules. If Illinois adopted the UBE, the option of transferring in by motion after three years and the option of transferring an MBE score would remain. In addition, candidates would also be able to use a UBE score earned in any other jurisdiction to apply for admission to the Illinois bar for a period specified by Illinois. Significantly, the UBE does not permit a transfer of status. Instead, candidates are only transferring a portable score that may be used to apply for admission in another UBE jurisdiction.[47] Accordingly, if a candidate earns a 262 on the UBE, that candidate will be eligible for admission in jurisdictions that have passing scores of 260, but will not be eligible for admission with that UBE score in a jurisdiction that sets its passing score at 266. Lastly, if Illinois adopted the UBE, candidates who take the Illinois bar would also be able to transfer their scores to the 25 states that have adopted the UBE, including the bordering states Missouri and Iowa.

F. Possibilities for Continuing to Evaluate Knowledge of Illinois Law

As noted above, adoption of the UBE does not preclude a state from imposing additional testing or educational requirements on state-specific laws. Of the states that have adopted the UBE, seven require a jurisdiction-specific component,[48] ranging from a separate educational course to an additional exam. These various state specific components are listed below, as described by each state.

Missouri. Missouri, the first state to adopt the UBE, chose an education-focused approach. It developed a Missouri curriculum, available online, that provides candidates with written outlines of "significant issues of distinction in Missouri law, including appropriate references to Missouri statutory, decision, and common law." It then formulated a 30-question multiple-choice test covering matters addressed in the written outlines. This Missouri Educational Component Test ("MECT") is an open book test, which can be taken any time after a candidate has submitted an application to take the Missouri Bar Exam, or up to one year after

[44] Ill. S. Ct. R. 705 (West 2014).
[45] *See* Illinois Board of Admissions to the Bar, *Information For Bar Exam Applicants*, https://www.ilbaradmissions.org/appinfo.action?id=1.
[46] *Id.*
[47] *See* National Conference of Bar Examiners, *supra* note 1.
[48] *See* American Bar Association Section of Legal Education and Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements 2016*, Chart 6, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2016_comp_guide.authcheckdam.pdf.

the candidate has achieved a passing UBE score in Missouri, or another jurisdiction. Because this approach is focused more on education than testing, candidates may take the MECT as many times as necessary to achieve a passing score.[49]

New York. New York requires candidates to complete an online course in New York-specific law, known as the New York Law Course ("NYLC"), and to take and pass an online examination, known as the New York Law Exam ("NYLE"). The NYLC is an online, on demand course that reviews important and unique aspects of New York law. The NYLC consists of approximately 15 hours of recorded lectures with embedded questions that must be answered correctly before a candidate can continue viewing the lecture. The NYLE is a 50-item, two-hour, open-book, multiple-choice test administered online that tests important New York rules. Candidates are required to achieve a 60% score to pass (i.e., they must answer 30 of the 50 questions correctly). Any candidate who fails to achieve that score must retake both the NYLC and the NYLE.[50]

Alabama. Alabama requires candidates to take an online video course. The course consists of eight online learning modules covering the following subjects: Alabama Constitution; Alternative Dispute Resolution; Civil Litigation; Criminal Law; Family Law; Real Property; Torts; and Wills & Trusts/Probate. Completion of all online learning modules contained in the course is a requirement for admission to the Alabama State Bar. Candidates will be given access to the course approximately 7-10 days after administration of the bar examination. UBE score transfer candidates are given access to the course after a complete application is submitted and approved by the Committee on Character & Fitness.[51]

Arizona. Completion of the Arizona Supreme Court Course on Arizona Law is a requirement for all types of admission. The course highlights areas of law specific to Arizona, providing candidates a base of knowledge common to the practice of law in Arizona. Topics include Civil Procedure, Torts, Contracts, Criminal Procedure, Family Law, Real Property, Professional Responsibility and Constitutional Law. The course includes approximately six hours of video instruction along with supplemental materials and knowledge checks.[52]

Montana. All candidates, whether by transferred UBE score or by examination, must register and attend the Montana Law Seminar ("MLS"), which is offered the Thursday following the February and July bar exam. The Montana Law Seminar is a Supreme Court-required course that focuses on the structure of the legal system in Montana, the unique aspects of Montana law and the accepted mores and culture of practicing law in Montana. The MLS is directed specifically to those seeking admission to the Bar, and only those who are applying for admission to the State Bar of Montana are eligible to attend. The MLS is not a CLE program, nor are CLE credits awarded. A candidate may delay attendance at the MLS, but may not be admitted to the Montana Bar until attendance at the MLS has been confirmed. The MLS is

[49] Missouri Education Component, available at http://www.courts.mo.gov/page.jsp?id=325; Martin, *supra* note 15.
[50] The New York State Board of Law Examiners, *available at* http://www.nybarexam.org/UBE/UBE.html, http://www.nybarexam.org/Content/CourseMaterials.htm.
[51] Alabama State Bar, available at http://alabar.scholarlab.com (contact the Alabama State Bar to access).
[52] Arizona Judicial Branch, http://www.azcourts.gov/educationservices/Committees/JCA/OnlineRegistration.aspx.

unique in that it provides candidates the opportunity not only to learn about important topics of Montana law, but also to network with lawyers and judges in the state.[53]

New Mexico. New Mexico requires candidates to attend a one day in-person class on New Mexico law before admission. Topics include Indian Law, Family Law, Professionalism, and Ethics. This one-day course is also open to attorneys seeking admission by motion, although priority is given to bar exam candidates.[54]

Washington. To be admitted to practice law in Washington, a candidate must successfully pass the Washington Law Component ("WLC"). The WLC is an online timed test based on the Washington Law Component Research Materials, which include 15 outlines on various subjects of law. These materials are available to candidates to study prior to the test. The purpose of the WLC is to educate new lawyers in Washington about areas of law that are unique to Washington law or that are substantially different from the law tested on the UBE. Candidates will be able to access the test from their online admissions account after they submit an application and pay the application fee. There are 60 multiple choice questions to be answered within a four-hour time period. Candidates have access to the WLC research materials while taking the test. A candidate must answer 80% of the questions correctly to pass.[55]

III. REASONS TO ADOPT THE UBE

The Committee considered numerous reasons to adopt the UBE in Illinois.

A. The Adoption of the UBE Will Provide More Employment Flexibility, Benefiting Young Lawyers, Legal Employers, and the Public.

First, adopting the UBE is consistent with the recommendations of the ISBA Debt Committee, which highlighted the employment and debt challenges facing young lawyers.[56] Many law students are graduating with high debt and limited employment opportunities. In 2012, the average debt of a law school graduate was $140,000, 59 percent higher than eight years earlier.[57] This debt burden can plague law graduates for years, negatively affecting their credit, their career prospects, and the quality of legal services these lawyers provide to the public. At the same time, half of new graduates earn a starting salary between $40,000 and $65,000, salaries

[53] Montana Judicial Branch, *Montana Law Seminar*, http://courts.mt.gov/library/bar-seminar.

[54] New Mexico's Board of Bar Examiners, *Required Class in New Mexico Law*, http://nmexam.org/event/required-class-in-new-mexico-law/.

[55] Washington State Bar Association, *Uniform Bar Exam*, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Uniform-Bar-Exam.

[56] Ill. State Bar. Ass'n, *Final Report, Findings & Recommendations on the Impact of Law School Debt on the Delivery of Legal Services* 11-14 (2013) [hereinafter ISBA Debt Committee Report]. A report by the National Association for Law Placement released in September 2016 found that the overall employment rate for recent law grads in 2015 was consistent with 2014 at 86.7% employment rate, down from 91.9% in 2007. However, only 66.6% of those jobs required bar passage. *See* National Association for Law Placement, *Highlights of Employment Outcomes For the Class of 2015*, http://www.nalp.org/0916research.

[57] Josh Mitchell, *Grad-School Loan Binge Fans Debt Worries*, Wall St. J. , Aug. 18, 2015, *available at* http://www.wsj.com/articles/loan-binge-by-graduate-students-fans-debt-worries-1439951900?alg=y.

that are not adequate to support such high debt loads.[58] This unfavorable debt to income ratio is exacerbated by the historically low bar passage rates of recent years.[59]

As one way of dealing with this problem, the ISBA Debt Committee recommended that the Illinois Supreme Court "should investigate ways to license new lawyers at less cost to the lawyer and with less of a delay after law school."[60] The UBE provides a tangible response to this recommendation by making a law degree more portable, thus allowing new graduates to more easily become licensed where they can find a job.

As the New York report on the UBE found, "[n]ew law graduates are entering a profession where the job market requires geographic flexibility in a challenging employment landscape," even while the current bar admissions system requires students to determine where they are going to practice before they have a job.[61] The UBE will alleviate this problem by allowing young lawyers to more easily transition to another state when an opportunity for a new job arises. Such a lawyer will no longer need to worry about committing another six months to taking an additional bar exam and waiting for it to be graded.

By adopting the UBE, Illinois bar exam takers will theoretically have job opportunities open to them in 25 other states in addition to Illinois.[62] That tally includes two bordering states, Missouri and Iowa, that have adopted the UBE. Young lawyers in border areas will become more marketable if they can be quickly licensed in both Illinois and another state.

The members of the ISBA Young Lawyers Division who responded to the Committee's requests for comment overwhelmingly endorsed the UBE because of the possibility that greater portability of a law degree will provide more employment opportunities to debt-ridden young lawyers. One member of the Young Lawyers Division Council stated, "not only will it help attorneys transition to other states, but it can help attorneys who want to practice between states." A law student representative told the Committee that "the adoption of the UBE would create more flexibility in a student's job search. Furthermore, the ability to be licensed in multiple jurisdictions could make someone a more attractive candidate in their job search."

Another young lawyer stated as follows:

> I am in favor of Illinois adopting the UBE. The UBE score is portable, and can be used to seek admission in another UBE jurisdiction. This is of vital importance to

---

[58] National Association of Law Placement, *Highlights of Employment Outcomes For the Class of 2015*, http://www.nalp.org/0916research. Furthermore, the median entry-level salary for a legal services attorney is $44,600; at 11-15 years of experience, the median is $65,000. Pay for public defenders and local prosecuting attorneys is somewhat higher, with a median of $50,400 for entry-level public defenders and increasing to about $84,500 for those with 11-15 years of experience. For local prosecuting attorneys, the corresponding figures are $51,100 and $80,000. National Association of Law Placement, *NALP's Public Sector and Public Interest Report Turns Ten!*, July 2014, http://www.nalp.org/july14research.

[59] Natalie Kitroeff, *Their Lowest Point in Decades*, Bloomberg, Sept. 17 2015, *available at* http://www.bloomberg.com/news/articles/2015-09-17/bar-exam-scores-drop-to-their-lowest-point-in-decades.

[60] ISBA Debt Committee Report, *supra* note 56, at 48.

[61] New York Report, *supra* note 19, at 38-39.

[62] Twenty jurisdictions have adopted and implemented the UBE. South Carolina, New Jersey, and Connecticut will administer the UBE starting February 2017. West Virginia will administer the UBE starting in July 2017 and Massachusetts will administer the UBE starting July 2018.

> new lawyers who are searching for that first law job, and may have to travel to find it. Equally as important is that the UBE would allow those who took a job in another jurisdiction to return to Illinois with fewer barriers to entry. Several of my friends from law school had to either sit for another bar exam in order to move back home, or delayed a return home for long enough to satisfy jurisdictional reciprocity requirements. These obstacles are unnecessary and unduly burdensome in today's fast-paced and highly mobile legal economy.

The widespread adoption of the UBE would allow lawyers to enjoy the same flexibility that is already common in other professional disciplines, including medicine, that use a uniform exam to determine competence for licensure.[63] As another Young Lawyers Division Council member told the Committee, "Having several CPA friends, I have seen the CPA exam's uniformity permit accountants to move freely about the Country (and the world). No doubt, a uniform bar exam would permit greater movement across state lines."[64]

Adopting the UBE may also assist small private firms and legal aid societies, particularly in rural areas, that have had difficulty finding qualified new attorneys.[65] Adopting the UBE would increase the pool of potential candidates for these jobs by adding attorneys in surrounding states with a portable UBE score to the pool of possible job candidates. Lois Wood, the Executive Director of Land of Lincoln Legal Assistance Foundation, mentioned the difficulty that legal aid societies in Illinois have had when waiting for new hires from out of state to pass the bar exam. Adopting the UBE can help eliminate some of those concerns and time delays.

Finally, these changes also hold potential benefits for the public. Many Illinois firms frequently have offices or have attorneys handling legal matters in neighboring states and elsewhere in the United States. If Illinois adopts the UBE, Illinois lawyers may be able to become licensed more quickly and with less expense in the neighboring states of Missouri and Iowa, for example, which have already adopted the UBE. Consumers of legal services in Illinois may find it easier to find an Illinois-based attorney licensed to practice in other states to advise them or represent them in an out-of-state or multi-state matter. Ultimately, Illinois lawyers who are able to use their UBE score to obtain admission to practice in other states will be able to provide Illinois consumers with more affordable and accessible legal services for such matters.

B. The UBE Increases the Bar's Focus on Practical Legal Skills.

In addition to providing more economic opportunities to law graduates, adopting the UBE will better test the practice readiness of candidates. Both the ISBA Debt Committee and the ISBA Curriculum Committee recommended more practice based training in law school to ensure

---

[63] The United States Medical Licensing Exam, which has been used since the early 1990s, "provides a single pathway for primary licensure of all graduates of . . . accredited medical schools in the United States and Canada." *See* Committee to Evaluate the USMLE Program, *Comprehensive Review of USMLE,* at p. 2, http://www.usmle.org/pdfs/cru/CEUP-Summary-Report-June2008.

[64] As of May 2014, 50 states and the District of Columbia have passed mobility laws that will allow licensed CPAs to provide services across state lines. *See* American Institute of CPAs, *History of CPA Mobility*, https://www.aicpa.org/Advocacy/State/Pages/SubstantialEquivalencyandPracticeMobility.aspx.

[65] ISBA Debt Committee Report, *supra* note 56 at 18-21.

that bar candidates have the practical skills necessary for practice.[66] By changing just one-eighth of the current Illinois bar exam, the UBE will better test these practical skills as compared to the current bar exam.

For example, the ISBA Debt Committee recommended a "focus on practice-oriented courses" and stated that nearly every young lawyer to testify indicated that he or she would have preferred more practice based classes if offered.[67] As a result, the ISBA Debt Committee recommended that the "supreme court should carefully consider the purpose of the current procedures for licensing attorneys, including the bar exam, and should evaluate whether the current procedures achieve that purpose."[68] It also recommended that the supreme court "should consider alternatives to the bar exam as a means of ensuring that new lawyers are qualified to practice."[69]

The ISBA Curriculum Committee explained that "[i]t is no longer sufficient for law school graduates to merely *think* like lawyers; they must be able to perform the basic tasks central to legal practice. Law school graduates must have a strong work ethic and be able to communicate effectively (both orally and in writing), solve problems, competently perform legal research, and draft common legal documents."[70] The ISBA Curriculum Committee also criticized the current bar exam format for focusing too much on academic skills over practical.[71]

Research suggests that these skills are crucial to the success of young attorneys. As the ISBA Curriculum Committee noted:

> *In July 2012, the National Conference of Bar Examiners evaluated the extent to which the bar exam tests the skills necessary for a newly licensed attorney . . . . Based on the findings . . ., changes are underway . . . .The results demonstrate that written communication, oral communication, and professionalism, among other skills, are considered significant nationally by practitioners and are thus identified by the NCBE as areas to include in the bar exam.*[72]

Consideration and adoption of the UBE is a natural outgrowth of these recommendations. If Illinois adopts the UBE, the three Illinois-specific essay questions would be replaced with an additional MPT task, which tests a candidate's practice ready skills. As a result, the MPT's share of a candidate's overall score would increase from 10 percent to 20 percent.

The MPT does not test substantive knowledge but instead tests examinees' "fundamental lawyering skills" by providing a realistic situation and a task that new lawyers should have the skills to accomplish.[73] Each MPT question includes a case file and a library of cases, statutes,

---

[66] ISBA Debt Committee Report, *supra* note 56, at 5-6, 45-46; Ill. State Bar Ass'n, *Report and Recommendations of the Special Committee on the Impact of Current Law School Curriculum on the Future of the Practice of Law in Illinois* 6-7, 63-66 (2015) [hereinafter ISBA Curriculum Committee Report].
[67] ISBA Debt Committee Report, *supra* note 56, at 45.
[68] *Id.* at 48.
[69] *Id.*
[70] ISBA Curriculum Committee Report, supra note 66, at 6.
[71] *Id.* at 84-85.
[72] *Id.* at 85.
[73] National Conference of Bar Examiners, *Multistate Performance Test*, http://www.ncbex.org/exams/mpt/.

regulations and rules. The case file contains source documents with the facts of the case, including deposition transcripts, pleadings, correspondence, police reports or medical records.[74] Candidates must sort through this file, which often contains irrelevant facts and ambiguous or conflicting testimony, to identify the material they need to perform the assigned task.[75]

For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.[76]

These types of tasks are similar to those a new lawyer will face in his or her first years of practice. Weighting a candidate's bar passage more towards his or her ability to effectively complete the MPT tasks will thus better ensure that the candidate is practice ready and qualified to practice as an attorney in Illinois.

C. Adopting the UBE Will Enhance a Candidate's Knowledge of Illinois-Specific Law.

As explained more fully above, the current Illinois bar exam includes all three components of the UBE: the MBE, the MEE, and the MPT. These three components, which are also part of the UBE, are weighted as 86.7% of the current Illinois Bar Examination score.[77] In addition to these three UBE components, the Illinois Bar Examination includes the IEE in which test takers are required to answer three essay questions designed to test Illinois-specific law. The IEE component is weighted as 13.3% of the overall score.[78]

Furthermore, there is no requirement that a candidate achieve a passing score on the IEE in isolation. Only the candidate's total score from all parts of the test must be at a passing level. Thus, a candidate can currently pass the Illinois bar exam while still scoring poorly on the Illinois essays.

The Illinois Board of Admissions to the Bar has also found that the Illinois essays frequently overlap with the MEE "in subject matter and issues selected for testing." [79] For the drafters of IEE,

> *[f]inding Illinois law-specific issues appropriate for a test of minimum competence to practice law has proved challenging when drafting IEE questions. Much of the difficulty stems from Illinois having adopted uniform laws, placing it in the modern majority of states that apply state common law.*[80]

Consequently, the IEE, at least in part, tests only general principles of law that are also tested on the MEE, rather than distinctions in Illinois law and procedure.

---

[74] National Conference of Bar Examiners, *Preparing for the MPT*, http://www.ncbex.org/exams/mpt/preparing/.
[75] *Id.*
[76] *Id.*
[77] Illinois Board of Admissions to the Bar, *Request for Public Comment on the Uniform Bar Examination*, September 10, 2015, at 2.
[78] *Id.*
[79] *Id.* at 3.
[80] *Id.*

Based on the above, the Committee concludes that the IEE may not be the best mechanism for insuring that Illinois lawyers are knowledgeable about Illinois specific areas of law and competent in applying these Illinois distinctions in their practices.

By contrast, if Illinois adopts the UBE, Illinois could adopt an additional licensing requirement that will better ensure familiarity with Illinois law. For example, Illinois could adopt a separate Illinois-specific exam and require each candidate to achieve a passing score on it apart from the candidates' score on the rest of the exam. This separate exam could be multiple choice or essay-based, and could be given 4-5 times a year (separate from the UBE administration) for both first-time candidates and UBE transferees. This separate exam could be a multiple-choice exam that would test more subjects of state law with more precision than the current essay questions.

Another possibility is that Illinois could also implement additional continuing legal education requirements in the first year of admission, or could require that new attorneys participate in a mentorship program. These types of programs will also greatly enhance new lawyers' practice ready skills.

D. Illinois Law School Deans Support Adoption of the UBE.

The Committee also reached out to Illinois law school deans. In addition to the overwhelming support of young lawyers and law students, Illinois law school deans are generally in favor of the change to the UBE. The dean of the Southern Illinois University School of Law was in favor of the adoption of the UBE, particularly because many SIU graduates wish to practice in both Missouri and Illinois. Deans from the DePaul University College of Law and the Northern Illinois University College of Law were open to exploring the adoption of the UBE. The dean of John Marshall Law School stated that he was "mainly positive on this possible development." The dean of Loyola University Chicago School of Law attended a Committee meeting and expressed his support for the UBE, although he cautioned that Illinois should also ensure that any changes do not negatively impact minority students.

IV. OBJECTIONS TO ADOPTING THE UBE

The Committee also considered potential concerns with the adoption of the UBE, with the goal of fully and fairly assessing each of them. Although some have criticized opponents of the UBE as protectionist and reactionary,[81] the Committee does not share this view. The Committee instead views many of the following concerns raised by UBE opponents to be real and legitimate, and deserving of careful consideration and a full response.

A. Adopting the UBE Will Result in an Inadequate Focus on Illinois Law.

The primary concern is that adopting the UBE means that Illinois bar candidates will not be tested on Illinois-specific law. Illinois law and procedure have numerous aspects that are unique and differ from federal law and federal procedure. Members of the Bar are aware of these

[81] Barron YoungSmith, *The National Bar Exam That Could Save the Legal Profession*, July 22, 2014, http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/the_uniform_bar_exam_or_ube_could_save_the_legal_profession_go_take_it.html.

many differences, including the differences in contribution law, Supreme Court Rule 213 expert disclosure requirements, intrastate *forum non conveniens* rules, the Dead Man's Act, jury demand issues, and many other unique provisions of state law. Illinois courts also apply discovery rules differently with respect to what is considered privileged, what must be produced in litigation, and the description of privileged documents required by Supreme Court Rule 201(n). The adoption of the UBE thus leads to the question of whether a candidate can be competent to practice in Illinois without knowledge of Illinois-specific law.

Underlying this concern is the assumption that someone who passes the bar should be able to practice as a lawyer in Illinois. Without knowledge of distinctive aspects of Illinois law, new lawyers can be a danger not only to themselves, but also to their clients, the rest of the bar, the courts, and the public in general.

A related issue is that if Illinois law is not tested at the time of the exam, then candidates will be left with the impression that Illinois law is not as important for their preparation and practice as an attorney. This impression may be misleading, given that attorneys in practice will be required to know Illinois law to protect their client's interests.

Resolution: As explained above, the UBE actually enhances Illinois' ability to ensure that candidates are familiar with Illinois law, as compared to the current test. Only about 13% of a candidate's overall score on the current bar exam comes from the IEE—the segment of the test devoted to Illinois law. But even this section of the exam is not devoted exclusively to Illinois law (testing such subjects as federal taxation), and candidates can score partial credit by answering based on general principles of law. It is thus possible to pass the current Illinois bar exam without studying Illinois law in any depth.

The best way to enhance the testing of Illinois-specific law is to adopt the UBE with an Illinois component that tests candidates on Illinois law, and to require each candidate to earn a passing score on the Illinois-specific test, apart from the candidate's score on the rest of the UBE. Such a version of the UBE would better prepare Illinois lawyers regarding multiple aspects of Illinois law. There are a number of options for the form of this Illinois-specific component, as discussed below, but they all have the potential to enhance a candidate's exposure to Illinois law as compared to the current process.

B. Foreign Lawyers Will Enter Illinois and Take Jobs Away from Illinois Attorneys.

Another concern is that adopting the UBE will lead to an influx of foreign lawyers, causing Illinois lawyers to lose jobs and lose business. Illinois has a high number of lawyers already. The United States Department of Labor reports that Illinois has one of the highest concentrations of lawyers in the country, with over 5 lawyers employed per 1000 jobs in the state.[82] The Department's statistics also show that the Chicago metro area has more lawyers than all but three other metropolitan areas in the country.[83]

[82] Bureau of Labor Statistics, *Occupational Employment and Wages*, May 2015, www.bls.gov/oes/current/oes231011.htm.
[83] *Id*.

Even while Illinois continues to have a high concentration of lawyers, the number of lawsuits in the state has decreased. The Annual Report of Illinois Courts states that lawsuits are substantially down from 2010 to 2014, having declined from 3.8 million to 2.9 million during that time.[84] Moreover, Illinois lawyers are facing challenges they never faced before. Out-of-state lawyers advertise on TV in Illinois. Nontraditional lawyer referral services like AVVO represent a significant challenge, and non-lawyer entities like LegalZoom seek to replace the services that lawyers have traditionally provided. All of these factors put lawyers in a sensitive and difficult position.

To be sure, statistics from the NCBE do not suggest that the adoption of the UBE will lead to an influx of new lawyers. The NCBE statistics show that most states that have adopted the UBE see about as many attorneys transferring UBE scores out as in, and the overall numbers of transfers are small.[85]

Nonetheless, Illinois may be unique. None of the states from which statistics are available are similar to Illinois. Illinois is a large state containing one of the nation's largest cities and is home to a significant national and international legal market. The only comparable state to adopt the UBE thus far is New York. At this time no statistics are available from New York because it administered the UBE for the first time in July 2016. In its report recommending adoption of the UBE, New York anticipated that many lawyers would transfer to other states to partially offset those who would come into the state.[86] Data does not yet exist to confirm or refute that conclusion.

Resolution: The Committee concluded that the threat that foreign lawyers transferring into Illinois will disrupt an already weak legal employment market is not significant, for multiple reasons.

First, there are geographical areas within Illinois suffering from a shortage of lawyers that could benefit from UBE candidates transferring into the state. For example, the ISBA Debt Committee found that there is a shortage of lawyers in rural parts of the state.[87] Lawyers in rural parts of the state are also disproportionately older, suggesting that the shortage of lawyers will continue to intensify in future years.[88] Adopting the UBE could help attorneys who initially took the bar in other states to take these jobs. In particular, Missouri and Iowa are two bordering UBE states that might prove fertile sources of candidates to the bar to serve rural counties in southern and western Illinois.

Currently, lawyers living along Illinois' borders often take two bar exams. Many lawyers in Southern Illinois take the Missouri bar, and lawyers in Northern Illinois often take the Iowa bar. Adopting the UBE will allow young lawyers in these areas to save a significant amount of time and money, as they will not have to prepare for a second bar examination, take a second bar prep course, and wait for the results of another bar exam. Prospective employers may benefit as

[84] Administrative Office of the Illinois Court, *2014 Annual Report of the Illinois Courts*, at 9.
[85] *See* Appendix B.
[86] New York Report, *supra* note 19, at 42-43.
[87] ISBA Debt Committee Report, *supra* note 56, at 23-25.
[88] *Id.*

well, as they will not need to wait for new hires to take another bar exam before starting work across the border.

Second, there are also practice areas within Illinois that suffer from a shortage of attorneys. As the ISBA Debt Committee found, job opportunities are plentiful in certain specialized practice areas, such as ERISA, regulatory compliance, and sophisticated tax planning.[89] The more fluid job market made possible by the UBE will better match qualified young attorneys from across the country with Illinois' particular job needs.

Third, Illinois' other requirements for bar admission beyond the bar exam will continue to ensure that only qualified attorneys can practice in Illinois. A candidate must still pay the relevant fee, pass character and fitness, and meet whatever additional Illinois-specific requirements Illinois chooses to impose (including potentially some type of test on Illinois law). Thus, casual transferees to Illinois are not likely, as New York concluded when addressing a similar concern in its state.[90] The majority of people who will become lawyers in Illinois will continue to be people who have connections to this state and want to practice law here.

Fourth, Illinois' passing score will likely still be high enough that many candidates who want to transfer in will not be able to do so. After Illinois raises its passing score to 268 in 2017, it will have a passing score higher than most other UBE jurisdictions. As a result, some candidates may fail to earn a score high enough to practice in Illinois, but may be eligible to move to practice in another state, thus decreasing the likelihood that Illinois will see a significant net influx of UBE transfers.

Finally, the Committee also concluded that using the bar exam to limit the number of attorneys in Illinois is not consistent with the core purpose of the bar exam. The exam is not in place to limit the number of lawyers in a specific state. Instead, the bar exam is in place to ensure minimum competency. As the New York committee evaluating the UBE stated, the bar exam is "a consumer protection device intended to ensure, to the extent possible, that only those who have demonstrated minimum competence are permitted to bear the title 'Attorney at Law' and represent clients."[91] The Illinois Committee views the bar examination in the same way.

C. The UBE Landscape Suggests More Lawyers May Transfer Into Illinois.

A related concern is tied to the current UBE map. Currently, 25 jurisdictions have adopted the UBE, providing numerous locations to which an Illinois bar candidate could transfer a UBE score. But many large states with national and international legal markets comparable to Illinois have not adopted the UBE, including Texas, California, and Florida.[92] Moreover, there is no indication these states have any plans to adopt the UBE. By adopting the UBE, Illinois may become a magnet for transfers from "smaller states," while not as many lawyers will seek to transfer out of Illinois to smaller jurisdictions.

---

[89] *Id.* at 28.
[90] New York Report, *supra* note 19, at 43.
[91] *Id.*
[92] National Conference of Bar Examiners, *Mission and Services of the National Conference of Bar Examiners*, July 21, 2016.

Resolution: Although not every state has adopted the UBE, the trend appears to be that more and more states are adopting it. Moreover, several of Illinois' neighboring states have adopted it. This trend is likely to continue, particularly if Illinois joins New York as the second large state with a national and international legal market to adopt the UBE. This momentum will encourage other large states to join as well, which should also lessen the danger that Illinois will disproportionately attract UBE transfers.

D. The UBE May Have a Negative Impact on Minority Candidates.

There is also a concern that adopting the UBE may affect minority candidates negatively. Some have pointed out that the UBE serves to enhance the flaws of the current bar exam, including that minorities traditionally perform worse than non-minority candidates, by applying the same exam to everyone.[93] Even worse, the UBE removes the ability of the states to act as workshops to develop new approaches to the bar exam that may help to alleviate this problem.[94]

Resolution: Current data suggests that minority students perform disproportionately worse on the bar exam as it currently exists. As outlined above, however, adopting the UBE means that only one-eighth of the test will change, as the three essays on the IEE are replaced by an additional MPT task. Even the part of the test that is changing will not introduce a radically different component, as the MPT is already a part of the current Illinois exam. It thus seems unlikely that the adoption of the UBE will significantly alter the current situation with respect to minority passing rates.

Nonetheless, little data currently exists about the impact of adopting the UBE on minority passing rates. The Committee therefore recommends that after adopting the UBE, Illinois should collect data to study any possible impact on minority students.

The New York Committee suggested a similar course of action, recommending that New York monitor the following data points over the course of at least three years of bar examinations:

- Bar passage rates by (1) race; (2) ethnicity; and (3) gender. These data points should be reviewed for overall performance and performance by question type and compared to the current test in the same categories.

- Performance by candidate credentials: (1) LSAT scores; (2) Law school GPA; (3) Other indicators deemed relevant by the bar examiners of the state.

- Statistics related to individuals who are taking the test for the first time vs. subsequent attempts. The Committee noted that there was evidence that racial and gender differences decline with the second taking of the test and that this could point to the need for tailored preparation strategies.[95]

---

[93] Ben Bratman, *Opinion: Why More States Should Not Jump on the Uniform Bar Exam Bandwagon*, JD Journal, 2015, at 8.
[94] *Id*.
[95] New York Report, *supra* note 19, at 61-63.

The Illinois Committee proposes that Illinois study the same factors. After three years, Illinois can make a more informed determination about whether the UBE has any negative effect on minority students, and take necessary steps to mitigate such an effect, if it exists. At this time, there is no objective basis for this concern to stop the adoption of the UBE.

V. RECOMMENDATIONS

The Committee has extensively analyzed the current Illinois bar exam, the experience of other states that have adopted the UBE, and the likely impact of either maintaining the current exam or adopting the UBE on current and future Illinois lawyers, Illinois law firms, and the public at large. Based on these considerations the Committee unanimously endorses the following recommendations:

A. Illinois Should Adopt the UBE.

After considering the views of both proponents and critics of the UBE and engaging in an independent analysis of all of the issues, the Committee recommends that Illinois adopt the UBE. Although the critics of the UBE rightly point out the importance of ensuring that candidates have knowledge of Illinois-specific law, the Committee believes that this goal can be achieved best by adopting the UBE and including an additional state-specific component. If this state-specific component is sufficiently rigorous, it will be a better guarantor of knowledge of Illinois law than the current system.

At the same time, adopting the UBE with its additional MPT task will advance the goal of ensuring that new lawyers are practice ready. Critics of traditional bar examination methods express concern that multiple choice and essay examinations testing a lawyer's ability to memorize and recall information do not adequately assess a lawyer's ability to think critically, comprehend and analyze information, apply legal concepts to a factual problem, and communicate effectively in writing. Adopting the UBE represents another step toward a bar exam focused on the practical skills a lawyer will use in practice.

Adopting the UBE will allow Illinois to administer a second MPT task and will provide more testing of practical skills and lawyering competency generally.

Perhaps the greatest benefits of adopting the UBE will go to young lawyers facing a hostile job market. In the current legal marketplace, lawyers who have the ability to practice in more than one jurisdiction have a competitive advantage over lawyers licensed to practice in only one state. Young lawyers, in particular, who may have difficulty finding entry-level legal employment will have broader opportunities for practice and will be able to widen their search for employment if Illinois adopts the UBE. Recent law graduates facing high law school debt burdens in particular will be able to secure more lucrative positions or positions that offer loan repayment if they are able to market their legal skills in more than one state.

B. Illinois Should Adopt an Additional Licensing Requirement to Ensure Familiarity with Illinois Law.

Although some states that have adopted the UBE have chosen not to require a state-specific component for admission to the Bar in their states, the Committee recommends that Illinois require that new candidates and practicing attorneys licensed in other states seeking admission on motion to the Illinois bar be familiar with distinct areas of Illinois substantive law and procedure. The Committee recommends that these options be considered not only for new admittees, but also for practicing attorneys seeking admission on motion. The Committee has identified a variety of options that the Illinois Board of Admissions to the Bar and the Supreme Court of Illinois should consider as possible methods for increasing attorneys' knowledge and competence with respect to Illinois-specific law.

1. Illinois Could Modify or Expand its Current Minimum Continuing Legal Education Requirements to Include Education and Focus on Distinctions in Illinois-Specific Substantive Law and Procedure.

Pursuant to Illinois Supreme Court Rule 793, newly admitted attorneys are required to complete the following three requirements during the first year they are admitted to practice in Illinois:

> *The requirement for newly-admitted attorneys includes three elements:*
>
> *(1) A Basic Skills Course of no less than six hours covering topics such as practice techniques and procedures under the Illinois Rules of Professional Conduct, client communications, use of trust accounts, attorneys' other obligations under the Court's Rules, required record keeping, professional responsibility topics (which may include professionalism, diversity issues, mental illness and addiction issues and civility) and may cover other rudimentary elements of practice. The Basic Skills Course must include at least six hours approved for professional responsibility credit. An attorney may satisfy this requirement by participating in a mentoring program approved by the Commission on Professionalism pursuant to Rule 795(d)(12); and*
>
> *(2) At least nine additional hours of MCLE credit. These nine hours may include any number of hours approved for professional responsibility credit;*
>
> *(3) Reporting to the MCLE Board as required by Rule 796.*[96]

The programs accredited to qualify for the Basic Skills Course, professional responsibility credits, and qualifying mentoring programs could be modified to provide more emphasis on unique and distinctive areas of Illinois law and practice. In the alternative, current requirements could be expanded to increase the total number of hours required or to include a fourth requirement devoted more exclusively to education and training on Illinois-specific substantive law and procedure.

[96] Ill. S. Ct. R. 793 (West 2014), *Requirement for Newly Admitted Attorneys,* http://www.illinoiscourts.gov/supremecourt/rules/art_vii/artvii.htm.

Newly admitted attorneys are eligible for complimentary membership in the ISBA during their first year of bar admission and can meet their Illinois MCLE requirements through programs provided by the ISBA at no cost.[97] The ISBA has developed a full set of curricula for newly admitted lawyers to meet the Basic Skills Course and professional responsibility credits required by Illinois Supreme Court Rule 793.[98] If additional state-specific components are required, the ISBA will be able to modify or add this information to its curricula.

Enhancing or expanding the content of existing Basic Skills Courses and qualifying mentoring programs to provide additional training and emphasis on distinctive areas of Illinois law and practice is a simple and effective way to increase knowledge and competence among lawyers practicing in Illinois. Although some modification to existing programs and curricula will be required, it is unlikely that these enhancements will be expensive or unduly burdensome on qualified CLE providers and mentoring programs, or on admitted lawyers.

The Committee further recommends that Illinois require practicing lawyers seeking admission to the Illinois bar on motion to also complete similar CLE programs and/or mentoring programs focused on providing training and emphasis on distinctive areas of Illinois law and practice. This measure will ensure that all out of state attorneys seeking to practice in Illinois are competent in Illinois law.

2. Illinois Could Require a Course on Illinois-specific law and/or a Multiple Choice Examination to Be Administered Periodically Throughout the Year.

A number of states that have adopted the UBE have created in person courses, online videos, or online interactive educational programs designed to teach state-specific information and, in some cases, to provide periodic embedded questions within the course to ensure ongoing attention and understanding of the material covered. Other UBE states have included not only a mandatory online course, but also multiple choice tests that are either self-administered for educational purposes or that require a minimum passing score for admission.

Both options—an Illinois specific test or an educational course—could apply to candidates taking the UBE in Illinois, candidates seeking to transfer their UBE score from another jurisdiction, and practicing attorneys seeking admission by motion, thereby ensuring that all attorneys practicing in Illinois have some exposure to Illinois law.

There are multiple options for implementing this requirement. For example, an educational program could be offered online to reduce cost and increase accessibility. It could also include embedded questions and interactive components to ensure the candidates are engaged in the course and are applying Illinois law correctly. In any case, such a course should be sufficiently rigorous to ensure candidates gain familiarity with Illinois law.

---

[97] Ill. State Bar Ass'n, *Continuing Legal Education: New Attorneys*, http://onlinecle.isba.org/store/provider/custompage.php?pageid=105.

[98] Ill. State Bar Ass'n, *Continuing Legal Education: ISBA Basic Skills - For Newly Admitted Attorneys*, http://onlinecle.isba.org/store/seminar/seminar.php?seminar=45257.

Numerous options exist for the testing requirement as well. First, any test could be a self-administered diagnostic examination or a graded examination with a minimum score requirement.

Second, the test could be administered prior to admission, or within a specified period of time not longer than a year after admission. Administering the exam after a period of practice would give the candidate context for the test and a deeper understanding of why the Illinois-specific points of law are important. If the exam were given after admission, it could not require a particular passing score such that some attorneys could fail, so as to not detrimentally affect representation of the lawyers' clients. Instead, the test could only be diagnostic.

Third, an Illinois multiple-choice examination could be administered as an open-book examination (that could be taken online from any location at any time) or as a closed-book examination (that would have to proctored at a testing center). If Illinois elects an open-book format, the examination could be carefully timed such that candidates must have a solid grounding in Illinois law to complete the examination within the time allowed. Requiring candidates to take a closed-book examination at a testing center would likely increase the cost of the examination, but could provide a more rigorous test of attorney competence and understanding of Illinois-specific law.

3. Illinois Could Administer the Illinois Essay Examination Periodically Throughout the Year and Require a Minimum Passing Score.

If Illinois adopts the UBE, it could also continue to administer a separate Illinois Essay Examination similar to that currently in place, but at a separate time and place than the bar exam. Administering the IEE as a separate examination might allow for a more rigorous testing of knowledge of Illinois law, because Illinois could require a minimum passing score on the Illinois portion alone.

The Committee does <u>not</u> recommend that a third half-day be added to the examination schedule to allow the IEE to be administered at the same time as the UBE. This setup would eliminate the flexibility gained from adopting the UBE, which allows candidates to transfer a score into Illinois at any time without waiting for another administration of the bar exam. Requiring candidates to sit for an additional partial day for an Illinois-specific examination would also add significantly to the cost of administering the examination, would require candidates to expend additional funds for lodging and expenses related to staying overnight for an additional day of testing, and would be unduly burdensome for bar examiners and test-takers.

To maintain the flexibility offered by the UBE, the IEE would have to be given multiple times per year, presenting additional obstacles. For example, a new version of the test would have to be developed for each administration to ensure the security of the questions. The administrative burden of doing so would be significant. In addition, the cost of administering and proctoring the IEE periodically throughout the year might increase costs for candidates taking the bar examination and possibly deter potential candidates from seeking admission to the Illinois bar.

Thus, given the other options for ensuring that Illinois lawyers have knowledge and competence in Illinois specific areas of law and practice outlined above, administering a separate IEE may not be the best option.

C. Illinois Should Accept Transferred UBE Scores for Up to Three (3) Years.

Illinois currently allows attorneys to gain admission by motion after practicing for three years in another jurisdiction:

> *Any person who, as determined by the Board of Admissions to the Bar, has been licensed to practice in the highest court of law in any United States state, territory, or the District of Columbia for no fewer than three years may be eligible for admission on motion.*[99]

Based on this rule, the Committee recommends that Illinois accept transferred UBE scores for up to three years after the score has been earned. These two rules would then match up and ensure that candidates always have an administratively easy option for gaining admission to practice in Illinois.

D. Illinois Should Gather Data Related to the Performance of Minority Candidates on the UBE, Determine if the UBE Adversely Affects Minority Candidates, and Mitigate These Affects, if Any.

In 2016, the American Bar Association adopted two resolutions relating to the UBE. At its midyear meeting in 2016, the American Bar Association's House of Delegates adopted Resolution 109 which "*urges the bar admission authorities in each state and territory to adopt expeditiously the Uniform Bar Examination in their respective jurisdictions.*"[100] At that same midyear meeting in 2016, the American Bar Association's House of Delegates also adopted Resolution 117, which

> *[u]rges bar admission authorities to consider the impact on minority applicants in deciding whether to adopt the Uniform Bar Examination (UBE) in their jurisdiction . . . .*[101]

In recommending adoption of the UBE, the New York Advisory Committee stated that "there is simply no available evidence suggesting that the UBE would negatively affect (or, for that matter, positively affect) any particular demographic group."[102] To further study and evaluate the potential impact of adoption of the UBE on minority candidates, the New York Advisory Committee recommended that New York collect specific data and study bar passage rates by race, ethnicity, and gender over the course of at least three years of bar examinations.[103]

---

[99] Ill. S. Ct. R. 705 (West 2014).
[100] American Bar Association, *Midyear Meeting 2016 Reporter Resources: House of Delegates Resolutions*, http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/109.html.
[101] *Id*.
[102] New York Report, *supra* note 19, at 61.
[103] *Id*.

Although New York has now adopted the UBE, the results of New York's collection and evaluation of data of UBE test takers in New York are still unknown.

In accordance with ABA Resolution 117 and best practices established by the study of UBE data in New York, the Committee recommends that Illinois collect and evaluate the data of UBE test takers and implement a study of that data similar to that being conducted in New York.

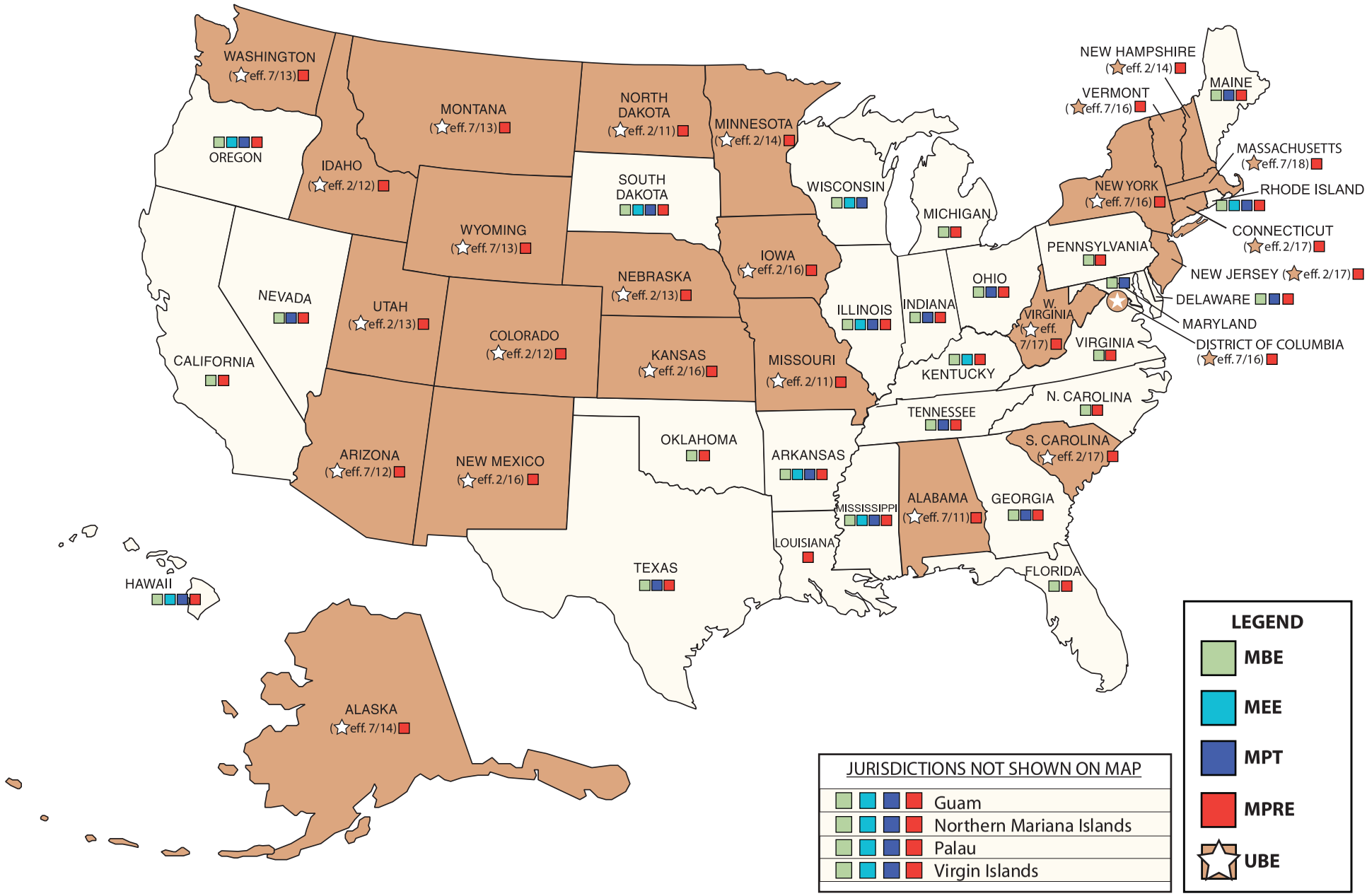
VI. CONCLUSION

Candidates for admission to the Illinois bar face unprecedented challenges in navigating the legal job market with an increasingly burdensome debt load. The complexity of law practice across state lines and the increased cost to consumers with out-of-state legal needs create additional challenges in today's legal marketplace. At the same time, state-specific laws remain important in our federal system, and no lawyer can competently practice in Illinois without some knowledge of these distinctions. The UBE represents a unique opportunity to mitigate the impact of the challenges in the legal market, while still ensuring the competence of candidates and their knowledge of Illinois-specific law. The UBE should thus be a part of the ongoing efforts to efficiently and effectively meet the legal needs of the people of the state of Illinois.

Adoption of the Uniform Bar Examination

with NCBE Tests Administered by Non-UBE Jurisdictions

July 25, 2016



Appendix B: UBE Transfer Statistics by Source and Destination
As of October 4, 2016 (Source: NCBE)

	Scores Earned	Scores Out	Scores In
Missouri (2/11)	5,641	508	184
North Dakota (2/11)	702	201	222
Alabama (7/11)	4,025	54	88
Colorado (2/12)	6,351	824	372
Idaho (2/12)	848	187	173
Arizona (7/12)	4,860	569	218
Nebraska (2/13)	839	129	86
Utah (2/13)	1,817	181	227
Montana (7/13)	665	173	246
Washington (7/13)	4,373	310	430
Wyoming (7/13)	307	85	277
Minnesota (2/14)	2,747	135	333
New Hampshire (2/14)	708	99	32
Alaska (7/14)	261	47	57
Iowa (2/16)	261	11	51
Kansas (2/16)	210	19	310
New Mexico (2/16)	282	11	101
District of Columbia (7/16)			45
New York (7/16)			77
Vermont (7/16)	65	2	11
Connecticut			3
New Jersey			2

UBE Scores Earned and Transferred by Exam Date (as of 10/4/16)

	February		July		Total by Year	
	Scores Earned	Scores Trfrd	Scores Earned	Scores Trfrd	Scores Earned	Scores Trfrd
2011	216	11	1,237	43	1,453	54
2012	936	69	3,169	379	4,105	448
2013	1,401	246	4,670	742	6,071	988
2014	2,166	272	5,475	624	7,641	896
2015	2,340	264	5,197	513	7,537	777
2016	2,737	289	5,418	93	8,155	382
Total	9,796	1,151	25,166	2,394	34,962	3,545

Assembly Meeting
December 10, 2016

Agenda Item 9
ABA Model Rule 8.4(g)

ILLINOIS STATE BAR ASSOCIATION

MEMORANDUM

To: ISBA Assembly

From: Charles Northrup, General Counsel

Date: November 18, 2016

Re: ABA Model Rule 8.4(g) (Anti-harassment/discrimination)

I. Introduction

In August, 2016 the American Bar Association ("ABA") adopted revisions to the Model Rules of Professional Conduct to address harassment and discrimination in the legal profession. The Illinois Supreme Court's Committee on Professional Responsibility is reviewing these revisions and considering whether to recommend that the Court adopt them. The Professional Responsibility Committee has invited the ISBA to comment. ISBA President Cornelius is asking that the Assembly review, debate, and take a position on this matter at its December 10, 2016 meeting.

II. Background

In the spring, 2016, a proposal to establish ABA Model Rule 8.4(g) to prohibit harassment and discrimination in the practice of law was placed on the ABA House of Delegates agenda. The ABA proposal was circulated to all ISBA sections. Twenty-one sections expressed opposition to the proposal, three expressed support, and the remainder either took no position or did not consider it. In July, the ISBA Executive Committee reviewed the ABA proposal and ISBA section input and determined to oppose the proposal on grounds of vagueness, overbreadth, and potential disciplinary uncertainty in its application and enforcement. The Executive Committee's position, while not binding, was conveyed to Illinois' ABA House of Delegate delegates.

On the eve of ABA House of Delegate consideration, the proposal was amended. The amended proposal passed the House of Delegates on a voice vote. As noted above, the Court's Professional Responsibility Committee is now considering amending Illinois' Rules of Professional Conduct to mirror the amended ABA Model Rule 8.4(g).

III. Analysis

1. New ABA Model Rule 8.4(g)

ABA Model Rule 8.4 (g) and associated Comments [3], [4], and [5] are attached. Under the Model Rule, it is misconduct for a lawyer to engage in conduct that the lawyer knows, or reasonably should know, is harassment or discrimination related to the practice of law. It provides that the prohibition does not apply to legitimate advice or advocacy. (These two provisions were part of the amendments presented to, and ultimately approved by, the ABA House of Delegates.) The related Comments provide additional interpretation of the Model Rule. Among other aspects, the Comments provide that: the Rule applies to all facets of practicing law as well as participation in bar association, business, and social activities related to the practice of law; the substantive law of antidiscrimination and anti-harassment may guide the application of the Rule; and a judicial

finding that peremptory challenges were exercised on a discriminatory basis do not alone establish a violation of the Rule.

Supporters of the Model Rule contend that it is consistent with, and in furtherance of, broad ABA policy goals of promoting full and equal participation in the justice system and eliminating bias in the legal profession. The broad scope of the Model Rule is justified on the grounds that lawyers have a special responsibility for the administration of justice in all aspects related to the practice of law and that ethics rules should make it clear that harassment and discrimination will not be tolerated. Supporters note that 22 states (including Illinois) already include anti-discrimination prohibitions in their professional conduct rules and that it was important for the ABA to include such a provision in the Model Rules. The inclusion of the "knows or reasonably should know" knowledge standard protects lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, while conversely preventing evasive defenses of suspect conduct. Supporters also contend that the Model Rule does not expand on what would be considered harassment and discrimination under federal or state law. They contend the Rule does not impact issues such as lawyer decisions to accept or decline representation, or the ability to charge a reasonable fee.

2. Current Illinois Rule 8.4(j)

The Illinois Rules of Professional Conduct currently include a prohibition against discrimination. Illinois RPC 8.4(j) and its associated Comment are attached. The Illinois Rule has been in place since 1990.

While broadly similar, there are several differences between ABA Model Rule 8.4(g) and the current Illinois Rule 8.4(j):

* Perhaps the most significant difference is that under the Illinois Rule, misconduct must be specifically tied to a violation of a federal, state, or local law prohibiting discrimination and that no disciplinary charge can be brought against a lawyer without a final court or administrative order finding that the lawyer has engaged in an unlawful discriminatory act. The ABA Model Rule does not include this prerequisite. Comment [3] of the Model Rule provides "The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)."

* The Illinois Rule is limited to discrimination, while the ABA Rule specifically references both discrimination and harassment. Comment [3] of the new Model Rule provides "Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct."

* The scope of conduct prohibited in Illinois encompasses conduct that "reflects adversely on the lawyer's fitness as a lawyer." To determine whether the conduct impacts the lawyer's fitness as a lawyer, a number of circumstances are identified in the Rule including the seriousness of the conduct, whether the lawyer knew the conduct was prohibited, whether there is a demonstrated pattern of conduct, and whether the conduct occurred in connection with professional activities. The Model Rule encompasses "conduct related to the practice of law." As provided in the Comments, this phrase includes "representing clients, interacting with witnesses, coworkers, court personnel, and lawyers, operating a law practice, and participating in bar association, business or social activities in connection with the practice of law."

* The Model Rule includes certain classifications not currently included in the Illinois Rule, including: gender identity, marital status, and ethnicity.

Disciplinary statistics from the ARDC provide the number of charges (the initial consumer complaint) against Illinois lawyers alleging discriminatory conduct. In 2015, five out of 5,090 charges involved claims of discrimination; in 2014 it was seven out of 5,254; in 2013 it was two out of 5,410; in 2012 it was six out of 5,712; in 2011 it was zero out of 6,155; and in 2010 it was two out of 5,617. It also appears that none of these charges resulted in any formal disciplinary prosecution.

ISBA sections have not had an opportunity to review Model Rule 8.4(g). Many section objections to the earlier ABA proposal have been addressed in the new Model Rule. Nevertheless, as context and an aid to the Assembly's review, general objections to the original proposal included the potential inability of lawyers employed by faith based organizations to advise their employers on permissible religiously-based employee conduct standards (such as marriage or human sexuality). There was also a faith-based concern that the proposal would have a chilling effect on the willingness of lawyers to participate and serve on boards of religious organizations whose tenets might be considered discriminatory under the proposal. Additional concerns centered on vagueness of the proposed Model Rule which might allow misapplication and misinterpretation of the rule, especially by disciplinary authorities. Specific ISBA section objections included the proposal's vagueness, overbreadth, and lack of any knowledge requirement. Concerns centered on fee charging issues, the ability of lawyers to decline to take on client matters, and the possibility that the rule might simply serve as a means for disgruntled clients (or prospective clients) to complain against lawyers (resulting in burdensome responses to ARDC inquiries).

IV. Action Item

The Assembly is asked to consider the above information and determine whether it supports or is opposed to amending the Illinois Rules of Professional Conduct to mirror the new ABA Model Rule 8.4(g), or should take some other action as may be warranted.

ABA Model Rules of Professional Conduct (August 2016):

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Official Comments:

…

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See Rule 1.2(b).

Illinois Rules of Professional Conduct

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Adopted July 1, 2009, effective January 1, 2010.

Comment

…

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

…

Adopted July 1, 2009, effective January 1, 2010.

ILLINOIS STATE
BAR ASSOCIATION

Assembly Meeting
December 10, 2016

Agenda Item 10B
Assembly Finance Committee
(Year-end Financial Statements)

ILLINOIS STATE BAR ASSOCIATION
OPERATING STATEMENT AND BUDGET FOR
THE PERIOD OF JULY 1, 2015 THRU JUNE 30, 2016

	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
1 Income	$8,166,741	$8,051,610	$115,131	$8,982,263
Expenses:				
2 Administrative	$5,991,193	$6,198,057	$206,864	$6,434,668
3 Publications	269,100	266,000	(3,100)	285,950
4 General Meetings and Travel	537,447	443,000	(94,447)	443,500
5 Program Expenses	759,896	830,803	70,907	759,772
6 Committee Expenses	136,831	176,250	39,419	171,800
7 Section Expense	262,880	321,250	58,370	316,250
Expense Subtotal	$7,957,347	$8,235,360	$278,013	$8,411,940
Contribution from Bldg Expansion Func	$0	$170,000	($170,000)	$0
Extra Budgetary Authorizations:				
New Lawyer Market Research	0	0	0	0
Write off LRS Project	22,401	0	(22,401)	
Proposed Service Tax Legislation	11,000	0	(11,000)	0
Total Extra Budgetary Auths.	$33,401	$0	($33,401)	$0
Net Operating Surplus (Deficit)	$175,993	($13,750)	$189,743	$570,323
Market Gain (Loss) on Long-Term Investments	($112,036)			
Net Surplus (Deficit)	$63,957			

	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
INCOME				
1 Membership Dues	$5,527,365	$5,544,700	($17,335)	$6,664,883
2 Membership Campaign	248,484	73,160	175,324	108,280
3 Section Fees	511,477	520,000	(8,523)	510,000
4 IBJ Advertising	254,535	280,000	(25,465)	276,000
5 IBJ Subscriptions	8,691	6,000	2,691	6,000
6 Newsletter Advertising	36,714	45,000	(8,286)	40,000
7 Internet Advertising	53,753	45,000	8,753	45,000
8 Ill. Compiled Statutes	63,838	71,000	(7,162)	21,000
9 Ill. Courts Bulletin	12,400	13,500	(1,100)	10,000
10 Book Publications	103,636	115,000	(11,364)	110,000
11 IlBarDocs	10,206	9,000	1,206	64,600
12 Income from Investments	160,138	130,000	30,138	130,000
13 Lawyer Referral Fees	69,998	90,000	(20,002)	65,000
14 Public Info Material	6,324	2,000	4,324	2,000
15 Bank of America Royalties Program	56,853	60,000	(3,147)	57,500
16 Other Program Royalties	113,637	110,000	3,637	115,000
17 Other Income	3,459	1,500	1,959	3,000
18 CRO Rental Income Suite 950	3,395	5,000	(1,605)	3,000
19 Commercial Mailing Labels	13,011	12,000	1,011	10,000
20 CLE Live Programs	298,399	388,750	(90,351)	250,000
21 CLE Electronic Sales	247,581	150,000	97,581	125,000
22 Fastcase Contribution from ISBA Mutual Insurance	90,000	90,000	0	90,000
23 Solo Small Firm Conference	38,448	53,000	(14,552)	40,000
24 Fred Lane's Programs	14,399	17,000	(2,601)	16,000
25 Free CLE Sponsorship from ISBA Mutual Insurance	220,000	220,000	0	220,000
TOTAL	$8,166,741	$8,051,610	$115,131	$8,982,263

	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
ADMINISTRATIVE EXPENSES				
26 Staff Salaries	$3,176,997	$3,305,000	$128,003	$3,419,000
27 Payroll Taxes	251,093	257,000	5,907	275,000
28 Indirect Payroll	636,478	668,595	32,117	753,000
29 Postage and Express	189,261	180,000	(9,261)	180,000
30 IT/Data Processing	166,873	166,200	(673)	160,000
31 Telephone	27,789	30,000	2,211	30,000
32 Staff Travel	110,812	100,000	(10,812)	112,000
33 General Office Machines	16,765	18,000	1,235	16,000
34 Paper and Envelopes	40,628	40,000	(628)	45,000
35 Utilities	104,909	130,000	25,091	112,000
36 Building Maintenance	84,316	52,000	(32,316)	52,000
37 Amortization & Depreciation	412,337	455,512	43,175	496,168
38 Pressroom	97,705	97,000	(705)	53,000
39 Mailroom	18,442	20,000	1,558	25,000
40 Insurance	77,133	80,000	2,867	80,000
41 Office Exp., Supplies, Library	42,403	40,000	(2,403)	40,000
42 Credit Card and Bank Serv. Charge	69,782	85,000	15,218	95,000
43 Election Expenses	21,108	22,500	1,392	22,500
44 Bar Center Taxes	52,569	51,750	(819)	52,000
45 Auditors	29,750	31,000	1,250	31,000
46 Legal Service	1,018	8,000	6,982	6,000
47 Chicago Office Expense	363,025	360,500	(2,525)	380,000
TOTAL	$5,991,193	$6,198,057	$206,864	$6,434,668

	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
PUBLICATIONS				
48 Bar Journal	$167,749	$170,000	$2,251	$170,000
49 Unrelated Income Tax	27,761	30,000	2,239	35,000
50 E-Clips	31,050	30,000	(1,050)	31,000
51 Book Publications	37,540	31,000	(6,540)	31,000
52 IlBarDocs	0	0	0	16,950
53 Graphic Design Enhancements	5,000	5,000	0	1,000
54 Communication Branding Update	0	0	0	1,000
TOTAL	$269,100	$266,000	($3,100)	$285,950
GENERAL MEETINGS and TRAVEL				
55 Officers and Board	$161,893	$150,000	($11,893)	$150,000
56 Officer Stipends	30,000	30,000	0	30,000
57 ABA Meetings	41,854	40,000	(1,854)	50,000
58 Annual Meeting	138,805	35,000	(103,805)	40,000
59 Midyear Meeting	71,618	80,000	8,382	75,500
60 Other	2,110	2,000	(110)	1,000
61 Admission Ceremonies	7,042	11,000	3,958	8,000
62 Assembly	80,630	87,000	6,370	85,000
63 Distinguished Counsellor Ceremony	3,495	8,000	4,505	4,000
TOTAL	$537,447	$443,000	($94,447)	$443,500

PROGRAM EXPENSES	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
64 Academy of Illinois Lawyers	$0	$2,500	$2,500	$0
65 Affiliated Bar Association Grants	4,350	5,000	650	5,000
66 Allerton House Conference	0	0	0	1,000
67 Celebrating the Profession Lunch	0	0	0	2,500
68 Cook County Luncheon	0	0	0	2,000
69 CLE Live Program Expense	228,062	231,803	3,741	195,000
70 CLE Electronic Program Expense	163,246	205,500	42,254	125,000
71 ISBA Website and Internet Services	25,000	25,000	0	30,000
72 Judicial Evaluations Cook	2,513	0	(2,513)	0
73 Law Practice Management	0	0	0	61,230
74 Judicial Evaluations Downstate	3,005	4,000	995	4,000
75 Law School Programs	2,419	5,000	2,581	5,000
76 Lawyer Referral Service	18,553	10,500	(8,053)	20,000
77 LRE Mock Trial	1,000	1,000	0	1,000
78 Legislation Other	55,505	50,000	(5,505)	54,000
79 Membership & Marketing	58,798	53,000	(5,798)	65,542
80 Marketing & Comm. Programming	1,529	10,000	8,471	7,500
81 Membership Publications	784	10,000	9,216	10,000
82 Membership Advertising	6,445	30,000	23,555	15,000
83 Fastcase Online Caselaw	116,662	120,000	3,338	94,500
84 Public Relations Other	7,945	8,500	555	8,500
85 Solo and Small Firm Conference	56,215	45,000	(11,215)	40,000
86 Unauthorized Practice of Law	29	3,000	2,971	2,000
87 Young Lawyers Division	7,836	11,000	3,164	11,000
TOTAL	$759,896	$830,803	$70,907	$759,772

COMMITTEE EXPENSES	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
88 AR & DC Committee	$4,986	$4,500	($486)	$4,500
89 Bar Services and Activities	4,778	9,000	4,222	9,000
90 Budget & Audit	238	1,000	762	1,000
91 CLE Programs Committee	12,807	13,000	193	13,000
92 Corrections and Sentencing	5,152	9,000	3,848	9,000
93 Delivery of Legal Services	3,743	5,500	1,757	5,500
94 Disability Law Committee	7,420	7,000	(420)	7,500
95 Ed., Admission & Competence	5,489	3,500	(1,989)	5,000
96 Government Lawyers Committee	4,612	4,000	(612)	5,000
97 IBJ Editorial Board	3,851	6,000	2,149	5,000
98 Investment Committee	402	1,000	598	750
99 J. A. Polls Committee	7,495	8,000	505	8,000
100 Judicial Evaluations-Outside Cook	11,230	15,000	3,770	15,000
101 Judicial Evaluations-Cook	1,997	1,500	(497)	0
102 Law Office Management and Economic	3,529	5,000	1,471	6,000
103 Law School Committee	1,127	3,000	1,873	5,000
104 Law Related Education for the Public	4,450	6,500	2,050	6,500
105 Legal Technology	2,814	7,500	4,686	6,000
106 Legislation Committee	2,190	3,000	810	2,500
107 Marketing & Communications	8,754	7,000	(1,754)	7,500
108 Mentoring Committee	0	0	0	1,000
109 Military Affairs	3,176	2,000	(1,176)	2,000
110 Racial & Ethnic Minorities and the Law	2,302	4,000	1,698	3,000
111 Other Committee Expense	6,399	2,000	(4,399)	3,000
112 Professional Conduct	2,361	5,000	2,639	4,000

	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
COMMITTEE EXP. CONTINUED				
113 Scope & Correlation	176	500	324	500
114 Sexual Orientation & Gender Identity	7,911	8,000	89	8,000
115 Tone and Conduct Committee	0	250	250	50
116 Women and the Law Committee	3,878	6,000	2,122	5,000
117 Unauthorized Practice of Law	2,351	4,000	1,649	3,500
118 Diversity Leadership Council	2,014	8,000	5,986	6,000
119 Diversity Reception	8,181	10,000	1,819	8,000
120 Comt. on Solo Small Firm Conf.	1,018	1,500	482	1,500
121 Task Force on Legal Education	0	5,000	5,000	0
122 SC Law School Dean Council/Forum	0	0	0	4,500
TOTAL COMMITTEE EXPENSES	$136,831	$176,250	$39,419	$171,800

SECTION EXPENSES	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
123 Administrative Law	$3,852	$5,000	$1,148	$5,500
124 Agricultural Law	14,329	13,500	(829)	14,000
125 Alternative Dispute Resolution	9,285	8,000	(1,285)	9,000
126 Animal Law	3,127	4,500	1,373	4,500
127 Antitrust & Unfair Competition Law	349	1,500	1,151	1,500
128 Bench & Bar	6,037	10,000	3,963	8,000
129 Bus. Advice & Fin. Planning	5,665	4,500	(1,165)	6,000
130 Business & Securities Law	3,316	5,000	1,684	5,000
131 Child Law	4,622	5,000	378	5,000
132 Civil Practice & Procedure	10,717	12,000	1,283	5,500
133 Commercial Banking & Bankruptcy	6,786	9,000	2,214	9,000
134 Construction Law	3,983	5,500	1,517	5,500
135 Corporate Law Department	2,492	5,000	2,508	5,000
136 Criminal Justice	9,419	12,000	2,581	12,000
137 Education Law	3,276	5,500	2,224	5,000
138 Elder Law	12,636	13,000	364	11,000
139 Employee Benefits	979	2,500	1,521	2,500
140 Energy, Utilities, Telecommunications, and Transportation	1,432	1,500	68	1,500
141 Environmental Law	1,779	8,000	6,221	4,000
142 Family Law	17,511	25,000	7,489	25,000
143 Federal Practice	4,408	5,500	1,092	5,500
144 Federal Taxation	3,517	5,000	1,483	4,000
145 General Practice SSF	13,627	9,000	(4,627)	12,000
146 Health Care	10,249	12,000	1,751	12,000
147 Human Rights	6,269	7,500	1,231	6,500
148 Insurance Law	2,815	3,500	685	3,500

	ACTUAL JUNE 2016	BUDGET 2015/2016	BUDGET DIFFERENCE	BUDGET 2016/2017
SECTION EXP. CONTINUED				
149 Intellectual Property	$3,547	$3,000	($547)	$4,000
150 International & Immigration Law	3,141	3,000	(141)	3,000
151 Labor and Employment Law	7,887	7,000	(887)	8,000
152 Local Government	8,146	9,500	1,354	9,500
153 Mental Health	13,882	11,500	(2,382)	13,000
154 Mineral Law	6,770	5,500	(1,270)	5,500
155 Other	0	250	250	0
156 Real Estate Law	10,054	14,000	3,946	14,000
157 Senior Lawyers	7,174	10,000	2,826	8,000
158 State and Local Taxation	3,869	7,000	3,131	7,000
159 Tort Law	6,390	13,000	6,610	13,000
160 Traffic Laws and Courts	6,116	6,000	(116)	7,250
161 Trusts and Estates	9,915	11,000	1,085	12,500
162 Workers' Compensation	6,696	10,000	3,304	10,000
163 Young Lawyers Council	6,816	12,000	5,184	10,000
164 New Lawyer Forum	0	0	0	3,500
TOTAL SECTION EXPENSE	$262,880	$321,250	$58,370	$316,250

ILLINOIS STATE BAR ASSOCIATION
COMPARATIVE BALANCE SHEET

	June 30, 2016	June 30, 2015
Current Assets:		
Cash and Petty Cash	$837,438	$599,518
Certificates of Deposit	1,742,000	1,401,129
Money Market Investments	2,410,589	2,552,500
Accounts Receivable	152,578	146,597
Prepaid Expenses & Other Assets	148,562	211,149
Total Current Assets	$5,291,167	$4,910,893
Long Term Assets:		
Investments	$4,897,985	$4,859,425
Fixed Assets:		
Cost (Net of Depreciation)	$3,069,961	$2,858,312
Total Assets	$13,259,113	$12,628,630
Current Liabilities:		
Accounts Payable	$1,388,697	$934,832
ICB & LRS Deferred Income	13,408	16,627
Dues & Section Deferred Income	4,494,054	4,168,460
Other Deferred Income	108,644	12,242
Deferred Rent	395,295	405,330
Total Current Liability	$6,400,098	$5,537,491
Designated Fund Balance		
Building Expansion Fund	$1,448,924	1,448,924
Building Maintenance Fund	20,451	20,451
General Contingency Fund	858,700	858,700
Total Designated Fund Balance	$2,328,075	$2,328,075
Undesignated Fund Balance	$4,530,940	4,763,064
Total Liabilities and Fund Balance	$13,259,113	$12,628,630

ILLINOIS STATE
BAR ASSOCIATION

Assembly Meeting
December 10, 2016

Agenda Item 13A
Legislation
(Sponsored Legislation)

ILLINOIS STATE
BAR ASSOCIATION

MEMORANDUM

To: ISBA Assembly

From: Jim Covington

Date: November 9, 2016

In re: ISBA Proposed Package

This memo will summarize the proposals for legislation that have been suggested by an ISBA section or committee and recommended by the Legislation Committee and the Board of Governors. Also attached is the background materials for each proposal.

(1) 100-2. Life insurance policies in dissolution cases. (From Trusts and Estates) ISBA Legislative Proposal 100-2 is from Trusts and Estates and amends the Illinois Marriage and Dissolution of Marriage Act. It eliminates life insurance benefits from being paid to a former spouse after a judgment of dissolution of marriage unless there is a specific reference in the judgment to the contrary.

In 2012, Florida enacted a similar statute for the same reasons. It may be found here at 732.703.

This was sent to the following sections and committees:

- Elder Law—support.
- Family Law—support.
- General Practice, Solo & Small Firm—support the concept but it is written too narrowly because does not address security of obligations interest (for example: maintenance, child support, ERISA). It's very complicated and needs to be sent back to drafters to study more

regarding the scope of this amendment. *(Please note that 750 ILCS 5/504(f) specifically addresses how the court may apportion existing life insurance policies or require new life insurance policies.)*

- Insurance Law—support.

- Women and the Law—oppose.

The Legislation Committee approved this proposal in concept and asked Gary Gehlbach from Trusts and Estates to work on curative language to address General Practice's concern, which he now is doing.

(2) 100-3. Changes in criminal sentencing. (From Corrections and Sentencing) ISBA Legislative Proposal 100-3 is a proposal from Corrections and Sentencing Section Council that does three things.

(a) Current law allows a defendant to receive $5 a day credit toward fines for time served in custody prior to the sentencing. For instance, if a defendant was incarcerated in jail for 30 days before sentencing, they would receive a $150 credit toward any fines that are imposed by the court. This would increase it to $20 a day.

There are two reasons for this proposal. First, this level of $5 a day was established in about 1964 and has not been adjusted for inflation. Second, the types of fines and the amount of fines have consistently been increasing over the past few decades, making it more difficult for defendants to pay.

(b) Current law requires the court to consider at sentencing the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections.[1] Most judges do not mention this fact at sentencing, perhaps because they do not know how much it costs to incarcerate a person in prison per year. When asked, judges vary widely on what they believe the amount is. Since the court is required to consider the financial impact, it makes sense to put the official amount in a presentence report.

(c) Several of the first-time drug offender statutes and the supervision statute provide that a court will defer proceedings and then dismiss the matter if a person successfully completed the terms of the supervision.[2] There are many judges throughout the State who do not set court dates at the conclusion of the

[1] 730 ILCS 5/5-4-1.

[2] Supervision 730 ILCS 5/5-6-3.1; cannabis (720 ILCS 550/10); controlled substances (720 ILCS 570/410); and methamphetamine (720 ILCS 646/70).

period of supervision to determine whether the person completed the conditions and to dismiss the case. Because of this fact, defendants still have cases on their record that could affect employment and housing.

This proposal includes two changes to each of these statutes: First, it requires the court to set a date at the conclusion of the period to determine whether person has complied with the terms and conditions of supervision or probation. Second, it requires the court to determine that the defendant has fulfilled the terms and conditions of probation at the conclusion of the period of supervision or probation.

This was sent to the following sections and committees:

- Bench and Bar—no position.
- Criminal Justice—support.
- Racial and Ethnic Minorities and the Law—support.
- General Practice—supported everything except court supervision provision. But they could support that provision if amended to read that the case is to be automatically dismissed upon termination of supervision unless State raises an objection. *(Corrections amended the proposal after General Practice took this position to delete any requirement or suggestion that it had to be a contested proceeding or that the defendant had to appear.)*

(3) 100-6. Guilty pleas and immigration consequences. (International and Immigration Section Council)) ISBA Legislative Proposal 100-6 is a proposal from International and Immigration to improve judicial compliance with the current law that requires judicial notification of the immigration consequences of guilty pleas.

In January 2004, the Illinois General Assembly passed an amendment to the Code of Criminal Procedure that states:

> Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court *shall* give the following advisement to the defendant in open court:
>
> If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to

the United States or denial of naturalization under the laws of the United States. (725 ILCS 5/113-8; emphasis added)

Prior to that time, persons who were not U.S. citizens sometimes accepted guilty pleas without understanding that they could face deportation from the United States in addition to the agreed upon criminal sanctions. The defendant was then unpleasantly surprised when, after having completed his criminal sentence, he was taken into immigration custody and placed in deportation proceedings. Many defendants claimed they would not have pleaded guilty if they had known it would mean almost certain deportation from the country, separating them from their families, jobs, and homes.

For some time, members of the trial bar pushed for this legislation (Moran and Kinnally, "Aliens, Guilty Pleas and the Risk of Deportation: Time for Legislative Action," *Illinois Bar Journal* (2001) Vol. 89, pp.194-198). As a result of the amendment to 725 ILCS 5/113-8, this warning is now posted on many courtroom walls or in hallways in circuit courts around the state.

Yet not all trial judges are giving this required admonition. Some judges may believe the posting of the notice of this advisement in courtrooms is sufficient. Other judges may be relying on written agreements in court orders signed by the accused.

Immigration and International believe that the language denotes it must be given, and believes, much like the waiver of a jury trial, that it must be announced in open court when the accused is present. (*People v. Thornton,* (2nd Dist. 2006) 363 Ill.App.3d 481.)

Unfortunately, the Supreme Court of Illinois arrived at a different conclusion in a bifurcated analysis predicated on a thirty-year-old California Supreme Court opinion. The Illinois Supreme Court said the admonition statute posed two questions: (a) whether the statute is mandatory or permissive; and (b) whether the statute is mandatory or directory. (*People v. Del Villar*, 236 Ill.2d 507 (2009))

The court said that even though the initial inquiry may find a statue to incorporate an obligatory duty (*i.e.*, "the trial court shall give the advisement"), according to the Illinois Supreme Court, it is the resolution of the second question that determines whether a statute is truly mandatory. Thus, if the statute does not contain a provision that dictates a particular consequence for noncompliance by the governmental actor, it is directory in nature.

Thus, this bill inserts a consequence for noncompliance with this statute so that this admonition is given in open court just as the Illinois General Assembly intended for it to be given.

Text of the proposed amendment (new language is underlined)

725 ILCS 5/133-8

Advisement concerning status as an alien. (a) Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:

If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States.

(b) If the defendant is arraigned on or after the effective date of this amendatory Act of the 100th General Assembly and the court fails to advise the defendant as required by subsection (a) of this Section and the defendant shows that conviction of the offense to which the defendant pleaded guilty, guilty but mentally ill, or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty, guilty but mentally ill, or nolo contendere, and enter a plea of not guilty.

This was sent to the following section council:

- Criminal Justice—supported with proposed language that is now reflected in the proposal in the paragraph above.

Please call if you have any questions. Thank you.

PROPOSAL NO. 100-2

LRB10000024HEP10025b

100TH GENERAL ASSEMBLY

State of Illinois

2017 and 2018

INTRODUCED _____, BY

SYNOPSIS AS INTRODUCED:

750 ILCS 5/503 from Ch. 40, par. 503

Amends the Illinois Marriage and Dissolution of Marriage Act. Provides that as to any policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes non-marital property, or constitutes marital property but was not specifically allocated between the parties as provided in the Act, a beneficiary designation made by or on behalf of the decedent prior to the entry of the judgment for dissolution or declaration of invalidity of marriage that provides for the payment or transfer at death of any of the proceeds of the policy to or for the benefit of the decedent's former spouse is void as of the time of the judgment for dissolution or declaration of invalidity of marriage and the policy proceeds shall pass as if the decedent's former spouse predeceased the decedent.

LRB100 00024 HEP 10025 b

A BILL FOR

AN ACT concerning civil law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Illinois Marriage and Dissolution of Marriage Act is amended by changing Section 503 as follows:

(750 ILCS 5/503) (from Ch. 40, par. 503)

(Text of Section before amendment by P.A. 99-763)

Sec. 503. Disposition of property and debts.

(a) For purposes of this Act, "marital property" means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent or property acquired in exchange for such property;

(2) property acquired in exchange for property acquired before the marriage;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties, including a premarital agreement or a postnuptial agreement;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse except, however,

when a spouse is required to sue the other spouse in order to obtain insurance coverage or otherwise recover from a third party and the recovery is directly related to amounts advanced by the marital estate, the judgment shall be considered marital property;

(6) property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics;

(6.5) all property acquired by a spouse by the sole use of non-marital property as collateral for a loan that then is used to acquire property during the marriage; to the extent that the marital estate repays any portion of the loan, it shall be considered a contribution from the marital estate to the non-marital estate subject to reimbursement;

(7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

Property acquired prior to a marriage that would otherwise be non-marital property shall not be deemed to be marital

property solely because the property was acquired in contemplation of marriage.

The court shall make specific factual findings as to its classification of assets as marital or non-marital property, values, and other factual findings supporting its property award.

(b)(1) For purposes of distribution of property, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed marital property. This presumption includes non-marital property transferred into some form of co-ownership between the spouses, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. A spouse may overcome the presumption of marital property by showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section or was done for estate or tax planning purposes or for other reasons that establish that the transfer was not intended to be a gift.

(2) For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code, defined benefit plans, defined contribution plans and accounts, individual retirement accounts, and non-qualified plans) acquired by or participated in by either spouse after the marriage and before a judgment of

dissolution of marriage or legal separation or declaration of invalidity of the marriage are presumed to be marital property. A spouse may overcome the presumption that these pension benefits are marital property by showing through clear and convincing evidence that the pension benefits were acquired by a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is enforceable under Section 1-119 of the Illinois Pension Code.

The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

(3) For purposes of distribution of property under this Section, all stock options and restricted stock or similar form of benefit granted to either spouse after the marriage and before a judgment of dissolution of marriage or legal separation or declaration of invalidity of marriage, whether vested or non-vested or whether their value is ascertainable, are presumed to be marital property. This presumption of

marital property is overcome by a showing that the stock options or restricted stock or similar form of benefit were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock options and restricted stock or similar form of benefit between the parties at the time of the judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options and restricted stock or similar form of benefit may not be then determinable and that the actual division of the options may not occur until a future date. In making the allocation between the parties, the court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

(i) All circumstances underlying the grant of the stock option and restricted stock or similar form of benefit including but not limited to the vesting schedule, whether the grant was for past, present, or future efforts, whether the grant is designed to promote future performance or employment, or any combination thereof.

(ii) The length of time from the grant of the option to the time the option is exercisable.

(b-5)(1) As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes marital property, whether whole life, term life, group term life, universal life, or other form of life insurance policy, and whether or not the value is

ascertainable, the court shall allocate ownership, death benefits or the right to assign death benefits, and the obligation for premium payments, if any, equitably between the parties at the time of the judgment for dissolution or declaration of invalidity of marriage.

(2) As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes non-marital property, or constitutes marital property but was not specifically allocated between the parties as provided in paragraph (1) of this subsection, a beneficiary designation made by or on behalf of the decedent prior to the entry of the judgment for dissolution or declaration of invalidity of marriage that provides for the payment or transfer at death of any of the proceeds of the policy to or for the benefit of the decedent's former spouse is void as of the time of the judgment for dissolution or declaration of invalidity of marriage and the policy proceeds shall pass as if the decedent's former spouse predeceased the decedent.

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

(1)(A) If marital and non-marital property are commingled by one estate being contributed into the other, the following shall apply:

(i) If the contributed property loses its identity, the contributed property transmutes to the

estate receiving the property, subject to the provisions of paragraph (2) of this subsection (c).

(ii) If the contributed property retains its identity, it does not transmute and remains property of the contributing estate.

(B) If marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection (c).

(2)(A) When one estate of property makes a contribution to another estate of property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation. No such reimbursement shall be made with respect to a contribution that is not traceable by clear and convincing evidence or that was a gift. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property that received the contribution.

(B) When a spouse contributes personal effort to non-marital property, it shall be deemed a contribution from the marital estate, which shall receive reimbursement for the efforts if the efforts are significant and result in substantial appreciation to the non-marital property

except that if the marital estate reasonably has been compensated for his or her efforts, it shall not be deemed a contribution to the marital estate and there shall be no reimbursement to the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) each party's contribution to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any decrease attributable to an advance from the parties' marital estate under subsection (c-1)(2) of Section 501; (ii) the contribution of a spouse as a homemaker or to the family unit; and (iii) whether the contribution is after the commencement of a proceeding for dissolution of marriage or declaration of invalidity of marriage;

(2) the dissipation by each party of the marital

property, provided that a party's claim of dissipation is subject to the following conditions:

(i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;

(ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;

(iii) a certificate or service of the notice of intent to claim dissipation shall be filed with the clerk of the court and be served pursuant to applicable rules;

(iv) no dissipation shall be deemed to have occurred prior to 3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage;

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the

spouse having the primary residence of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any prenuptial or postnuptial agreement of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties.

(e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.

(f) In a proceeding for dissolution of marriage or declaration of invalidity of marriage or in a proceeding for disposition of property following dissolution of marriage by a

court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, in determining the value of the marital and non-marital property for purposes of dividing the property, has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.

(g) The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties. In making a determination under this subsection, the court may consider, among other things, the conviction of a party of any of the offenses set forth in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.3, 12-13, 12-14, 12-14.1, 12-15, or 12-16, or Section 12-3.05 except for subdivision (a)(4) or (g)(1), of the Criminal Code of 1961 or the Criminal Code of 2012 if the victim is a child of one or both of the parties, and there is a need for, and cost of, care, healing and counseling for the child who is the victim of the crime.

(h) Unless specifically directed by a reviewing court, or upon good cause shown, the court shall not on remand consider any increase or decrease in the value of any "marital" or

"non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.

(i) The court may make such judgments affecting the marital property as may be just and may enforce such judgments by ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court.

(j) After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

(1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 14 days after the closing of proofs in the final hearing or within such other period as the court orders.

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.

(3) The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or

former counsel; and such a waiver shall not constitute a prerequisite to a hearing for contribution. If either party's presentation on contribution, however, includes evidence within the scope of the attorney-client privilege, the disclosure or disclosures shall be narrowly construed and shall not be deemed by the court to constitute a general waiver of the privilege as to matters beyond the scope of the presentation.

(4) No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of Section 508.

(5) A contribution award (payable to either the petitioning party or the party's counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508.

(6) The changes to this Section 503 made by this amendatory Act of 1996 apply to cases pending on or after June 1, 1997, except as otherwise provided in Section 508.

(k) In determining the value of assets or property under

this Section, the court shall employ a fair market value standard. The date of valuation for the purposes of division of assets shall be the date of trial or such other date as agreed by the parties or ordered by the court, within its discretion. If the court grants a petition brought under Section 2-1401 of the Code of Civil Procedure, then the court has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.

(l) The court may seek the advice of financial experts or other professionals, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine as a witness any professional consulted by the court designated as the court's witness. Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. The court shall allocate the costs and fees of those professional personnel between the parties based upon the financial ability of each party and any other criteria the court considers appropriate, and the allocation is subject to reallocation under subsection (a) of Section 508. Upon the request of any party or upon the court's own motion, the court may conduct a hearing as to the reasonableness of those fees and costs.

(m) The changes made to this Section by Public Act 97-941 apply only to petitions for dissolution of marriage filed on or

after January 1, 2013 (the effective date of Public Act 97-941).

(Source: P.A. 99-78, eff. 7-20-15; 99-90, eff. 1-1-16.)

(Text of Section after amendment by P.A. 99-763)

Sec. 503. Disposition of property and debts.

(a) For purposes of this Act, "marital property" means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent or property acquired in exchange for such property;

(2) property acquired in exchange for property acquired before the marriage;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties, including a premarital agreement or a postnuptial agreement;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse except, however, when a spouse is required to sue the other spouse in order to obtain insurance coverage or otherwise recover from a third party and the recovery is directly related to amounts advanced by the marital estate, the judgment shall be considered marital property;

(6) property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics;

(6.5) all property acquired by a spouse by the sole use of non-marital property as collateral for a loan that then is used to acquire property during the marriage; to the extent that the marital estate repays any portion of the loan, it shall be considered a contribution from the marital estate to the non-marital estate subject to reimbursement;

(7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

Property acquired prior to a marriage that would otherwise be non-marital property shall not be deemed to be marital property solely because the property was acquired in contemplation of marriage.

The court shall make specific factual findings as to its classification of assets as marital or non-marital property, values, and other factual findings supporting its property

award.

(b)(1) For purposes of distribution of property, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed marital property. This presumption includes non-marital property transferred into some form of co-ownership between the spouses, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section or was done for estate or tax planning purposes or for other reasons that establish that a transfer between spouses was not intended to be a gift.

(2) For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code, defined benefit plans, defined contribution plans and accounts, individual retirement accounts, and non-qualified plans) acquired by or participated in by either spouse after the marriage and before a judgment of dissolution of marriage or legal separation or declaration of invalidity of the marriage are presumed to be marital property. A spouse may overcome the presumption that these pension benefits are marital property by showing through clear and convincing evidence that the pension benefits were acquired by

a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is enforceable under Section 1-119 of the Illinois Pension Code.

The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

(3) For purposes of distribution of property under this Section, all stock options and restricted stock or similar form of benefit granted to either spouse after the marriage and before a judgment of dissolution of marriage or legal separation or declaration of invalidity of marriage, whether vested or non-vested or whether their value is ascertainable, are presumed to be marital property. This presumption of marital property is overcome by a showing that the stock options or restricted stock or similar form of benefit were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock options and restricted stock or similar form of benefit between the parties at the time of the

judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options and restricted stock or similar form of benefit may not be then determinable and that the actual division of the options may not occur until a future date. In making the allocation between the parties, the court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

(i) All circumstances underlying the grant of the stock option and restricted stock or similar form of benefit including but not limited to the vesting schedule, whether the grant was for past, present, or future efforts, whether the grant is designed to promote future performance or employment, or any combination thereof.

(ii) The length of time from the grant of the option to the time the option is exercisable.

(b-5)(1) As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes marital property, whether whole life, term life, group term life, universal life, or other form of life insurance policy, and whether or not the value is ascertainable, the court shall allocate ownership, death benefits or the right to assign death benefits, and the obligation for premium payments, if any, equitably between the parties at the time of the judgment for dissolution or declaration of invalidity of marriage.

(2) As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes non-marital property, or constitutes marital property but was not specifically allocated between the parties as provided in paragraph (1) of this subsection, a beneficiary designation made by or on behalf of the decedent prior to the entry of the judgment for dissolution or declaration of invalidity of marriage that provides for the payment or transfer at death of any of the proceeds of the policy to or for the benefit of the decedent's former spouse is void as of the time of the judgment for dissolution or declaration of invalidity of marriage and the policy proceeds shall pass as if the decedent's former spouse predeceased the decedent.

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

(1)(A) If marital and non-marital property are commingled by one estate being contributed into the other, the following shall apply:

(i) If the contributed property loses its identity, the contributed property transmutes to the estate receiving the property, subject to the provisions of paragraph (2) of this subsection (c).

(ii) If the contributed property retains its identity, it does not transmute and remains property of the contributing estate.

(B) If marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection (c).

(2)(A) When one estate of property makes a contribution to another estate of property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation. No such reimbursement shall be made with respect to a contribution that is not traceable by clear and convincing evidence or that was a gift. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property that received the contribution.

(B) When a spouse contributes personal effort to non-marital property, it shall be deemed a contribution from the marital estate, which shall receive reimbursement for the efforts if the efforts are significant and result in substantial appreciation to the non-marital property except that if the marital estate reasonably has been compensated for his or her efforts, it shall not be deemed a contribution to the marital estate and there shall be no reimbursement to the marital estate. The court may provide for reimbursement out of the marital property to be divided

or by imposing a lien against the non-marital property which received the contribution.

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) each party's contribution to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any decrease attributable to an advance from the parties' marital estate under subsection (c-1)(2) of Section 501; (ii) the contribution of a spouse as a homemaker or to the family unit; and (iii) whether the contribution is after the commencement of a proceeding for dissolution of marriage or declaration of invalidity of marriage;

(2) the dissipation by each party of the marital property, provided that a party's claim of dissipation is subject to the following conditions:

(i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;

(ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;

(iii) a certificate or service of the notice of intent to claim dissipation shall be filed with the clerk of the court and be served pursuant to applicable rules;

(iv) no dissipation shall be deemed to have occurred prior to 3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage;

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having the primary residence of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any prenuptial or postnuptial agreement of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties.

(e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.

(f) In a proceeding for dissolution of marriage or declaration of invalidity of marriage or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, in determining the value of the marital and non-marital property for purposes of dividing the property, has the discretion to use the date of the trial or such other date as

agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.

(g) The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties. In making a determination under this subsection, the court may consider, among other things, the conviction of a party of any of the offenses set forth in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.3, 12-13, 12-14, 12-14.1, 12-15, or 12-16, or Section 12-3.05 except for subdivision (a)(4) or (g)(1), of the Criminal Code of 1961 or the Criminal Code of 2012 if the victim is a child of one or both of the parties, and there is a need for, and cost of, care, healing and counseling for the child who is the victim of the crime.

(h) Unless specifically directed by a reviewing court, or upon good cause shown, the court shall not on remand consider any increase or decrease in the value of any "marital" or "non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.

(i) The court may make such judgments affecting the marital property as may be just and may enforce such judgments by

ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court.

(j) After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

(1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 14 days after the closing of proofs in the final hearing or within such other period as the court orders.

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.

(3) The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or former counsel; and such a waiver shall not constitute a prerequisite to a hearing for contribution. If either party's presentation on contribution, however, includes evidence within the scope of the attorney-client privilege, the disclosure or disclosures shall be narrowly

construed and shall not be deemed by the court to constitute a general waiver of the privilege as to matters beyond the scope of the presentation.

(4) No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of Section 508.

(5) A contribution award (payable to either the petitioning party or the party's counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508.

(6) The changes to this Section 503 made by this amendatory Act of 1996 apply to cases pending on or after June 1, 1997, except as otherwise provided in Section 508.

(k) In determining the value of assets or property under this Section, the court shall employ a fair market value standard. The date of valuation for the purposes of division of assets shall be the date of trial or such other date as agreed by the parties or ordered by the court, within its discretion. If the court grants a petition brought under Section 2-1401 of

the Code of Civil Procedure, then the court has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.

(l) The court may seek the advice of financial experts or other professionals, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine as a witness any professional consulted by the court designated as the court's witness. Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. The court shall allocate the costs and fees of those professional personnel between the parties based upon the financial ability of each party and any other criteria the court considers appropriate, and the allocation is subject to reallocation under subsection (a) of Section 508. Upon the request of any party or upon the court's own motion, the court may conduct a hearing as to the reasonableness of those fees and costs.

(m) The changes made to this Section by Public Act 97-941 apply only to petitions for dissolution of marriage filed on or after January 1, 2013 (the effective date of Public Act 97-941).

(Source: P.A. 99-78, eff. 7-20-15; 99-90, eff. 1-1-16; 99-763, eff. 1-1-17.)

Section 95. No acceleration or delay. Where this Act makes changes in a statute that is represented in this Act by text that is not yet or no longer in effect (for example, a Section represented by multiple versions), the use of that text does not accelerate or delay the taking effect of (i) the changes made by this Act or (ii) provisions derived from any other Public Act.

Select Year: 2016 Go

The 2016 Florida Statutes

Title XLII
ESTATES AND TRUSTS

Chapter 732
PROBATE CODE: INTESTATE SUCCESSION AND WILLS

View Entire Chapter

732.703 Effect of divorce, dissolution, or invalidity of marriage on disposition of certain assets at death.—

(1) As used in this section, unless the context requires otherwise, the term:

(a) "Asset," when not modified by other words or phrases, means an asset described in subsection (3), except as provided in paragraph (4)(j).

(b) "Beneficiary" means any person designated in a governing instrument to receive an interest in an asset upon the death of the decedent.

(c) "Death certificate" means a certified copy of a death certificate issued by an official or agency for the place where the decedent's death occurred.

(d) "Employee benefit plan" means any funded or unfunded plan, program, or fund established by an employer to provide an employee's beneficiaries with benefits that may be payable on the employee's death.

(e) "Governing instrument" means any writing or contract governing the disposition of all or any part of an asset upon the death of the decedent.

(f) "Payor" means any person obligated to make payment of the decedent's interest in an asset upon the death of the decedent, and any other person who is in control or possession of an asset.

(g) "Primary beneficiary" means a beneficiary designated under the governing instrument to receive an interest in an asset upon the death of the decedent who is not a secondary beneficiary. A person who receives an interest in the asset upon the death of the decedent due to the death of another beneficiary prior to the decedent's death is also a primary beneficiary.

(h) "Secondary beneficiary" means a beneficiary designated under the governing instrument who will receive an interest in an asset if the designation of the primary beneficiary is revoked or otherwise cannot be given effect.

(2) A designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is void as of the time the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, if the designation was made prior to the dissolution or court order. The decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent. An individual retirement account described in s. 408 or s. 408A of the Internal Revenue Code of 1986, or an employee benefit plan, may not be treated as a trust for purposes of this section.

(3) Subsection (2) applies to the following assets in which a resident of this state has an interest at the time of the resident's death:

(a) A life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan.

(b) An employee benefit plan.

(c) An individual retirement account described in s. 408 or s. 408A of the Internal Revenue Code of 1986, including an individual retirement annuity described in s. 408(b) of the Internal Revenue Code of 1986.

(d) A payable-on-death account.

(e) A security or other account registered in a transfer-on-death form.

(f) A life insurance policy, annuity, or other similar contract that is not held within an employee benefit plan or a tax-qualified retirement account.

(4) Subsection (2) does not apply:

(a) To the extent that controlling federal law provides otherwise;

(b) If the governing instrument is signed by the decedent, or on behalf of the decedent, after the order of dissolution or order declaring the marriage invalid and such governing instrument expressly provides that benefits will be payable to the decedent's former spouse;

(c) To the extent a will or trust governs the disposition of the assets and s. 732.507(2) or s. 736.1105 applies;

(d) If the order of dissolution or order declaring the marriage invalid requires that the decedent acquire or maintain the asset for the benefit of a former spouse or children of the marriage, payable upon the death of the decedent either outright or in trust, only if other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist upon the death of the decedent;

(e) If, under the terms of the order of dissolution or order declaring the marriage invalid, the decedent could not have unilaterally terminated or modified the ownership of the asset, or its disposition upon the death of the decedent;

(f) If the designation of the decedent's former spouse as a beneficiary is irrevocable under applicable law;

(g) If the governing instrument is governed by the laws of a state other than this state;

(h) To an asset held in two or more names as to which the death of one coowner vests ownership of the asset in the surviving coowner or coowners;

(i) If the decedent remarries the person whose interest would otherwise have been revoked under this section and the decedent and that person are married to one another at the time of the decedent's death; or

(j) To state-administered retirement plans under chapter 121.

(5) In the case of an asset described in paragraph (3)(a), paragraph (3)(b), or paragraph (3)(c), unless payment or transfer would violate a court order directed to, and served as required by law on, the payor:

(a) If the governing instrument does not explicitly specify the relationship of the beneficiary to the decedent or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment on account of, or transferring any interest in, the asset to the beneficiary.

(b) As to any portion of the asset required by the governing instrument to be paid after the decedent's death to a primary beneficiary explicitly designated in the governing instrument as the decedent's spouse:

1. If the death certificate states that the decedent was married at the time of his or her death to that spouse, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to such primary beneficiary.

2. If the death certificate states that the decedent was not married at the time of his or her death, or if the death certificate states that the decedent was married to a person other than the spouse designated as the primary beneficiary at the time of his or her death, the payor is not liable for making a payment on

account of, or for transferring an interest in, that portion of the asset to a secondary beneficiary under the governing instrument.

3. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the primary beneficiary upon delivery to the payor of an affidavit validly executed by the primary beneficiary in substantially the following form:

STATE OF
COUNTY OF

Before me, the undersigned authority, personally appeared (type or print Affiant's name) ("Affiant"), who swore or affirmed that:

1. (Type or print name of Decedent) ("Decedent") died on (type or print the date of the Decedent's death).

2. Affiant is a "primary beneficiary" as that term is defined in Section 732.703, Florida Statutes. Affiant and Decedent were married on (type or print the date of marriage), and were legally married to one another on the date of the Decedent's death.

(Affiant)

Sworn to or affirmed before me by the affiant who is personally known to me or who has produced (state type of identification) as identification this day of (month), (year).

(Signature of Officer)
(Print, Type, or Stamp Commissioned name of Notary Public)

4. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the secondary beneficiary upon delivery to the payor of an affidavit validly executed by the secondary beneficiary affidavit in substantially the following form:

STATE OF
COUNTY OF

Before me, the undersigned authority, personally appeared (type or print Affiant's name) ("Affiant"), who swore or affirmed that:

1. (Type or print name of Decedent) ("Decedent") died on (type or print the date of the Decedent's death).

2. Affiant is a "secondary beneficiary" as that term is defined in Section 732.703, Florida Statutes. On the date of the Decedent's death, the Decedent was not legally married to the spouse designated as the "primary beneficiary" as that term is defined in Section 732.703, Florida Statutes.

Sworn to or affirmed before me by the affiant who is personally known to me or who has produced (state type of identification) as identification this day of (month), (year).

(Signature of Officer)
(Print, Type, or Stamp Commissioned name of Notary Public)

(6) In the case of an asset described in paragraph (3)(d), paragraph (3)(e), or paragraph (3)(f), the payor is not liable for making any payment on account of, or transferring any interest in, the asset to any beneficiary.

(7) Subsections (5) and (6) apply notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest pursuant to subsection (2).

(8) This section does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest by operation of this section, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to

such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator, or other third party.

(9) This section applies to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

History.—s. 1, ch. 2012-148; s. 6, ch. 2013-172.

PROPOSAL NO. 100-3

LRB10000022RLC10023b

100TH GENERAL ASSEMBLY

State of Illinois

2017 and 2018

INTRODUCED _____, BY

SYNOPSIS AS INTRODUCED:

720 ILCS 550/10	from Ch. 56 1/2, par. 710
720 ILCS 570/410	from Ch. 56 1/2, par. 1410
720 ILCS 646/70	
725 ILCS 5/110-14	from Ch. 38, par. 110-14
730 ILCS 5/5-3-2	from Ch. 38, par. 1005-3-2
730 ILCS 5/5-6-3.1	from Ch. 38, par. 1005-6-3.1

Amends the Cannabis Control Act, the Illinois Controlled Substances Act, and the Methamphetamine Control and Community Protection Act. Provides that at the time a defendant is placed on probation, the court shall set a date at the conclusion of the period to determine whether the defendant has complied with the terms and conditions of probation. Amends the Code of Criminal Procedure of 1963. Provides that a person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense shall be allowed a credit of $20 (rather than $5) for each day the person is incarcerated toward any fine imposed. Amends the Unified Code of Corrections. Provides that in felony cases, the presentence report shall set forth the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections. Provides that at the time a defendant is placed on supervision, the court shall set a date at the conclusion of the period to determine whether the defendant has complied with the terms and conditions of supervision.

LRB100 00022 RLC 10023 b

FISCAL NOTE ACT
MAY APPLY

A BILL FOR

AN ACT concerning criminal law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Cannabis Control Act is amended by changing Section 10 as follows:

(720 ILCS 550/10) (from Ch. 56 1/2, par. 710)

Sec. 10. (a) Whenever any person who has not previously been convicted of, or placed on probation or court supervision for, any offense under this Act or any law of the United States or of any State relating to cannabis, or controlled substances as defined in the Illinois Controlled Substances Act, pleads guilty to or is found guilty of violating Sections 4(a), 4(b), 4(c), 5(a), 5(b), 5(c) or 8 of this Act, the court may, without entering a judgment and with the consent of such person, sentence him to probation.

(b) When a person is placed on probation, the court shall enter an order specifying a period of probation of 24 months, and shall defer further proceedings in the case until the conclusion of the period or until the filing of a petition alleging violation of a term or condition of probation. <u>At the time the person is placed on probation, the court shall set a date at the conclusion of the period to determine whether the person has complied with the terms and conditions of probation.</u>

(c) The conditions of probation shall be that the person: (1) not violate any criminal statute of any jurisdiction; (2) refrain from possession of a firearm or other dangerous weapon; (3) submit to periodic drug testing at a time and in a manner as ordered by the court, but no less than 3 times during the period of the probation, with the cost of the testing to be paid by the probationer; and (4) perform no less than 30 hours of community service, provided community service is available in the jurisdiction and is funded and approved by the county board.

(d) The court may, in addition to other conditions, require that the person:

(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed by the court in the order of probation;

(2) pay a fine and costs;

(3) work or pursue a course of study or vocational training;

(4) undergo medical or psychiatric treatment; or treatment for drug addiction or alcoholism;

(5) attend or reside in a facility established for the instruction or residence of defendants on probation;

(6) support his dependents;

(7) refrain from possessing a firearm or other dangerous weapon;

(7-5) refrain from having in his or her body the presence of any illicit drug prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, unless prescribed by a physician, and submit samples of his or her blood or urine or both for tests to determine the presence of any illicit drug;

(8) and in addition, if a minor:

(i) reside with his parents or in a foster home;

(ii) attend school;

(iii) attend a non-residential program for youth;

(iv) contribute to his own support at home or in a foster home.

(e) Upon violation of a term or condition of probation, the court may enter a judgment on its original finding of guilt and proceed as otherwise provided.

(f) At the conclusion of the period of probation, if the court determines that the person has complied with ~~Upon fulfillment of~~ the terms and conditions of probation, the court shall discharge the ~~such~~ person and dismiss the proceedings against him or her.

(g) A disposition of probation is considered to be a conviction for the purposes of imposing the conditions of probation and for appeal, however, discharge and dismissal under this Section is not a conviction for purposes of disqualification or disabilities imposed by law upon

conviction of a crime (including the additional penalty imposed for subsequent offenses under Section 4(c), 4(d), 5(c) or 5(d) of this Act).

(h) Discharge and dismissal under this Section, Section 410 of the Illinois Controlled Substances Act, Section 70 of the Methamphetamine Control and Community Protection Act, Section 5-6-3.3 or 5-6-3.4 of the Unified Code of Corrections, or subsection (c) of Section 11-14 of the Criminal Code of 1961 or the Criminal Code of 2012 may occur only once with respect to any person.

(i) If a person is convicted of an offense under this Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act within 5 years subsequent to a discharge and dismissal under this Section, the discharge and dismissal under this Section shall be admissible in the sentencing proceeding for that conviction as a factor in aggravation.

(j) Notwithstanding subsection (a), before a person is sentenced to probation under this Section, the court may refer the person to the drug court established in that judicial circuit pursuant to Section 15 of the Drug Court Treatment Act. The drug court team shall evaluate the person's likelihood of successfully completing a sentence of probation under this Section and shall report the results of its evaluation to the court. If the drug court team finds that the person suffers from a substance abuse problem that makes him or her

substantially unlikely to successfully complete a sentence of probation under this Section, then the drug court shall set forth its findings in the form of a written order, and the person shall not be sentenced to probation under this Section, but may be considered for the drug court program.

(Source: P.A. 98-164, eff. 1-1-14; 99-480, eff. 9-9-15.)

Section 10. The Illinois Controlled Substances Act is amended by changing Section 410 as follows:

(720 ILCS 570/410) (from Ch. 56 1/2, par. 1410)

Sec. 410. (a) Whenever any person who has not previously been convicted of, or placed on probation or court supervision for any offense under this Act or any law of the United States or of any State relating to cannabis or controlled substances, pleads guilty to or is found guilty of possession of a controlled or counterfeit substance under subsection (c) of Section 402 or of unauthorized possession of prescription form under Section 406.2, the court, without entering a judgment and with the consent of such person, may sentence him or her to probation.

(b) When a person is placed on probation, the court shall enter an order specifying a period of probation of 24 months and shall defer further proceedings in the case until the conclusion of the period or until the filing of a petition alleging violation of a term or condition of probation. At the

time the person is placed on probation, the court shall set a date at the conclusion of the period to determine whether the person has complied with the terms and conditions of probation.

(c) The conditions of probation shall be that the person: (1) not violate any criminal statute of any jurisdiction; (2) refrain from possessing a firearm or other dangerous weapon; (3) submit to periodic drug testing at a time and in a manner as ordered by the court, but no less than 3 times during the period of the probation, with the cost of the testing to be paid by the probationer; and (4) perform no less than 30 hours of community service, provided community service is available in the jurisdiction and is funded and approved by the county board.

(d) The court may, in addition to other conditions, require that the person:

(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed by the court in the order of probation;

(2) pay a fine and costs;

(3) work or pursue a course of study or vocational training;

(4) undergo medical or psychiatric treatment; or treatment or rehabilitation approved by the Illinois Department of Human Services;

(5) attend or reside in a facility established for the

instruction or residence of defendants on probation;

(6) support his or her dependents;

(6-5) refrain from having in his or her body the presence of any illicit drug prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, unless prescribed by a physician, and submit samples of his or her blood or urine or both for tests to determine the presence of any illicit drug;

(7) and in addition, if a minor:

(i) reside with his or her parents or in a foster home;

(ii) attend school;

(iii) attend a non-residential program for youth;

(iv) contribute to his or her own support at home or in a foster home.

(e) Upon violation of a term or condition of probation, the court may enter a judgment on its original finding of guilt and proceed as otherwise provided.

(f) At the conclusion of the period of probation, if the court determines that the person has complied with ~~Upon fulfillment of~~ the terms and conditions of probation, the court shall discharge the person and dismiss the proceedings against him or her.

(g) A disposition of probation is considered to be a conviction for the purposes of imposing the conditions of

probation and for appeal, however, discharge and dismissal under this Section is not a conviction for purposes of this Act or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.

(h) There may be only one discharge and dismissal under this Section, Section 10 of the Cannabis Control Act, Section 70 of the Methamphetamine Control and Community Protection Act, Section 5-6-3.3 or 5-6-3.4 of the Unified Code of Corrections, or subsection (c) of Section 11-14 of the Criminal Code of 1961 or the Criminal Code of 2012 with respect to any person.

(i) If a person is convicted of an offense under this Act, the Cannabis Control Act, or the Methamphetamine Control and Community Protection Act within 5 years subsequent to a discharge and dismissal under this Section, the discharge and dismissal under this Section shall be admissible in the sentencing proceeding for that conviction as evidence in aggravation.

(j) Notwithstanding subsection (a), before a person is sentenced to probation under this Section, the court may refer the person to the drug court established in that judicial circuit pursuant to Section 15 of the Drug Court Treatment Act. The drug court team shall evaluate the person's likelihood of successfully completing a sentence of probation under this Section and shall report the results of its evaluation to the court. If the drug court team finds that the person suffers from a substance abuse problem that makes him or her

substantially unlikely to successfully complete a sentence of probation under this Section, then the drug court shall set forth its findings in the form of a written order, and the person shall not be sentenced to probation under this Section, but may be considered for the drug court program.

(Source: P.A. 98-164, eff. 1-1-14; 99-480, eff. 9-9-15.)

Section 15. The Methamphetamine Control and Community Protection Act is amended by changing Section 70 as follows:

(720 ILCS 646/70)

Sec. 70. Probation.

(a) Whenever any person who has not previously been convicted of, or placed on probation or court supervision for any offense under this Act, the Illinois Controlled Substances Act, the Cannabis Control Act, or any law of the United States or of any state relating to cannabis or controlled substances, pleads guilty to or is found guilty of possession of less than 15 grams of methamphetamine under paragraph (1) or (2) of subsection (b) of Section 60 of this Act, the court, without entering a judgment and with the consent of the person, may sentence him or her to probation.

(b) When a person is placed on probation, the court shall enter an order specifying a period of probation of 24 months and shall defer further proceedings in the case until the conclusion of the period or until the filing of a petition

alleging violation of a term or condition of probation. At the time the person is placed on probation, the court shall set a date at the conclusion of the period to determine whether the person has complied with the terms and conditions of probation.

(c) The conditions of probation shall be that the person:

(1) not violate any criminal statute of any jurisdiction;

(2) refrain from possessing a firearm or other dangerous weapon;

(3) submit to periodic drug testing at a time and in a manner as ordered by the court, but no less than 3 times during the period of the probation, with the cost of the testing to be paid by the probationer; and

(4) perform no less than 30 hours of community service, if community service is available in the jurisdiction and is funded and approved by the county board.

(d) The court may, in addition to other conditions, require that the person take one or more of the following actions:

(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed by the court in the order of probation;

(2) pay a fine and costs;

(3) work or pursue a course of study or vocational training;

(4) undergo medical or psychiatric treatment; or

treatment or rehabilitation approved by the Illinois Department of Human Services;

(5) attend or reside in a facility established for the instruction or residence of defendants on probation;

(6) support his or her dependents;

(7) refrain from having in his or her body the presence of any illicit drug prohibited by this Act, the Cannabis Control Act, or the Illinois Controlled Substances Act, unless prescribed by a physician, and submit samples of his or her blood or urine or both for tests to determine the presence of any illicit drug; or

(8) if a minor:

(i) reside with his or her parents or in a foster home;

(ii) attend school;

(iii) attend a non-residential program for youth; or

(iv) contribute to his or her own support at home or in a foster home.

(e) Upon violation of a term or condition of probation, the court may enter a judgment on its original finding of guilt and proceed as otherwise provided.

(f) At the conclusion of the period of probation, if the court determines that the person has complied with ~~Upon fulfillment of~~ the terms and conditions of probation, the court shall discharge the person and dismiss the proceedings against

the person.

(g) A disposition of probation is considered to be a conviction for the purposes of imposing the conditions of probation and for appeal, however, discharge and dismissal under this Section is not a conviction for purposes of this Act or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.

(h) There may be only one discharge and dismissal under this Section, Section 410 of the Illinois Controlled Substances Act, Section 10 of the Cannabis Control Act, Section 5-6-3.3 or 5-6-3.4 of the Unified Code of Corrections, or subsection (c) of Section 11-14 of the Criminal Code of 1961 or the Criminal Code of 2012 with respect to any person.

(i) If a person is convicted of an offense under this Act, the Cannabis Control Act, or the Illinois Controlled Substances Act within 5 years subsequent to a discharge and dismissal under this Section, the discharge and dismissal under this Section are admissible in the sentencing proceeding for that conviction as evidence in aggravation.

(j) Notwithstanding subsection (a), before a person is sentenced to probation under this Section, the court may refer the person to the drug court established in that judicial circuit pursuant to Section 15 of the Drug Court Treatment Act. The drug court team shall evaluate the person's likelihood of successfully completing a sentence of probation under this Section and shall report the results of its evaluation to the

court. If the drug court team finds that the person suffers from a substance abuse problem that makes him or her substantially unlikely to successfully complete a sentence of probation under this Section, then the drug court shall set forth its findings in the form of a written order, and the person shall not be sentenced to probation under this Section, but may be considered for the drug court program.

(Source: P.A. 98-164, eff. 1-1-14; 99-480, eff. 9-9-15.)

Section 20. The Code of Criminal Procedure of 1963 is amended by changing Section 110-14 as follows:

(725 ILCS 5/110-14) (from Ch. 38, par. 110-14)

Sec. 110-14. Credit for Incarceration on Bailable Offense.

(a) Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $20 ~~$5~~ for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine.

(b) Subsection (a) does not apply to a person incarcerated for sexual assault as defined in paragraph (1) of subsection (a) of Section 5-9-1.7 of the Unified Code of Corrections.

(Source: P.A. 93-699, eff. 1-1-05.)

Section 25. The Unified Code of Corrections is amended by

changing Sections 5-3-2 and 5-6-3.1 as follows:

(730 ILCS 5/5-3-2) (from Ch. 38, par. 1005-3-2)

Sec. 5-3-2. Presentence Report.

(a) In felony cases, the presentence report shall set forth:

(1) the defendant's history of delinquency or criminality, physical and mental history and condition, family situation and background, economic status, education, occupation and personal habits;

(2) information about special resources within the community which might be available to assist the defendant's rehabilitation, including treatment centers, residential facilities, vocational training services, correctional manpower programs, employment opportunities, special educational programs, alcohol and drug abuse programming, psychiatric and marriage counseling, and other programs and facilities which could aid the defendant's successful reintegration into society;

(3) the effect the offense committed has had upon the victim or victims thereof, and any compensatory benefit that various sentencing alternatives would confer on such victim or victims;

(3.5) information provided by the victim's spouse, guardian, parent, grandparent, and other immediate family and household members about the effect the offense

committed has had on the victim and on the person providing the information; if the victim's spouse, guardian, parent, grandparent, or other immediate family or household member has provided a written statement, the statement shall be attached to the report;

(4) information concerning the defendant's status since arrest, including his record if released on his own recognizance, or the defendant's achievement record if released on a conditional pre-trial supervision program;

(5) when appropriate, a plan, based upon the personal, economic and social adjustment needs of the defendant, utilizing public and private community resources as an alternative to institutional sentencing;

(6) any other matters that the investigatory officer deems relevant or the court directs to be included; ~~and~~

(7) information concerning defendant's eligibility for a sentence to a county impact incarceration program under Section 5-8-1.2 of this Code; and ~~.~~

(8) the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections.

(b) The investigation shall include a physical and mental examination of the defendant when so ordered by the court. If the court determines that such an examination should be made, it shall issue an order that the defendant submit to examination at such time and place as designated by the court

and that such examination be conducted by a physician, psychologist or psychiatrist designated by the court. Such an examination may be conducted in a court clinic if so ordered by the court. The cost of such examination shall be paid by the county in which the trial is held.

(b-5) In cases involving felony sex offenses in which the offender is being considered for probation only or any felony offense that is sexually motivated as defined in the Sex Offender Management Board Act in which the offender is being considered for probation only, the investigation shall include a sex offender evaluation by an evaluator approved by the Board and conducted in conformance with the standards developed under the Sex Offender Management Board Act. In cases in which the offender is being considered for any mandatory prison sentence, the investigation shall not include a sex offender evaluation.

(c) In misdemeanor, business offense or petty offense cases, except as specified in subsection (d) of this Section, when a presentence report has been ordered by the court, such presentence report shall contain information on the defendant's history of delinquency or criminality and shall further contain only those matters listed in any of paragraphs (1) through (6) of subsection (a) or in subsection (b) of this Section as are specified by the court in its order for the report.

(d) In cases under Sections 11-1.50, 12-15, and 12-3.4 or 12-30 of the Criminal Code of 1961 or the Criminal Code of

2012, the presentence report shall set forth information about alcohol, drug abuse, psychiatric, and marriage counseling or other treatment programs and facilities, information on the defendant's history of delinquency or criminality, and shall contain those additional matters listed in any of paragraphs (1) through (6) of subsection (a) or in subsection (b) of this Section as are specified by the court.

(e) Nothing in this Section shall cause the defendant to be held without bail or to have his bail revoked for the purpose of preparing the presentence report or making an examination. (Source: P.A. 97-1109, eff. 1-1-13; 97-1150, eff. 1-25-13; 98-372, eff. 1-1-14.)

(730 ILCS 5/5-6-3.1) (from Ch. 38, par. 1005-6-3.1)

Sec. 5-6-3.1. Incidents and conditions of supervision.

(a) When a defendant is placed on supervision, the court shall enter an order for supervision specifying the period of such supervision, and shall defer further proceedings in the case until the conclusion of the period. <u>At the time a defendant is placed on supervision, the court shall set a date at the conclusion of the period to determine whether the defendant has complied with the conditions of supervision.</u>

(b) The period of supervision shall be reasonable under all of the circumstances of the case, but may not be longer than 2 years, unless the defendant has failed to pay the assessment required by Section 10.3 of the Cannabis Control Act, Section

411.2 of the Illinois Controlled Substances Act, or Section 80 of the Methamphetamine Control and Community Protection Act, in which case the court may extend supervision beyond 2 years. Additionally, the court shall order the defendant to perform no less than 30 hours of community service and not more than 120 hours of community service, if community service is available in the jurisdiction and is funded and approved by the county board where the offense was committed, when the offense (1) was related to or in furtherance of the criminal activities of an organized gang or was motivated by the defendant's membership in or allegiance to an organized gang; or (2) is a violation of any Section of Article 24 of the Criminal Code of 1961 or the Criminal Code of 2012 where a disposition of supervision is not prohibited by Section 5-6-1 of this Code. The community service shall include, but not be limited to, the cleanup and repair of any damage caused by violation of Section 21-1.3 of the Criminal Code of 1961 or the Criminal Code of 2012 and similar damages to property located within the municipality or county in which the violation occurred. Where possible and reasonable, the community service should be performed in the offender's neighborhood.

For the purposes of this Section, "organized gang" has the meaning ascribed to it in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act.

(c) The court may in addition to other reasonable conditions relating to the nature of the offense or the

rehabilitation of the defendant as determined for each defendant in the proper discretion of the court require that the person:

(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed by the court in the order of supervision;

(2) pay a fine and costs;

(3) work or pursue a course of study or vocational training;

(4) undergo medical, psychological or psychiatric treatment; or treatment for drug addiction or alcoholism;

(5) attend or reside in a facility established for the instruction or residence of defendants on probation;

(6) support his dependents;

(7) refrain from possessing a firearm or other dangerous weapon;

(8) and in addition, if a minor:

(i) reside with his parents or in a foster home;

(ii) attend school;

(iii) attend a non-residential program for youth;

(iv) contribute to his own support at home or in a foster home; or

(v) with the consent of the superintendent of the facility, attend an educational program at a facility other than the school in which the offense was

committed if he or she is placed on supervision for a crime of violence as defined in Section 2 of the Crime Victims Compensation Act committed in a school, on the real property comprising a school, or within 1,000 feet of the real property comprising a school;

(9) make restitution or reparation in an amount not to exceed actual loss or damage to property and pecuniary loss or make restitution under Section 5-5-6 to a domestic violence shelter. The court shall determine the amount and conditions of payment;

(10) perform some reasonable public or community service;

(11) comply with the terms and conditions of an order of protection issued by the court pursuant to the Illinois Domestic Violence Act of 1986 or an order of protection issued by the court of another state, tribe, or United States territory. If the court has ordered the defendant to make a report and appear in person under paragraph (1) of this subsection, a copy of the order of protection shall be transmitted to the person or agency so designated by the court;

(12) reimburse any "local anti-crime program" as defined in Section 7 of the Anti-Crime Advisory Council Act for any reasonable expenses incurred by the program on the offender's case, not to exceed the maximum amount of the fine authorized for the offense for which the defendant was

sentenced;

(13) contribute a reasonable sum of money, not to exceed the maximum amount of the fine authorized for the offense for which the defendant was sentenced, (i) to a "local anti-crime program", as defined in Section 7 of the Anti-Crime Advisory Council Act, or (ii) for offenses under the jurisdiction of the Department of Natural Resources, to the fund established by the Department of Natural Resources for the purchase of evidence for investigation purposes and to conduct investigations as outlined in Section 805-105 of the Department of Natural Resources (Conservation) Law;

(14) refrain from entering into a designated geographic area except upon such terms as the court finds appropriate. Such terms may include consideration of the purpose of the entry, the time of day, other persons accompanying the defendant, and advance approval by a probation officer;

(15) refrain from having any contact, directly or indirectly, with certain specified persons or particular types of person, including but not limited to members of street gangs and drug users or dealers;

(16) refrain from having in his or her body the presence of any illicit drug prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, unless prescribed by a physician, and submit samples of his

or her blood or urine or both for tests to determine the presence of any illicit drug;

(17) refrain from operating any motor vehicle not equipped with an ignition interlock device as defined in Section 1-129.1 of the Illinois Vehicle Code; under this condition the court may allow a defendant who is not self-employed to operate a vehicle owned by the defendant's employer that is not equipped with an ignition interlock device in the course and scope of the defendant's employment; and

(18) if placed on supervision for a sex offense as defined in subsection (a-5) of Section 3-1-2 of this Code, unless the offender is a parent or guardian of the person under 18 years of age present in the home and no non-familial minors are present, not participate in a holiday event involving children under 18 years of age, such as distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter.

(c-5) If payment of restitution as ordered has not been made, the victim shall file a petition notifying the sentencing court, any other person to whom restitution is owed, and the State's Attorney of the status of the ordered restitution payments unpaid at least 90 days before the supervision

expiration date. If payment as ordered has not been made, the court shall hold a review hearing prior to the expiration date, unless the hearing is voluntarily waived by the defendant with the knowledge that waiver may result in an extension of the supervision period or in a revocation of supervision. If the court does not extend supervision, it shall issue a judgment for the unpaid restitution and direct the clerk of the circuit court to file and enter the judgment in the judgment and lien docket, without fee, unless it finds that the victim has recovered a judgment against the defendant for the amount covered by the restitution order. If the court issues a judgment for the unpaid restitution, the court shall send to the defendant at his or her last known address written notification that a civil judgment has been issued for the unpaid restitution.

(d) The court shall defer entering any judgment on the charges until the conclusion of the supervision.

(e) At the conclusion of the period of supervision, if the court determines that the defendant has successfully complied with all of the conditions of supervision, the court shall discharge the defendant and enter a judgment dismissing the charges.

(f) Discharge and dismissal upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law

upon conviction of a crime. Two years after the discharge and dismissal under this Section, unless the disposition of supervision was for a violation of Sections 3-707, 3-708, 3-710, 5-401.3, or 11-503 of the Illinois Vehicle Code or a similar provision of a local ordinance, or for a violation of Sections 12-3.2, 16-25, or 16A-3 of the Criminal Code of 1961 or the Criminal Code of 2012, in which case it shall be 5 years after discharge and dismissal, a person may have his record of arrest sealed or expunged as may be provided by law. However, any defendant placed on supervision before January 1, 1980, may move for sealing or expungement of his arrest record, as provided by law, at any time after discharge and dismissal under this Section. A person placed on supervision for a sexual offense committed against a minor as defined in clause (a)(1)(L) of Section 5.2 of the Criminal Identification Act or for a violation of Section 11-501 of the Illinois Vehicle Code or a similar provision of a local ordinance shall not have his or her record of arrest sealed or expunged.

(g) A defendant placed on supervision and who during the period of supervision undergoes mandatory drug or alcohol testing, or both, or is assigned to be placed on an approved electronic monitoring device, shall be ordered to pay the costs incidental to such mandatory drug or alcohol testing, or both, and costs incidental to such approved electronic monitoring in accordance with the defendant's ability to pay those costs. The county board with the concurrence of the Chief Judge of the

judicial circuit in which the county is located shall establish reasonable fees for the cost of maintenance, testing, and incidental expenses related to the mandatory drug or alcohol testing, or both, and all costs incidental to approved electronic monitoring, of all defendants placed on supervision. The concurrence of the Chief Judge shall be in the form of an administrative order. The fees shall be collected by the clerk of the circuit court, except as provided in an administrative order of the Chief Judge of the circuit court. The clerk of the circuit court shall pay all moneys collected from these fees to the county treasurer who shall use the moneys collected to defray the costs of drug testing, alcohol testing, and electronic monitoring. The county treasurer shall deposit the fees collected in the county working cash fund under Section 6-27001 or Section 6-29002 of the Counties Code, as the case may be.

The Chief Judge of the circuit court of the county may by administrative order establish a program for electronic monitoring of offenders, in which a vendor supplies and monitors the operation of the electronic monitoring device, and collects the fees on behalf of the county. The program shall include provisions for indigent offenders and the collection of unpaid fees. The program shall not unduly burden the offender and shall be subject to review by the Chief Judge.

The Chief Judge of the circuit court may suspend any additional charges or fees for late payment, interest, or

damage to any device.

(h) A disposition of supervision is a final order for the purposes of appeal.

(i) The court shall impose upon a defendant placed on supervision after January 1, 1992 or to community service under the supervision of a probation or court services department after January 1, 2004, as a condition of supervision or supervised community service, a fee of $50 for each month of supervision or supervised community service ordered by the court, unless after determining the inability of the person placed on supervision or supervised community service to pay the fee, the court assesses a lesser fee. The court may not impose the fee on a minor who is made a ward of the State under the Juvenile Court Act of 1987 while the minor is in placement. The fee shall be imposed only upon a defendant who is actively supervised by the probation and court services department. The fee shall be collected by the clerk of the circuit court. The clerk of the circuit court shall pay all monies collected from this fee to the county treasurer for deposit in the probation and court services fund pursuant to Section 15.1 of the Probation and Probation Officers Act.

A circuit court may not impose a probation fee in excess of $25 per month unless the circuit court has adopted, by administrative order issued by the chief judge, a standard probation fee guide determining an offender's ability to pay. Of the amount collected as a probation fee, not to exceed $5 of

that fee collected per month may be used to provide services to crime victims and their families.

The Court may only waive probation fees based on an offender's ability to pay. The probation department may re-evaluate an offender's ability to pay every 6 months, and, with the approval of the Director of Court Services or the Chief Probation Officer, adjust the monthly fee amount. An offender may elect to pay probation fees due in a lump sum. Any offender that has been assigned to the supervision of a probation department, or has been transferred either under subsection (h) of this Section or under any interstate compact, shall be required to pay probation fees to the department supervising the offender, based on the offender's ability to pay.

(j) All fines and costs imposed under this Section for any violation of Chapters 3, 4, 6, and 11 of the Illinois Vehicle Code, or a similar provision of a local ordinance, and any violation of the Child Passenger Protection Act, or a similar provision of a local ordinance, shall be collected and disbursed by the circuit clerk as provided under Section 27.5 of the Clerks of Courts Act.

(k) A defendant at least 17 years of age who is placed on supervision for a misdemeanor in a county of 3,000,000 or more inhabitants and who has not been previously convicted of a misdemeanor or felony may as a condition of his or her supervision be required by the court to attend educational

courses designed to prepare the defendant for a high school diploma and to work toward a high school diploma or to work toward passing high school equivalency testing or to work toward completing a vocational training program approved by the court. The defendant placed on supervision must attend a public institution of education to obtain the educational or vocational training required by this subsection (k). The defendant placed on supervision shall be required to pay for the cost of the educational courses or high school equivalency testing if a fee is charged for those courses or testing. The court shall revoke the supervision of a person who wilfully fails to comply with this subsection (k). The court shall resentence the defendant upon revocation of supervision as provided in Section 5-6-4. This subsection (k) does not apply to a defendant who has a high school diploma or has successfully passed high school equivalency testing. This subsection (k) does not apply to a defendant who is determined by the court to be a person with a developmental disability or otherwise mentally incapable of completing the educational or vocational program.

(l) The court shall require a defendant placed on supervision for possession of a substance prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act after a previous conviction or disposition of supervision for possession of a substance prohibited by the Cannabis Control

Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act or a sentence of probation under Section 10 of the Cannabis Control Act or Section 410 of the Illinois Controlled Substances Act and after a finding by the court that the person is addicted, to undergo treatment at a substance abuse program approved by the court.

(m) The Secretary of State shall require anyone placed on court supervision for a violation of Section 3-707 of the Illinois Vehicle Code or a similar provision of a local ordinance to give proof of his or her financial responsibility as defined in Section 7-315 of the Illinois Vehicle Code. The proof shall be maintained by the individual in a manner satisfactory to the Secretary of State for a minimum period of 3 years after the date the proof is first filed. The proof shall be limited to a single action per arrest and may not be affected by any post-sentence disposition. The Secretary of State shall suspend the driver's license of any person determined by the Secretary to be in violation of this subsection.

(n) Any offender placed on supervision for any offense that the court or probation department has determined to be sexually motivated as defined in the Sex Offender Management Board Act shall be required to refrain from any contact, directly or indirectly, with any persons specified by the court and shall be available for all evaluations and treatment programs

required by the court or the probation department.

(o) An offender placed on supervision for a sex offense as defined in the Sex Offender Management Board Act shall refrain from residing at the same address or in the same condominium unit or apartment unit or in the same condominium complex or apartment complex with another person he or she knows or reasonably should know is a convicted sex offender or has been placed on supervision for a sex offense. The provisions of this subsection (o) do not apply to a person convicted of a sex offense who is placed in a Department of Corrections licensed transitional housing facility for sex offenders.

(p) An offender placed on supervision for an offense committed on or after June 1, 2008 (the effective date of Public Act 95-464) that would qualify the accused as a child sex offender as defined in Section 11-9.3 or 11-9.4 of the Criminal Code of 1961 or the Criminal Code of 2012 shall refrain from communicating with or contacting, by means of the Internet, a person who is not related to the accused and whom the accused reasonably believes to be under 18 years of age. For purposes of this subsection (p), "Internet" has the meaning ascribed to it in Section 16-0.1 of the Criminal Code of 2012; and a person is not related to the accused if the person is not: (i) the spouse, brother, or sister of the accused; (ii) a descendant of the accused; (iii) a first or second cousin of the accused; or (iv) a step-child or adopted child of the accused.

(q) An offender placed on supervision for an offense committed on or after June 1, 2008 (the effective date of Public Act 95-464) that would qualify the accused as a child sex offender as defined in Section 11-9.3 or 11-9.4 of the Criminal Code of 1961 or the Criminal Code of 2012 shall, if so ordered by the court, refrain from communicating with or contacting, by means of the Internet, a person who is related to the accused and whom the accused reasonably believes to be under 18 years of age. For purposes of this subsection (q), "Internet" has the meaning ascribed to it in Section 16-0.1 of the Criminal Code of 2012; and a person is related to the accused if the person is: (i) the spouse, brother, or sister of the accused; (ii) a descendant of the accused; (iii) a first or second cousin of the accused; or (iv) a step-child or adopted child of the accused.

(r) An offender placed on supervision for an offense under Section 11-6, 11-9.1, 11-14.4 that involves soliciting for a juvenile prostitute, 11-15.1, 11-20.1, 11-20.1B, 11-20.3, or 11-21 of the Criminal Code of 1961 or the Criminal Code of 2012, or any attempt to commit any of these offenses, committed on or after June 1, 2009 (the effective date of Public Act 95-983) ~~this amendatory Act of the 95th General Assembly~~ shall:

(i) not access or use a computer or any other device with Internet capability without the prior written approval of the court, except in connection with the offender's employment or search for employment with the

prior approval of the court;

(ii) submit to periodic unannounced examinations of the offender's computer or any other device with Internet capability by the offender's probation officer, a law enforcement officer, or assigned computer or information technology specialist, including the retrieval and copying of all data from the computer or device and any internal or external peripherals and removal of such information, equipment, or device to conduct a more thorough inspection;

(iii) submit to the installation on the offender's computer or device with Internet capability, at the offender's expense, of one or more hardware or software systems to monitor the Internet use; and

(iv) submit to any other appropriate restrictions concerning the offender's use of or access to a computer or any other device with Internet capability imposed by the court.

(s) An offender placed on supervision for an offense that is a sex offense as defined in Section 2 of the Sex Offender Registration Act that is committed on or after January 1, 2010 (the effective date of Public Act 96-362) that requires the person to register as a sex offender under that Act, may not knowingly use any computer scrub software on any computer that the sex offender uses.

(t) An offender placed on supervision for a sex offense as defined in the Sex Offender Registration Act committed on or

after January 1, 2010 (the effective date of Public Act 96-262) shall refrain from accessing or using a social networking website as defined in Section 17-0.5 of the Criminal Code of 2012.

(u) Jurisdiction over an offender may be transferred from the sentencing court to the court of another circuit with the concurrence of both courts. Further transfers or retransfers of jurisdiction are also authorized in the same manner. The court to which jurisdiction has been transferred shall have the same powers as the sentencing court. The probation department within the circuit to which jurisdiction has been transferred may impose probation fees upon receiving the transferred offender, as provided in subsection (i). The probation department from the original sentencing court shall retain all probation fees collected prior to the transfer.

(Source: P.A. 98-718, eff. 1-1-15; 98-940, eff. 1-1-15; 99-78, eff. 7-20-15; 99-143, eff. 7-27-15; 99-642, eff. 7-28-16; 99-797, eff. 8-12-16; revised 9-1-16.)

PROPOSAL NO. 100-6

Memo

TO: ISBA Committees and Section Councils

FROM: International and Immigration Law Section Council
Patrick M. Kinnally, Chair
Cindy G. Buys, Legislative Liaison

DATE: August --, 2016

RE: 725 ILCS 5/113-8

The International and Immigration Law Section Council urges the Illinois State Bar Association to support an amendment to 725 ILSC 5/113-8 relating to guilty pleas to improve compliance with judicial notification of the immigration consequences of guilty pleas.

Text of the proposed amendment (new language is underlined)

> Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:
>
> "If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States."
>
> Any plea accepted by the court without the benefit of this advisement shall be a nullity and shall have no consequences [if challenged/if the defendant so requests].

Background

In January 2004, the Illinois General Assembly passed an amendment to the Illinois Criminal Statute which says:

> Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:
>
> "If you are not a citizen of the United States, you are hereby advised that

conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States."

* * *

725 ILCS 5/113-8 (emphasis added)

Prior to that time, persons who were not U.S. citizens sometimes accepted guilty pleas without understanding that they could face deportation from the United States in addition to the agreed upon criminal sanctions. The defendant was then unpleasantly surprised when, after having completed his criminal sentence, he was taken into immigration custody and placed in deportation proceedings. Many defendants claimed they would not have pled guilty if they had known it would mean almost certain deportation from the country, separating them from their families, jobs and homes. For some time, members of the trial bar pushed for this legislation (Moran and Kinnally, "Aliens, Guilty Pleas and the Risk of Deportation: Time for Legislative Action," Illinois Bar Journal (2001) Vol. 89, pp.194-198). As a result of the amendment to 725 ILCS 5/113-8, this warning is now posted on many courtroom walls or in hallways in circuit courts around the state.

Interpretation of 725 ILCS 5/113-8 by Illinois Courts

Despite the mandatory language of the statute, some trial judges are not giving this required admonition. Some judges may believe the posting of the notice of this advisement in court rooms is sufficient. Other judges may be relying on written agreements in court orders signed by the accused. But this is not what the law requires. Quite plainly, it directs:

***

"*the court shall give the following advisement to the defendant in open court*".

***

That language denotes it must be given, and insists, much like the waiver of a jury trial, it be announced in open court when the accused is present. See People v. Thornton, (2nd Dist. 2006) 363 Ill.App.3d 481.

Moreover, the statute says the court "shall" give the advisement as to a "misdemeanor or felony offense" in "open court". Since this statutory requirement is mandatory, a cogent argument can be made that such warning must be given orally by the trial court in open court. It does not suffice merely to have placards attached to courtroom walls which state such a caveat.

Lower courts in Illinois split on the issue of whether the failure to provide the admonishment would result in vacation of a guilty plea. One division of the First District Appellate Court held the trial court's failure to give the admonishment did not permit the defendant to vacate his guilty plea. See People v. Bilelgene (2008) 381 Ill.App.3d 292. But in People v. Del Villar (2008) 383 Ill.App.3d 80, another division vacated a plea where the admonishment was not announced in open court.

The Second District joined the Bilelgene majority opinion in concluding the language of the statute, even though it says the trial court "shall" give the admonishment, does not mean a trial judge has to do that. People v. Leon (2009) 387 Ill. App. 3d 1035 (Ill.App. 2d Dist.). This ruling ignores the definite requirement of a statute in the guise of what the court decrees as statutory interpretation. The Leon court found that even though the legislature said a trial judge shall give the admonition, the word "shall" does not mean "shall." And, because it did not, the imperative of giving the admonition was not mandatory but only directory.

To get to this result, the Leon court noted there was no statement in the legislation which indicated that any consequence would ensue if the trial judge failed to obey the statute. (People v. Robinson (2005) 217 Ill.43). It is true, as the Leon court observed, that whether a statute is mandatory or directory is a question of legislative intent. However, Leon fails to focus on what consequences flow from the failure to give the admonition. It seems quite obvious that the General Assembly was concerned that unknowing defendants, not judges, prosecutors, or defense attorneys, were entering into plea arguments – contracts with the government – that were not undertaken with full knowledge of the consequences of the deal they were making. See People v. Reed (1997) 177 Ill.2d 389; People v. Youngbey (1980) 82 Ill.2d 556 The Leon tribunal ignored the fact that plea agreements are contracts that require the parties who enter into them must do so with full knowledge of all the terms of such a pact.

Instead, the Leon court focused on the "type of plea" which dictates whether the admonition must be given. Apparently, the variety of a plea only applies to people who are immigrants, whether documented or otherwise. The court observed the statute would also apply to every citizen, which the legislature could never have intended. This is odd logic for two reasons: although there may be different kinds of plea agreements (Alford, etc.) such contracts are not generally classified on citizenship status (or lack thereof). The statute does not classify whether a person is a permanent resident alien, is undocumented, or is a citizen. It applies to all defendants. Next, the legislature did say trial courts need to give the admonishment to every defendant in plain and concise terms and in "open court". The legislature did not say you only give such a warning to non-citizens in some other venue such as chambers.

In reversing the Appellate Court in Del Villar, the Supreme Court effectively has rendered the Illinois guilty plea admonishment statute toothless. (People v. Del Villar, 235 Ill. 2d. 507 (2009) ("Del Villar").

Leobardo Del Villar, at a circuit court hearing on November 2, 2005, pleaded guilty to aggravated unlawful use of a weapon by a felon. Before doing so, the trial judge asked him whether he was entering into the plea agreement in return for a sentence recommendation, freely and voluntarily. He answered affirmatively. The trial court next asked, "Are you a citizen of the United States?" and Del Villar said, "Yes." Sentencing was deferred until the end of November, when a term of four years imprisonment was to be imposed.

Two weeks later, Del Villar asked the trial court to vacate his plea stating he was a legal permanent resident alien, not a United States citizen, and the trial court failed to admonish him consistent with 725 ILCS 5/113-8. The trial court refused the request because Del Villar had lied

to the court in November about his citizenship status. The Appellate Court reversed, stating the trial court was required by the statute to warn Del Villar based on the statute's plain and mandatory language. The Supreme Court disagreed, and reinstated Del Villar's plea based on the guilty plea he sought to withdraw in the trial court.

The plain language of the statute says, "The trial court shall give the following advisement to the defendant in open court". This would seem to be a straightforward command that a lay person reading the statute would understand. However, in a bifurcated analysis predicated on a thirty-year-old California Supreme Court opinion (Morris v. County of Marin, (1977) 18 Cal. 3d 901, 908) (Marin), the Illinois Supreme Court said the admonition statute posed two questions: (a) whether the statute is mandatory or permissive; and (b) whether the statute is mandatory or directory. (see, e.g., People v. Robinson (2005) 217 Ill. 2d 43). Even though the initial inquiry may find a statue to incorporate an obligatory duty (*i.e.*, "the trial court shall give the advisement"), according to the Supreme Court, it is the resolution of the second question that determines whether a statute is truly mandatory. Thus, if the statute does not contain a provision which dictates a particular consequence for noncompliance by the governmental actor, it is directory in nature. The upshot being, in Del Villar's situation, there is no consequence for the trial court's failure to admonish him.

This interpretation of a legislative decree is remiss for various reasons. It relies on People v. Huante (1991) 143 Ill.2d 61, for the proposition that immigration consequences relating to a guilty plea and subsequent conviction are collateral to that process. Huante did not involve a legislative decree. Rather, Huante involved a claim of ineffective assistance of counsel under the Sixth Amendment due to the attorney's failure to properly advise his client of the immigration consequences regarding entering a plea consistent. The admonishment statute is not an interaction between a client and a lawyer: it is a governmental duty, the work of a trial judge, which has been created by the legislature.

In addition, the issue in Del Villar is one of procedural default: namely, the trial court's failure to do what that statue requires. Indeed, the trial court asked Del Villar if he was a United States citizen. Later, when the trial court learned Del Villar was a non-citizen, he refused to admonish him because of his prior prevarication. The fact remains, however, he is still a non-citizen and the consequences which flow from that status are the ones the statute sought to address at the time the plea was entered, whether or not he lied about his immigration status.

Understandably, the trial court was concerned, as it should be, that Del Villar lied to the court. Yet, this does not diminish the court's responsibility to comply with the statute, and ensure the plea Del Villar was agreeing to was knowing and voluntary.

Lastly, the court's reliance on Marin, a decision of the California Supreme Court, is troubling. Procedurally, it is very doubtful that members of our Illinois General Assembly were reading California jurisprudence as to how the statutes they enact should be interpreted at the time the admonition statute was drafted. Also, the court's mandatory/directory analysis in People v. Robinson postdates the admonition statute's effective date.

On substantive level, as Justice Freeman observed in his concurring opinion in Del Villar, the majority opinion's two-part test for determining when a statute is mandatory is confusing to say the least. Although the Marin court acknowledged the interpretive dichotomy of mandatory/permissive and mandatory/directory, it rejected its application to the facts of the case before it. Marin had nothing to do admonishing defendants in Illinois trial courts or California tribunals.

Whether one agrees with the requirement of advising any defendant, citizen or otherwise, of the consequences relating to a plea of guilty is not the issue, but the law. 725 ILCS 5/113-8 is not a Supreme Court Rule, but a law enacted by the Illinois legislature. Where the purpose of such legislation is to ensure that a defendant "knowingly and voluntarily" makes an agreement (*i.e.*, guilty plea), then the analysis cannot proceed based on statutory interpretation alone. The statute's purpose, as it states, is that a trial judge is to advise the defendant of the potential consequences a conviction may create with respect to "deportation, exclusion from the United States or denial of naturalization under the laws of the United States." This is not a passive role, but one that ensures a guilty plea is knowing, voluntary and informed. It cannot be collateral to a conviction when it is the judge's job to ensure the plea is knowing and voluntary and the admonition is the means to that end. The consequences of not complying with the statute must be the focus, and for non-citizens that consequence may be banishment to a country they never knew.

The purpose of the proposal is to make plain what the General Assembly stated over a decade ago, i.e., what 725 ILCS 5/113-8 means. The consequence of failing to give admonishment by a trial judge should denote the plea is a nullity; alternatively, it should accord the defendant the right to withdraw the guilty plea.

Accordingly, the International and Immigration Law Section Council requests that the ISBA support an amendment to 725 ILCS 5/113-8 to provide the specific consequence of nullification of a guilty plea entered without the benefit of a judicial admonishment regarding potential immigration consequences to ensure that this admonishment is considered mandatory by the Illinois courts.

ILLINOIS STATE BAR ASSOCIATION

SEPTEMBER 2016 VOL. 61 NO. 3

Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

What does "shall" mean?

BY PATRICK M. KINNALLY

People v. Geiler, 2016 IL 119095

At an early age, studying a Baltimore *Catechism* at Holy Angels grammar school, certain maxims were taught like, "Thou shall not steal," "Thou shall not commit adultery," "Thou shall not covet a neighbor's goods" (or a wife, for that matter). These tenets comprised, in part, the Ten Commandments. A juridical text of significant import we know. It seemed pretty clear what was declared. No wiggle room in that credo. Mandatory directives, moral imperatives, perhaps, but surely not permissive ones. Later, as an English major, I learned "shall" was largely an auxiliary verb, depending on the tense, which included certainty. Sometimes it could be modal with reference to what might happen in the future like, "I shall see you next week". Notwithstanding, the word even in law school, had inevitability. It denoted a directive, a compulsory meaning or an obligation.

American *jurisprudence* seems to have turned these concepts around. *People v. Geiler*, 2016 IL 1199095 ("*Geiler*"). The use of the word "shall" in a statute, apparently, is not dispositive of legislative intent, it seems. See, *Gananian v. Wagstaffe*, 199 Cal.

Continued on next page

Serving a dissolved company: *Isfan v. Longwood Tower*

BY HON. DANIEL T. GILLESPIE AND DANIEL BURLEY

When companies dissolve, creditors flock to collect their unpaid balances. But how does a party serve a dissolved entity? It depends on whether the company is a limited liability entity or a corporation. The distinction is important, as improperly serving a dissolved entity can scuttle a case.

Serving a dissolved limited liability company – rather than a dissolved corporation – was at the heart of *John Isfan Const. Inc. v. Longwood Towers, LLC.*[1] Isfan, a construction company, sued Longwood, a developer, for an alleged unpaid balance of $789,835. Isfan had performed remodeling work at the developer's 80-unit condominium complex on South Longwood Drive in Chicago.

Longwood, an Illinois limited

Continued on page 4

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

What does "shall" mean?

CONTINUED FROM PAGE 1

App.4th 1532 (2011).

Geiler is a run-of-the-mill case brought by Christopher Geiler ("Chris") a *pro se* defendant, involved in a traffic citation proceeding. Allegedly, he was driving 80 m.p.h. in a 65 m.p.h. speed zone. He was ticketed by a Troy, Illinois, police officer. Illinois Supreme Court Rule 552 said:

* * *

> The arresting officer *shall* complete the form or ticket, and within 48 hours after the arrest, *shall* transmit the portions entitled "Complaint" and "Disposition Report," and where appropriate "Report of Conviction" either in person or by mail to the Clerk of the Circuit court of the county in which the violation occurred.

* * *

Chris received his traffic citation on May 5, 2014. The arresting officer did not transmit it to the circuit court clerk until May 9, 2014. May 5, 2014, was a Monday. Clearly, the Supreme Court Rule was violated. The Trial and Appellate Courts found the rule was abrogated and dismissed the citation.

In its appeal, the State of Illinois argued the temporal requirement contained in Rule 552 is a directory, not a mandatory precept; and, unless Chris was prejudiced by the police officer's non-compliance, the mandatory character of the rule is permissive. But, compare *People v. Hanna*, 185 Ill.App.3d 404 (1989); *Geiler*, 2016 IL 1199095, (sl.op., pp. 4-5).

This argument is mistaken for two reasons. First, Chris will be prejudiced by the government's non-compliance with the Supreme Court Rule. He will likely have to pay a fine, if convicted. Because the government actor failed to do what the rule required; Chris suffers the consequence. Call it nonfeasance or misfeasance, the result inures to Chris. Next, the rule states the government actor *shall* make the transmission of the records: that never happened. If the government gets to make the rules, it should follow them. Citizens, of course, must follow the rules; so should the government. Official conduct should be held to a higher standard, not a lesser one.

Our Supreme Court did not see it that way. The Supreme Court relied on the mandatory-directory distinction of what "shall" means to determine the consequences of a failure by the government to fulfill a statutory obligation. In so doing, it told Chris "shall" does not denote the government actor had to comply with what the rule commanded. See, *People v.* Ziobro, 242 Ill.2d 34 (2011) (*"Ziobro"*); *People v. Delvillar*, 235 Ill.2d 507 (2009) (*"Delvillar"*); *People v. Robinson*, 217 Ill.2d 43 (2005) (*"Robinson"*). These precedents hold that a failure to comply with a procedural step by a government official will not have the result of invalidating the rule's operation. *Geiler*, 2016 IL 1199095, sl.op. at p. 5, citing *Morris v. County of Marin*, 559 P.2d 606 (Cal. 1977) (*"Marin"*).

The Supreme Court opined that procedural commands to government officials are presumed to be directory, not substantive. This seems unique. If a government actor *shall* perform an act that is an obligation, not a discretionary function, then that actor should be charged with the effect of his/her non-compliance. Relying on *Delvillar*, the Court concluded the act the rule requires only becomes mandatory if: negative language in the statute or rule prohibits further action if noncompliance ensues, (*i.e.*, a consequence); or the right the statute is designed to protect would generally be injured under a directory reading.

The Court concluded that the right Rule 552 is designed to protect is its own Rule, which is to ensure judicial uniformity and efficiency, as well as to expedite the handling of traffic cases. It found that judicial efficiency would not be injured under a directory reading of the rule. Finally, it observed that violation of the rule would not prejudice the rights of Chris. *Geiler*, sl.op. at p. 6. Evidently, since the

Trial Briefs

Published at least four times per year. Annual subscription rates for ISBA members: $25.

To subscribe, visit 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

EDITOR
James J. Ayres

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

rule contained no consequence if violated, "shall" did not mean it was obligatory.

Let's look at this protocol from a citizen's perspective. A rule created by the government says you cannot drive 80 mph in a 65 mph traffic zone. If you do, you violate the rule. Next, the rule says the person who enforces the rule shall transmit his report of the violation to the circuit clerk. He fails to do that. He infringes the rule, has knowledge of it; and is charged with performing the act(s) the rule requires. His transgression of the rule does not matter. In other words, the entity that makes the rule, and is to implement the rule, suffers no consequence for failing to do its job. Of course, this promotes citizen mistrust in government. That is not good policy, regardless of whether judicial efficiency is a paramount concern for traffic citations.

With respect, this decision is misguided. Its reliance on *Robinson, Delvillar* and *Ziobro* should be reconsidered. In *Robinson*, the issue was whether a circuit clerk served an order on time (s/he did not); in *Delvillar*, the issue was whether a circuit judge failed to admonish an immigrant defendant consistent with 725 ICLS 5/113-8 (he did not); in *Ziobro*, the issue was whether the arresting officer complied with Supreme Court Rule 504 (he did not).

In today's world, words denote what every man and woman understand them to announce. "Shall" means "shall", not "would", "should" or "may". And, it means much more to our citizens, like Chris, whom read what the law states to them in plain words we all comprehend.

In *Geiler, Robinson, Delvillar and Ziobro*, our Supreme Court relied on *Morris v. County of Marin* 136 Cal.Rptr. 251, 559 P.2d 606 (1977), a California Supreme Court precedent authored 40 years ago. Let's see what this opinion actually declares.

In 1972, Marin County had a rule which said to get a building permit, a contractor had to have a certificate of workers' compensation insurance. Marin County issued a permit to Guy Cahoon, a contractor, to perform construction work. Cahoon never had the insurance. After work commenced, Cahoon's employee, Morris, was severely injured on the job. Morris sued Marin County for failure to fulfill its statutory obligation to require workers' compensation insurance, and such failure proximately caused his uncompensated injuries.

Marin claimed the statute requiring it to ensure Cahoon had the insurance was not a mandatory duty. The statute said:

* * *

> Every county which requires the issuance of a permit as a condition precedent to construction . . . shall require that each applicant for such permit have on file . . . a certificate of insurance . . . of workers' compensation insurance. . . .

* * *

Marin, 559 P.2d 606, 610.

Marin claimed this statutory command was directory in nature. The statute did not provide any effect if the contractor, like Cahoon, did not have insurance. Nevertheless, the statute was held to be mandatory, not directory.

The distinction between what constitutes a mandatory duty of a government actor as opposed to what constitutes the directory or mandatory legal doctrine in statutory interpretation seems not only clumsy, but more of a means to get to what is perceived as to be an acceptable legislative intent. The doctrine goes like this. The directory or mandatory designation does not refer to whether a particular statutory requirement is "permissible" or obligatory" but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of abrogating the governmental action upon which the procedural requirement relates. *Marin*, 559 P.3d 611. Thus, in *Delvillar*, the trial court's procedural failure to admonish the accused in open court was not substantively mandatory since the statute carried no consequence for non-performance.

The holdings in *Delvillar, Ziobro, Robinson and Geiler* seem wrong. On what objective criteria will a decisionmaker rely to determine whether the statutory requirement of a government actor is truly mandatory? It seems that if the statute is silent, then the intent should focus on the character of the act to be done and whether it serves a public purpose, as well as the language the statute employs. And, in *Marin,* that is exactly what happened. Morris was allowed to seek compensation because Marin County failed to follow the statutory edict. The statute did not dictate any consequence if the contractor failed to have workers' compensation insurance. That Court refused to follow the mandatory-directory distinction to accomplish the correct result. Contrariwise, *Robinson, Delvillar, Ziobro* and *Geiler* do the direct opposite. In each opinion, the Supreme Court held for the government actor in the face of mandatory language to which the actor failed to adhere. The process needs to mean what it plainly proclaims.

In his special concurrence in *Delvillar*, 235 Ill.2d 507 (2009), Justice Freeman opined that the analysis of courts seeking to classify statutes as mandatory or directory has resulted in confusion. He stated:

* * *

> The ordinary meaning of language should always be favored and the form of a verb used in a statute such as "shall" or "may" is the single most important textual consideration determining whether a statute is mandatory or directory. (Citing *Singer, Sutherland on Statutory Construction*, Sec. 57:3 at 13-14 (6th Rev. Ed. 2001).

* * *

Doesn't that observation make sense for anyone reading court rules or Illinois statutes? I submit, most people think so. Christopher Geiler did.

Traffic citations, post conviction petitions, admonishment of the accused as to immigration consequences are important to a large segment of our communities. Rules that pertain to those statutory topics where fines, imprisonment or deportation may result should be enforced in the plain language the statutes declare. That promotes trust in our government. A policy we, as judges and lawyers, *should* seek to achieve. ■

ILLINOIS STATE BAR ASSOCIATION™

Illinois Bar Journal

April 2001 • Volume 89 • Number 4 • Page 194 The Magazine of Illinois Lawyers

Immigration Law

Aliens, Guilty Pleas, and the Risk of Deportation: Time for Legislative Action

By Moira K. Moran and Patrick M. Kinnally

The authors recommend that the General Assembly require judges to admonish noncitizen defendants who could be deported if they plead guilty.

Roberto has been arrested for possessing cocaine. He is a permanent resident alien but not a citizen. His arrest report reveals his birth in Mexico.

His lawyer negotiates with the prosecutor on the drug charge, stipulating that if Roberto pleads guilty he will receive a reduced sentence. Roberto agrees, and the parties set a court date. Roberto never asks about whether he might be removed or deported if convicted. At the plea hearing, the judge accepts Roberto's plea and admonishes the defendant.

These admonishments include a myriad of repercussions stemming from Roberto's guilty plea. Even though all three professionals dealing with Roberto in effectuating his plea know he will probably be deported at the conclusion of his sentence, no one tells him. Even though Roberto is the only one in the courtroom who does not know his likely fate, the plea proceeds in accordance with Illinois law.

This article proposes that the Illinois General Assembly require judges to admonish aliens when pleading guilty to an offense that carries with it the possibility of removal upon conviction. A legislative response would produce a benefit far outweighing the slight burden it imposes.

I. Guilty Pleas and Aliens: The Process

In the typical scenario, the alien defendant pleads guilty to the crime. The court's job in part is to determine that defendants' waivers of their constitutional rights are knowing and freely given and to admonish defendants about the direct consequences of their crimes. Unfortunately, in Illinois, unlike in many other states, the trial judge's advisory need not include information to the noncitizen defendant that his or her plea could result in removal.[1] Once the court accepts the plea, the alien is sentenced.

Upon incarceration, the penal institution notifies the Immigration and Naturalization Service ("INS") of the defendant's noncitizen status. In turn, the INS serves a detainer on the jailkeeper, who releases the alien defendant to the custody of the INS. The INS may proceed with removal hearings while the alien defendant serves his or her sentence or when he or she is released from jail into INS custody. For certain aggravated felons who are aliens, upon release from incarceration for their criminal sentences the INS may take them into custody pending a removal hearing and not authorize bail.[2]

An immigration judge convenes removal hearings, which are initiated by the INS by issuing a notice to appear to the alien.[3] In certain cases, the INS will permit release of the alien prior to the hearing only upon posting cash delivery bonds.[4] Ten percent of the face amount, a standard requirement in criminal cases, is not enough. The full amount must be posted. The alien defendant is entitled to an administrative hearing before an immigration judge, who determines whether the alien is removable. Proof the state criminal felony conviction often results in banishment at the culmination of such a hearing.[5]

INS rules challenge the most seasoned attorney. With so many confusing caveats to the Immigration and Nationality Act, made even more forbidding by recent amendments (see sidebar), alien defendants must be made aware that a guilty plea may send them to a land they do not know and from which they cannot return. For aliens, a removal order is the equivalent of forced exile. Ironically, the alien defendants may be unaware this action could be a consequence of their guilty pleas. It is anomalous that no one has to tell the defendant about the most serious "punishment" for his or her crime.

II. Duty to the Defendant in Guilty Pleas

Although neither judges nor attorneys are required to inform noncitizen defendants that they may be deported, both must inform the defendant of certain factors so that the plea comports with constitutional standards. Both the court and the attorney have a duty to advise the criminal defendant of the direct consequences of pleading guilty.[6]

For a consequence to be direct, however, it must affect the case in which the defendant enters the plea. A future or contemplated, but uncertain, result is irrelevant to the validity of the guilty plea in the eyes of the judiciary. The judiciary need neither foresee nor explain every ramification of a guilty plea.

To require state trial court judges to imagine every possible consequence of a guilty plea and then inform every defendant about each is probably impractical. Yet this does not mean that requiring the court to admonish a noncitizen defendant of something so obvious and significant as the possibility of removal to a foreign land is unduly burdensome. Many states require it.[7]

Under the Illinois Supreme Court Rules, court and counsel have the obligation to ensure that a defendant who pleads guilty does so knowingly and voluntarily.[8] Part of satisfying the "knowingly and voluntarily" standard is informing the defendant of the direct consequences of his guilty plea.

According to the Illinois Supreme Court, however, failure of the defendant's counsel to inform the defendant of the collateral consequence of a guilty plea is not enough to constitute a basis for withdrawal of the guilty plea.[9] Instead, counsel must have actively misrepresented whether the guilty plea could result in removal.[10]

Clients depend on their attorneys and the court to inform them of the full ramifications of a guilty plea. Although technically removal is not considered a punishment, the consequences of being forced to leave the United States may be more punitive than time served in jail. Long-term residents are separated from their families. Others are sent to countries where they have no relationships, personal or business, and may not even speak the language.

Because the consequence of removal is so severe, courts began deciding on Fifth and Sixth Amendment grounds that lawyers were ineffective in assisting their clients if they failed to recognize that they were aliens and neglected to inform them of the effect of a guilty plea on their right to remain in this country.[11] Thus, courts in many states placed the burden on the attorney to inform his or her client of the collateral consequences of a guilty plea. But, as the following review of Illinois case law shows, our courts have imposed no such requirement on either lawyers or judges.

III. Illinois Case Law Involving Guilty Pleas

In *People v Correa*,[12] *People v Huante*,[13] and, most recently, *People v Williams*,[14] the Illinois Supreme Court discussed forewarning the alien defendant in cases of possible removal, ultimately opting not to require such admonishments of lawyers and judges.

***A.* People v Correa**

In *Correa*, the defendant was denied effective assistance of counsel when his attorney specifically misrepresented to him the effect of his guilty plea upon his immigrant status in response to the defendant's direct inquiry.[15] In other words, counsel incorrectly informed the defendant that a guilty plea would not affect his status as an immigrant when in fact it did.

In its decision, the court hinted that the judicial trend tended to favor holding counsel responsible for informing clients of the collateral consequence of deportation because of its severity. However, the court ultimately avoided discussing the passive conduct of an attorney who fails to inform the client of the consequences of a guilty plea. Based on the successful ineffective assistance of counsel claim waged against his attorney, Correa was entitled to withdraw his plea in a post-conviction setting, effectively keeping the INS out of his life.

FYI . . .

Side Bar

• Recent Changes to the Immigration and Nationality Act Raise Stakes for Alien Defendants

Subsequent appellate courts interpreted *Correa* as suggesting that an attorney has a duty to inform a noncitizen client of the possibility of deportation in response to a guilty plea even if the defendant does not raise the issue.[16] These courts, extrapolating from *Correa*, found no difference between passively or actively misrepresenting the possibility of removal to a client. But the supreme court would soon prove these courts mistaken.

B. People v Huante

In the wake of these post-*Correa* appellate court rulings, the Illinois Supreme Court ultimately opted not to require an admonishment in the 1991 case of *People v Huante*.[17] In *Huante*, the defendant pled guilty to felony drug charges. He filed a post-conviction petition to set aside the guilty plea based on ineffective assistance of counsel, claiming that he would not have pled guilty had his attorney first determined his noncitizen status and advised him that he would be subject to deportation as a result of his convictions.

The defendant had been a lawful permanent resident for 13 years at the time of his arrest. His attorney never questioned him about his citizenship status, and the defendant never divulged that he was a noncitizen. The attorney testified that he was not aware of the defendant's status.

The *Huante* court noted that it was being asked to address an attorney's failure to inform a noncitizen client, which the *Correa* court declined to address previously. The court determined that a defendant did not have to be informed of the collateral consequences of a plea for it to be "knowing and voluntary," the standard that a guilty plea must meet to comply with Supreme Court Rule 402.[18] Rule 402 does not require that the judge inform the criminal defendant of the collateral consequences of a guilty plea, including the possibility of deportation upon the entry of that plea.

Once again, the court noted that neither counsel nor the court had the responsibility to the defendant to inform him of the collateral consequences of his guilty plea.[19] As the court stated in *Correa* and *Huante*, only active misrepresentation of a collateral consequence, like deportation, constituted ineffective assistance of counsel.

In the *Huante* decision, the supreme court specifically overruled appellate court decisions that granted a defendant's claim for ineffective assistance of counsel because the attorney did not make himself aware of the client's immigrant status,[20] finding that such a consequence is only collateral. Accordingly, counsel and court need only admonish the defendant of the direct consequences of a guilty plea even though the attorney can still not actively misrepresent the implications of pleading guilty.

The result, although perhaps legally sound, makes little practical sense. If lawyers and the government negotiate plea agreements, the defendant who enters into that contract has an expectation about what the performance entails. That expectation is hardly realized when the performance of the contract results in deportation.

C. People v Williams

In November 1999, the Illinois Supreme Court addressed a judge's duty in *People v Williams*.[21] In this decision, the court emphasized that a judge must admonish a defendant pleading guilty of the direct consequences of his or her guilty plea. If, however, a consequence of the plea is collateral, then the defendant does not have a right to be advised of it before entering the plea. In other words, a defendant can enter a knowing and intelligent guilty plea without being advised of its collateral consequences.

Jettie Williams claimed that his original guilty plea to the attempted murder of Leroy Wade could not be used against him when he was retried for the murder of Wade. Wade died five years after Williams' original plea to the attempt charge. His attorney moved, in limine, to bar use of the former plea when the state sought to try Williams for Wade's murder. In reversing the trial and appellate courts, the supreme court concluded that the original plea was admissible in the murder trial.

The court concluded that it would be too unwieldy to require that the defendant be informed of every foreseeable consequence stemming from a plea of guilty. The trial court's obligation to inform encompasses only direct consequences of the sentence, i.e., those that the trial judge can impose.

A collateral consequence is not defined by the length or nature of the sentence imposed on the basis of the plea. Generally, a collateral consequence results from action taken by an agency that the trial court does not control. "Collateral consequences include, 'loss of public or private employment, effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, or anything else.'"[22]

The direct consequences of the plea are limited to its penal consequences, the court found. Deportation cannot be a penal consequence because it is not criminal punishment.

IV. Legislative Response

The judiciary has clearly delineated its duty to defendants in terms of collateral and direct consequences. Simply stated, no matter the significance of the collateral consequence, the judiciary and the attorneys who represent the defendant have no duty to inform the defendant about it.

Because the judiciary has refused to do so, the Illinois General Assembly should require judges to admonish alien defendants when they plead guilty that deportation is a retributive consequence. The need for an admonishment requirement is greater than ever, because removal for an aggravated felony is effectively a lifetime ban from the United States.

The state and federal criminal trial judge typically asks a set of standard questions to elicit whether a defendant's plea is knowing and voluntary. A simple judicial admonishment concerning deportation consequences surely would not be burdensome.

Other states and the District of Columbia have concluded that the collateral consequence of removal is important enough to require that the court and counsel advise the noncitizen defendant that he or she may suffer immigration consequences as a result of a plea bargain or conviction.[23] Some of those states, like Illinois, have large noncitizen populations.

The legislatures from these states, in their service to the state's residents, recognized the need to inform defendants in view of the serious adverse consequences a removal order entails. With the recent amendments to the INA, the need is even greater. The alien defendant's only real chance to avoid removal is largely in the state criminal trial court, not the immigration court. The trial court is the place where the parties agree to the plea. A simple statement, such as the one mandated by the California penal code, is sufficient to allow a defendant to plea knowingly and voluntarily:

> 1016.5(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
>
> (b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section.[24]

This is hardly burdensome. As a state resident, the noncitizen should be afforded this important constitutional guarantee.

Now that a commission is being appointed to rewrite the Illinois Criminal Code, this problem should be considered. Alien defendants deserve such a law and the information it would provide. In the meantime, however, lawyers and judges should, in the name of basic fairness and justice, assume this responsibility of their own volition.

Recent Changes to the Immigration and Nationality Act Raise Stakes for Alien Defendants

In a nutshell, recent amendments to the INA have increased the number of crimes for which defendants can be deported, apply retroactively to crimes committed before the enactment of such amendments, and apply to many types of convictions. *Matter of Lettman,* Int Dec 3370 (BIA 1998) aff'd, *Lettman v Reno,* 207 F3d 1368 (11th Cir 2000); see also *Lewis v INS,* 194 F3d 539 (4th Cir 1999). Because of all of the recent changes, noncitizens have an even greater need than before to be admonished before entering a plea to a criminal charge.

Crimes of moral turpitude. Noncitizens "convicted of a crime involving moral turpitude" within five years of the date of admission "for which a sentence of one year or longer may be imposed" are removable. 8 USC § 1227(a)(2)(A)(i). The maximum sentence possible for the crime controls, not the actual sentence the alien received. 8 USC § 1227(a)(2)(A)(ii).

Also, aliens "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct" are removable regardless of the sentence and whether the convictions resulted from a single trial. 8 USC § 1227(a)(2)(A)(ii). Two shoplifting convictions, one in 1988 and another in 1998, might be enough.

Retroactivity. Moreover, an alien is subject to removal for convictions regardless of when they occurred. New amendments to the INA apply to a criminal conviction on, before, or after the passage of such amendments. 8 USC § 1101(a)(43) (see *Matter of Truong,* Int Dec 3416 (BIA 1999)).

Also, such amendments may act as a bar to obtaining citizenship. (But see 8 CFR§ 316.10(b)(1)(ii), which does not bar obtaining naturalization if the aggravated felony conviction occurred prior to November 29, 1990.) This repercussion is a serious concern for lawful permanent residents who want to travel outside the United States, since it may make them inadmissible upon return.

Aggravated felonies. Most aliens, whether lawful permanent residents or otherwise, are removed because of convictions for "aggravated felonies." The INA defines an aggravated felony by reference to more than 20 separate subdivisions and at least 50 federal statutes. 8 USC § 1101(a)(43).

Aggravated felonies are of two types: character and punishment. The former are aggravated felonies regardless of the term of imprisonment. A domestic violence assault conviction; a misdemeanor; may be an aggravated felony. 8 USC § 1227(a)(2)(E). Certain driving-while-intoxicated convictions may also be considered aggravated felonies. *Matter of Magallanes,* Int Dec 3341 (BIA 1998); *Matter of Puente,* Int Dec 3412 (BIA 1999); but see *U.S. v Chapa-Garza,* 99-51199 (5th Cir March 1, 2001); *United States v Rutherford,* 54 F3d 370 (7th Cir 1995).

Indecency with a child by exposure is an aggravated felony. *Matter of Rodriguez,* Int Dec 3411 (BIA 1999). An attempted fraud conviction and the "crime of stalking" are also considered aggravated felonies under the INA's definition.

Punishment crimes, on the other hand, are aggravated felonies that require an ordered sentence of at least one year and include crimes of violence. 18 USC § 16; *Xiong v INS,* 173 F3d 601, 604 (7th Cir 1999). In determining whether a crime of violence is tantamount to an aggravated felony under the INA, one must analyze the state statute upon which the conviction rests. *Solorzano-Patlan v INS,* 207 F 3d 869 (7th Cir 2000). In any crime defined or interpreted as an aggravated felony under the INA, an alien is removable and is conclusively presumed to be deportable. 8 USC § 1227(a)(2)(A)(iii); *Matter of Sweetser,* Int Dec 3390 (BIA 1999).

Convictions. If defining a deportable crime under immigration law appears daunting, determining what constitutes a conviction under the INA can be equally difficult. A conviction for immigration purposes occurs when a defendant pleads guilty or nolo contendere. In immigration parlance, a conviction is a formal judgment of guilt of the noncitizen entered by a court.

A conviction for INA purposes results when the defendant admits facts sufficient to warrant a finding of guilt and the judge orders some form of punishment, penalty, or restraint on the noncitizen's liberty. *Matter of Roldan-Santoyo,* Int Dec 3377 (BIA 1999), rev'd, sub nom, *Lujan-Armendariz v INS*, 222 F3d 728 (9th Cir 2000).

If the noncitizen evades removal upon conviction, he or she must still pass the hurdle of the sentencing element of a conviction. This component, depending on its length, may be determinative as to whether that conviction results in removal.

Remedies. The INA has rendered the ameliorative sentencing schemes of deferred adjudication, conditional discharge alternatives, and their counterparts largely illusory. The INA states succinctly that "[a]ny reference to a term of imprisonment of a sentence with respect to an offense [includes] the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or part." 8 USC § 1101 (a)(48)(B); see *Matter of Punu,* Int Dec 3364 (BIA 1998).

For example, a judge may sentence a noncitizen defendant to two years in prison. Subsequently, the sentence is probated for two years in lieu of imprisonment. This is a two-year sentence for immigration purposes.

Historically, the INA provided a multitude of remedies in deportation hearings. These remedies might have cured a noncitizen's criminal conviction. They were known as waivers. An immigration judge had discretion in granting these waivers, depending on factors that tended to show the alien's ties to the United States.

The recent amendments to the INA have curtailed and eliminated the authority of an immigration judge to grant such waivers. For the most part, noncitizens convicted of an aggravated felony are not eligible for such remedies.

1. See Cal Penal Code §1016.5; Conn Gen Stat 54-1j; DC Code Ann §16-713; Fla R Crim P Rule 3.172; Haw Rev Stat § 802E-2; Mass Gen L ch 278, § 29D; Mont Stat § 46-12-210; Ohio Rev Code Ann § 2943.031; Or Rev Stat § 135.385; RI Gen Law § 12-12-22; Tex Crim Pro Code Ann § 26.13.

2. 8 USC § 1226; 8 CFR § 236.1(c). The INS bail bond program is currently under attack because it is incarcerating noncitizens indefinitely who may be removable. *Phan v Reno,* 56 F Supp 2d 1149 (WD Wa 1999) aff'd, sub nom, *Ma v Reno,* 208 F3d 815 (9th Cir 2000); 8 USC § 1231; cert granted, *Reno v Ma*, 121 S Ct 297 (2000).

3. 8 USC §§ 1229(d), 1229a.

4. 8 CFR § 236.1(c).

5. 8 USC § 1229a(c)(3)(B).

6. *People v Williams,* 188 Ill 2d 365, 370-71, 721 NE2d 539 (1999).

7. See note 1 above.

8. SCR 402.

9. *Williams,* 721 NE2d at 543-44. Note that this article does not address a lawyer's duty to his or her immigrant client under the Rules of Professional Conduct, nor does it speak to potential malpractice liability for failing to accurately represent the consequences of a guilty plea.

10. Id, 485 NE2d at 312.

11. Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies,* 51 Okla L Rev 697, 711 (1998); *Strickland v Washington,* 466 US 668 (1984); *People v Albanese,* 104 Ill 2d 504, 473 NE2d 1246 (1984).

12. *Correa,* 485 NE2d 307.

13. *People v Huante,* 143 Ill 2d 61, 71, 571 NE2d 736, 741 (1991).

14. *Williams*, 721 NE2d at 543-44.

15. *Correa*, 485 NE2d at 312.

16. See *People v Padilla,* 151 Ill App 3d 297, 502 NE2d 1182 (1st D 1986); *People v Sak*, 186 Ill App 3d 816, 542 NE2d 1155 (1st D 1989); *People v Miranda*, 184 Ill App 3d 718, 540 NE2d 1008 (2d D 1989); *People v Rodriguez*, 202 Ill App 3d 839, 841, 560 NE2d 434, 436 (3d D 1990); *People v Maranovic*, 201 Ill App 3d 492, 559 NE2d 126 (1st D 1990); and *People v Luna*, 211 Ill App 3d 390, 570 NE2d 404 (1st D 1991).

17. 571 NE2d 736.

18. Id, 571 NE2d at 740-41.

19. See *United States v George,* 869 F2d 333, 336-37 (7th Cir 1989), where the seventh circuit interpreting Illinois law also concluded that the consequence of possible deportation upon an alien who pled guilty to a criminal charge which rendered him deportable was collateral in nature.

20. *Huante*, 571 NE2d at 742, overruling *Padilla*, 502 NE2d 1182; *Miranda*, 540 NE2d 1008; and *Maranovic,* 559 NE2d 126.

21. *Williams*, 721 NE2d 539.

22. Id, 721 NE2d at 544.

23. See note 1 above.

24. Cal Penal Code § 1016.5.

ABOUT THE AUTHORS

Moira K. Moran is an associate with Cannon and Dunphy in Milwaukee. She graduated from Valparaiso University School of Law in 1999, where she was an executive editor of the *Law Review.*

Patrick M. Kinnally is a partner in the Aurora firm of Murphy, Hupp & Kinnally, P.C., where he practices in the areas of civil litigation, local government, and immigration law. He clerked for Justice James D. Heiple in the Illinois Appellate Court and is an adjunct professor of law at Northern Illinois University. He graduated from John Marshall Law School in 1980. He and Moira Moran are father and daughter.

Member Comments

922 N.E.2d 330
235 Ill.2d 507
337 Ill. Dec. 207
The PEOPLE of the State of Illinois, Appellant,
v.
Leobardo DELVILLAR, Appellee.
No. 106909.
Supreme Court of Illinois.
December 17, 2009.

[922 N.E.2d 332]

Lisa Madigan, Attorney General, Springfield, Richard A. Devine and Anita Alvarez, State's Attorneys, Chicago (James E. Fitzgerald, Annette Collins and Mary L. Boland, Assistant State's Attorneys, of counsel), for the People.

Abishi C. Cunningham, Jr., Public Defender, Chicago (Michael Davidson, of counsel), for appellee.

[922 N.E.2d 333]

Scott D. Pollock, Kathryn R. Weber, and Christina J. Murdoch, of Scott D. Pollock & Associates, P.C., and Stephen L. Tyma, all of Chicago, for amici curiae Chicago Chapter of the American Immigration Lawyers Association et al.

OPINION

Justice GARMAN delivered the judgment of the court, with opinion.

Defendant, Leobardo Delvillar, was charged with several weapons violations. Defendant agreed to plead guilty to one count of aggravated unlawful use of a weapon by a felon in return for a sentence recommendation. Defendant later filed a motion to withdraw his guilty plea on the grounds that he is a resident alien, and not a United States citizen, and that the circuit court failed to admonish him of the potential immigration consequences of his plea. The circuit court denied defendant's motion. The appellate court reversed and remanded for further proceedings. 383 Ill.App.3d 80, 321 Ill.Dec. 958, 890 N.E.2d 680. The State then petitioned this court for leave to appeal, which we allowed pursuant to Supreme Court Rule 315 (210 Ill.2d R. 315(a)).

BACKGROUND

Defendant was arrested and charged in July 2003 with three counts of aggravated unlawful use of a weapon by a felon (720 ILCS 5/24-1.6(a)(1) (West 2002)) and two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2002)). Defendant and the State reached a plea agreement on these charges under which defendant pled guilty to one count of aggravated unlawful use of a weapon. As agreed, the prosecutor recommended a sentence of four years in the Department of Corrections. The prosecutor also recommended the Department of Corrections' impact incarceration program, commonly referred to as "boot camp."

The plea hearing took place on November 2, 2005. The court first asked defendant if he was being forced or coerced into giving up the right to remain silent and to enter a guilty plea. Defendant answered "no." The court also asked defendant whether he was entering his plea freely and voluntarily. He answered "yes." Next, the court asked defendant whether he was a United States citizen. Defendant replied "yes." Based in part on this response, the court did not admonish defendant of any potential immigration consequences that might be imposed on a noncitizen as a result of a guilty plea. The court then accepted defendant's guilty plea. The court did not proceed to sentencing, however. Instead, in response to the request by defendant that he be permitted to finish a construction job, the court agreed to hold sentencing until a later court date.

At the sentencing hearing on November 30, 2005, the court ordered defendant to serve four years' imprisonment and recommended boot camp in accordance with the State's plea agreement offer. The court also advised defendant of his right to appeal, informing defendant that if he wished to appeal, he first had to file a motion to withdraw his guilty plea. The court admonished defendant that in his motion he would have to state all reasons for wanting to withdraw his guilty plea. Defendant indicated he had no questions about that requirement.

On December 15, 2005, defendant filed a motion to withdraw his guilty plea and vacate his conviction, asserting that he did not knowingly, intelligently, or voluntarily waive his right to trial or fully understand or comprehend the admonishments of the court at the time of his guilty plea. In his motion, defendant noted that at the time of

[922 N.E.2d 334]

his plea defense counsel was not aware of defendant's immigration status. The motion stated that defendant is not a United States citizen, but a resident alien. Defendant also contended that the court was required to advise him of the immigration consequences of his guilty plea and that the court failed to do so.

In a hearing on defendant's motion, the court reviewed the transcripts of defendant's plea hearing and confirmed that he had stated he was a United States citizen. In response, defense counsel suggested that defendant was a resident alien and that was the source of defendant's confusion at the plea hearing. The court stated, "he [defendant] lied to the court." The court then denied defendant's motion to withdraw his guilty plea. Defendant appealed.

The appellate court reversed, holding that the circuit court was required to admonish defendant of the potential immigration consequences of a guilty plea. The State filed a petition for leave to appeal, which this court granted pursuant to Supreme Court Rule 315 (210 Ill.2d R. 315(a)). We then allowed the Chicago Chapter of the American Immigration Lawyers Association, the Legal Assistance Foundation of Chicago, the National Immigrant Justice Center, the Illinois Coalition for Immigrant and Refugee Rights, and the Immigration Project to file a joint brief *amicus curiae* in support of defendant. 210 Ill.2d R. 345.

The question presented to this court is whether the failure to admonish defendant of the possible immigration consequences of his guilty plea, pursuant to section 113-8 of the Code of Criminal Procedure of 1963, required the circuit court to grant defendant's subsequent motion to withdraw his guilty plea and vacate a defendant's conviction. For the reasons that follow, we conclude that the failure to admonish did not require the circuit court to allow defendant's motion. We, therefore, reverse the decision of the appellate court and affirm the judgment of the circuit court.

ANALYSIS

Defendant's argument in the appellate court and the appellate court decision itself rely on a particular interpretation of a provision within the Code of Criminal Procedure. The relevant provision is as follows:

> "Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or felony offense, the court shall give the following advisement to the defendant in open court:
>
> `If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been

> charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.'" 725 ILCS 5/113-8 (West 2006).

The appellate court concluded that the above admonishment is mandatory and that the circuit court's failure to admonish defendant in accordance with section 113-8 required a reversal, regardless of defendant's immigration status. 383 Ill.App.3d at 88-89, 321 Ill.Dec. 958, 890 N.E.2d 680. The appellate court also acknowledged that another appellate court decision, *People v. Bilelegne,* 381 Ill.App.3d 292, 320 Ill.Dec. 420, 887 N.E.2d 564 (2008), came to a different conclusion. The *Bilelegne* court held that this section is directory, and that the circuit court did not err in denying the defendant's motion to withdraw his guilty plea. *Bilelegne,* 381 Ill. App.3d at 297, 320 Ill.Dec. 420, 887 N.E.2d 564.

[922 N.E.2d 335]

Before this court, the State argues that the *Bilelegne* court was correct in holding that section 113-8 is directory in nature and does not require the circuit court to allow a motion to withdraw a guilty plea in all cases. In response, defendant again argues that the appellate court correctly held that section 113-8 is mandatory and the failure to give the admonishment requires the court to allow withdrawal of defendant's guilty plea. Resolution of this issue requires an explanation of two distinct questions that are, as this court has acknowledged, easily confused because they both contain the term "mandatory."

One question asks whether a statute is mandatory or permissive. In answering this question, the term mandatory "`refers to an obligatory duty which a governmental entity is required to perform.'" *People v. Robinson,* 217 Ill.2d 43, 51, 298 Ill.Dec. 37, 838 N.E.2d 930 (2005), quoting *Morris v. County of Marin,* 18 Cal.3d 901, 908, 559 P.2d 606, 610-11, 136 Cal.Rptr. 251, 255-56 (1977). The term permissive refers to a discretionary power, which a governmental entity "`may exercise or not as it chooses.'" *Robinson,* 217 Ill.2d at 51, 298 Ill.Dec. 37, 838 N.E.2d 930, quoting *Morris,* 18 Cal.3d at 908, 559 P.2d at 610-11, 136 Cal.Rptr. at 255-56.

The second question asks whether a statutory provision is mandatory or directory. Under this question, statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision. *Pullen v. Mulligan,* 138 Ill.2d 21, 46, 149 Ill.Dec. 215, 561 N.E.2d 585 (1990). In the absence of such intent the statute is directory and no particular consequence flows from noncompliance. That is not to say, however, that there are *no* consequences. A directory reading acknowledges only that no specific consequence is triggered by the failure to comply with the statute. *Carr v. Board of Education of Homewood-Flossmoor Community High School District No. 233,* 14 Ill.2d 40, 44, 150 N.E.2d 583 (1958) (reading as directory a provision requiring execution of affidavits of qualifications during an election, where statute did not expressly void ballots cast without such affidavits).

The facts of *People v. Robinson,* 217 Ill.2d 43, 298 Ill.Dec. 37, 838 N.E.2d 930 (2005), serve to clarify the distinction between these two dichotomies. In *Robinson* this court was asked to interpret a provision of the Post-Conviction Hearing Act that addresses the procedures governing the circuit court when it determines that a postconviction petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000). The statute provides that the circuit court "`shall dismiss the petition in a written order * * *. Such order of dismissal is final and shall be served upon the petitioner by certified mail within 10 days of its entry.'"

Robinson, 217 Ill.2d at 50, 298 Ill.Dec. 37, 838 N.E.2d 930, quoting 725 ILCS 5/122-2.1(a)(2) (West 2000).

After Robinson's petition was summarily dismissed by the circuit court, the clerk failed to serve Robinson with the order of dismissal until 12 days after the court entered the order. This service clearly did not comply with the language of the statute requiring service within 10 days of the judgment. Robinson argued on appeal that the language of the statute is mandatory and that, therefore, the appellate court should remand his case for further proceedings under the Post-Conviction Hearing Act. The appellate court agreed and directed the circuit court to conduct further proceedings.

This court reversed the appellate court. In considering the distinction between mandatory and directory provisions, this court first pointed out "there is no genuine

[922 N.E.2d 336]

dispute that the 10-day notice requirement has the force of a command and that it imposed a mandatory obligation on the clerk." *Robinson,* 217 Ill.2d at 50, 298 Ill.Dec. 37, 838 N.E.2d 930. It was clear the legislature did not intend the provision to be a mere suggestion to the clerk of the court. The real issue in *Robinson* was determining the consequence of the clerk's noncompliance. *Robinson,* 217 Ill.2d at 51-52, 298 Ill.Dec. 37, 838 N.E.2d 930.

Like the provision in *Robinson,* the admonishment informing defendants of immigration consequences in the present case is mandatory in the sense that the circuit court does not have discretion in giving the admonishment. That is, the statute is mandatory with respect to the mandatory/permissive question. The statute imposes an obligation on the court to give the admonishment. The admonishment must be given regardless of whether a defendant has indicated he is a United States citizen or whether a defendant acknowledges a lack of citizenship. Thus, to the extent that defendant argues a mandatory reading leads to the conclusion that the circuit court was required to give the admonishment, he is correct.

However, this court recognizes, as we did in *Robinson,* that the dispositive issue in this case is not whether the statute is mandatory or permissive. Rather, the issue here is the second question, whether the statute is mandatory or directory. This separate dichotomy determines the consequences of a failure to give the admonishment. See *Robinson,* 217 Ill.2d at 52, 298 Ill.Dec. 37, 838 N.E.2d 930. To reiterate, the mandatory/directory dichotomy "`simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.'" *Robinson,* 217 Ill.2d at 51-52, 298 Ill.Dec. 37, 838 N.E.2d 930, quoting *Morris v. County of Marin,* 18 Cal.3d 901, 908, 559 P.2d 606, 610-11, 136 Cal.Rptr. 251, 255-56 (1977). In considering this question, the *Robinson* court set out the applicable framework for evaluating a statute.

Whether a statute is mandatory or directory is a question of statutory construction, which we review *de novo. Robinson,* 217 Ill.2d at 54, 298 Ill.Dec. 37, 838 N.E.2d 930. The statutory language is the most reliable evidence of the legislature's intent. *Pullen v. Mulligan,* 138 Ill.2d 21, 46, 149 Ill.Dec. 215, 561 N.E.2d 585 (1990). With respect to the mandatory/directory dichotomy, we presume that language issuing a procedural command to a government official indicates an intent that the statute is directory. *Robinson,* 217 Ill.2d at 58, 298 Ill.Dec. 37, 838 N.E.2d 930. This presumption is overcome under either of two conditions. A provision is mandatory under this dichotomy when there is negative language prohibiting further action in the case of noncompliance or when the right the

provision is designed to protect would generally be injured under a directory reading. *Robinson,* 217 Ill.2d at 58, 298 Ill.Dec. 37, 838 N.E.2d 930.

Neither condition applies in this case. Section 113-8 lacks any negative language prohibiting further action. For example, the statute does not prevent the circuit court from accepting defendant's guilty plea if the court fails to give the section 113-8 admonishment. At one point in the legislative process, the proposed section 113-8 did include such additional language providing a remedy for failure to give the admonishment. That version of the legislation indicated that the circuit court "shall vacate the judgment and permit the defendant to withdraw the plea of guilty" if the defendant demonstrated that his conviction of the offense to which he pleaded guilty may have immigration consequences. 93d

[922 N.E.2d 337]

Ill. Gen. Assem., Senate Bill 43, 2003 Sess. (as introduced). The legislature affirmatively chose, however, to eliminate this provision before passage. The presumption we recognized in *Robinson,* that procedural commands are directory, cannot be overcome by the enacted language of section 113-8.

With respect to the other condition identified in *Robinson,* we must first identify the right the statute was intended to protect. The right to be protected here is the right of a defendant to intelligently waive a jury trial and enter a guilty plea. Section 113-8 attempts to protect this right by informing defendants that there could be potential immigration consequences to entering a guilty plea. The legislature clearly thought this information is important to a defendant when making his decision to plead guilty.

We next ask whether the right that the statute intends to protect would be generally injured by a directory reading of the statute.

In *Robinson,* we noted that the right to appeal might be injured by untimely service in a given case. *Robinson,* 217 Ill.2d at 57, 298 Ill.Dec. 37, 838 N.E.2d 930. However, we noted there is no reason to believe that it generally would be. *Robinson,* 217 Ill.2d at 57, 298 Ill.Dec. 37, 838 N.E.2d 930. This was because even in cases where notice was several days late, there would often remain sufficient time within which the defendant could file a notice of appeal and therefore preserve his right to appeal.

In this case, we cannot say that the right the legislature intended to protect would generally be injured. Although an individual defendant's right to waive a trial might be injured by the failure to give the admonishment required by section 113-8, it cannot be said that it generally would be so. Immigration consequences—in particular, deportation—are not applicable to United States citizens. See *Oforji v. Ashcroft,* 354 F.3d 609, 619 (7th Cir.2003) (Posner, J., concurring). Citizens accordingly face no immigration consequences as a result of entering a guilty plea. Therefore, the presence or absence of the admonishment in a case involving a United States citizen does not affect a defendant's right to waive his or her trial, as the information intended to be provided by the statute is not useful to that defendant.

A defendant's right to intelligently waive a jury trial and plead guilty might be affected in a case where the defendant is not a United States citizen, and where the crime for which the defendant is entering a plea is one that could trigger immigration consequences. However, in another case a defendant may have reasons for pleading guilty even in the face of such consequences. Thus, because a defendant's right to waive a jury trial and enter a guilty plea will not necessarily be harmed in the absence of the admonishment, we conclude that the presumption of a directory reading of section 113-8 is not overcome. As neither condition articulated in

Robinson serves to overcome the presumption of a directory reading in this case, we conclude that the legislature intended such a reading.

In summary, we conclude that section 113-8 is mandatory in that it imposes an obligation on the circuit court to admonish all defendants of the potential immigration consequences of a guilty plea. However, the admonishment is not mandatory with respect to the mandatory-directory dichotomy. Thus, failing to issue the admonishment does not automatically require the court to allow a motion to withdraw a guilty plea. Rather, the failure to admonish a defendant of the potential immigration consequences of a guilty plea is

[922 N.E.2d 338]

but one factor to be considered by the court when ruling on a defendant's motion to withdraw a guilty plea.

The decision to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the circuit court and, as such, is reviewed for abuse of discretion. *People v. Walston,* 38 Ill.2d 39, 42, 230 N.E.2d 233 (1967). An abuse of discretion will be found only where the court's ruling is arbitrary, fanciful, unreasonable, or no reasonable person would take the view adopted by the trial court. *People v. Patrick,* 233 Ill.2d 62, 68, 330 Ill.Dec. 149, 908 N.E.2d 1 (2009), quoting *People v. Hall,* 195 Ill.2d 1, 20, 252 Ill.Dec. 552, 743 N.E.2d 126 (2000). A defendant does not have an automatic right to withdraw a plea of guilty. *People v. Jamison,* 197 Ill.2d 135, 163, 258 Ill.Dec. 514, 756 N.E.2d 788 (2001). Rather, defendant must show a manifest injustice under the facts involved. *Jamison,* 197 Ill.2d at 163, 258 Ill.Dec. 514, 756 N.E.2d 788. The decision of the trial court will not be disturbed unless the plea was entered through a misapprehension of the facts or of the law, or if there is doubt as to the guilt of the accused and justice would be better served by conducting a trial. *Jamison,* 197 Ill.2d at 163, 258 Ill.Dec. 514, 756 N.E.2d 788. Where the defendant has claimed a misapprehension of the facts or of the law, the misapprehension must be shown by the defendant. *Walston,* 38 Ill.2d at 44, 230 N.E.2d 233.

With regard to inadequate admonishments, the failure to properly admonish a defendant, standing alone, does not automatically establish grounds for reversing the judgment or vacating the plea. *People v. Fuller,* 205 Ill.2d 308, 323, 275 Ill.Dec. 755, 793 N.E.2d 526 (2002). Rather, a reviewing court focuses on whether the guilty plea was affirmatively shown to have been made voluntarily and intelligently. *Fuller,* 205 Ill.2d at 322, 275 Ill.Dec. 755, 793 N.E.2d 526.

This court has long established that, with respect to voluntariness, the pertinent knowledge to be provided by the court prior to accepting a guilty plea includes only the direct consequences of the defendant's plea. *People v. Manning,* 227 Ill.2d 403, 415, 318 Ill.Dec. 261, 883 N.E.2d 492 (2008). Direct consequences of a plea are those consequences affecting the defendant's sentence and other punishment that the circuit court may impose. *People v. Williams,* 188 Ill.2d 365, 372, 242 Ill. Dec. 260, 721 N.E.2d 539 (1999).

Collateral consequences, on the other hand, are effects upon the defendant that the circuit court has no authority to impose. A collateral consequence is one that results from an action that may or may not be taken by an agency that the trial court does not control. *Williams,* 188 Ill.2d at 372, 242 Ill.Dec. 260, 721 N.E.2d 539. Due process does not require that the defendant be informed of the collateral consequences of a guilty plea. *Williams,* 188 Ill.2d at 371, 242 Ill.Dec. 260, 721 N.E.2d 539 ("the defendant's knowledge of the collateral consequences of a guilty plea is not a prerequisite to the entry of a knowing and intelligent guilty plea").

Immigration consequences are collateral consequences. *Williams,* 188 Ill.2d at 372, 242 Ill.Dec. 260, 721 N.E.2d 539; *People v. Huante,* 143 Ill.2d 61, 71, 156 Ill.Dec. 756, 571 N.E.2d 736 (1991). As such, the failure to admonish a defendant of potential immigration consequences does not affect the voluntariness of the plea. Defendant argues that section 113-8 was intended to correct a deficiency in guilty plea admonishments that courts were not required to inform defendants of immigration consequences. Defendant correctly states the legislature's intent.

[922 N.E.2d 339]

As discussed above, section 113-8 changed what is required of the circuit court in accepting a defendant's guilty plea to include an admonition about the potential immigration consequences of that plea. However, the change in law reflected in section 113-8 cannot elevate potential immigration actions from collateral consequences to direct consequences. It is well established that a legislature cannot, without a constitutional amendment, deprive a defendant of a constitutionally protected right. *People ex rel. Daley v. Joyce,* 126 Ill.2d 209, 222, 127 Ill.Dec. 791, 533 N.E.2d 873 (1988). Likewise, although the legislature intended to further protect a defendant's right to voluntarily enter a guilty plea, the legislature cannot by statute alone add to what is constitutionally required of the circuit court. See *Tappy v. State ex rel. Byington,* 82 So.2d 161, 172 (Fla.1955) (Terrell, J., dissenting, joined by Thomas, J.) (noting that a legislature cannot expand, contract or modify constitutional requirements for holding elective office). Here, the effect of the statute is to require that defendants be informed of this one particular collateral consequence as well as the direct consequences of a guilty plea. In this case, because such consequences remain collateral, the failure to admonish defendant of such consequences does not call into question the constitutional voluntariness of his guilty plea.

However, as with other imperfect admonishments, although the failure to admonish a defendant of potential immigration consequences does not rise to a constitutional violation, reversal may yet be required if real justice has been denied or if the defendant has been prejudiced by the inadequate admonishment. *Fuller,* 205 Ill.2d at 323, 275 Ill.Dec. 755, 793 N.E.2d 526. Prejudice was a critical question considered by this court in *Robinson.* As noted above, we concluded that the statute in that case was directory. The clerk of the court in *Robinson* had a statutory duty to serve timely notice on petitioner. We recognized that the petitioner possessed a right to timely service that corresponds with the clerk's duty to provide it. However, we also concluded that the petitioner was not entitled to a remedy because, even without being timely served, he filed his notice of appeal on time. As such, the petitioner was not prejudiced by the clerk's error. *Robinson,* 217 Ill.2d at 47, 298 Ill.Dec. 37, 838 N.E.2d 930.

Again, it is defendant who must demonstrate that he has been prejudiced by the improper admonishment. *Walston,* 38 Ill.2d at 44, 230 N.E.2d 233. In this case defendant has not done so. In his motion to withdraw his guilty plea and at argument on the motion, defendant failed to demonstrate that he was subject to any potential immigration penalties or that he would have pleaded not guilty had he been admonished of those potential consequences. After having answered "yes" to the question whether he was a United States citizen in a previous hearing, defendant made no attempt to prove his resident alien status to the court in the subsequent hearing on his motion.

Further, although the *amici* have presented this court with several possible immigration consequences for noncitizens convicted of weapons felonies, we reiterate

that defendant failed to show the circuit court, in his motion or argument, that any of those consequences have been or will be applied to him. The circuit court was left to decide, based solely on defendant's conflicting assertions, whether defendant had told the truth at the guilty plea hearing, or was telling the truth at the hearing on his motion to withdraw that plea.

Nor did defendant demonstrate that he misunderstood the court's admonishments. In trying to explain why he told the court

[922 N.E.2d 340]

he was a United States citizen, defendant offered only the bare assertion that he had misunderstood the court when it asked about his citizenship. Defendant did not establish that he had difficulty hearing or understanding the court's admonishments in English.

Indeed, the record reflects that defendant understood the court's questions. At one point in the proceedings, counsel for defendant asked that the court postpone sentencing until defendant was able to complete a construction job. Counsel suggested that defendant could provide verification, at which point defendant interjected, "I have a contract." The court accepted defendant's word that he was engaged in the construction job, and asked defendant whether four weeks would be enough time. To this defendant responded, "[s]hould be fine, your Honor." Throughout the proceedings, defendant demonstrated an understanding of what the court was asking him. Based on these responses, a reasonable person could conclude that defendant understood the court when it asked whether defendant was a United States citizen.

In his motion to withdraw his guilty plea, defendant claims only that the circuit court failed to give the section 113-8 admonishment and that he is a resident alien, and not a United States citizen. These claims alone fall short of meeting defendant's burden to show that he suffered prejudice as a result of the circuit court's failure to admonish him. We therefore conclude that the circuit court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the appellate court, vacating denial of defendant's motion to withdraw his guilty plea, and affirm the judgment of the circuit court.

Appellate court judgment reversed; circuit court judgment affirmed.

Chief Justice FITZGERALD and Justices THOMAS, KARMEIER, and BURKE concurred in the judgment and opinion.

Justice FREEMAN specially concurred, with opinion.

Justice KILBRIDE specially concurred, with opinion.

Justice FREEMAN, specially concurring:

I joined fully in this court's decision in *People v. Robinson,* 217 Ill.2d 43, 298 Ill. Dec. 37, 838 N.E.2d 930 (2005), because I believed at the time that the analysis contained in it would ease the confusion that arises when courts seek to classify statutes as mandatory or directory. However, in the time since we filed our decision in *Robinson,* the confusion appears to be unabated. See *People v. Garstecki,* 234 Ill.2d 430, 435-36, 334 Ill.Dec. 639, 917 N.E.2d 465 (2009) (explaining split in appellate court over the classification of Supreme Court Rule 431); *People v. Ousley,* 235 Ill.2d 299, 311, 335 Ill.Dec. 850, 919 N.E.2d 875 (2009) (noting that "confusion still persists" post-*Robinson).* Because of this, I am convinced that the

analysis used in *Robinson* is no longer helpful. So, while I agree with the result reached in today's opinion, I write separately to express my views on the mandatory/directory question.

The issue in this case can be stated simply as: What are the consequences when the trial court fails to give an admonishment to a defendant in open court that the General Assembly indicated "shall" be given in section 113-8? Generally, the

[922 N.E.2d 341]

legislature does not intend its statutory provisions to be disregarded, but "not all directives and requirements declared in statute law should be understood to have equal force." 3 N. Singer, Sutherland on Statutory Construction § 57:1, at 6 (6th rev. ed.2001). I am no longer confident that the resolution of the mandatory/directory issue requires a discussion of two "distinct" questions that are "easily confused" because they both contain the term "mandatory." 235 Ill.2d at 514, 337 Ill.Dec. at 212, 922 N.E.2d at 335. I think the use of the two questions, as set forth in today's opinion, further confuses the issue because "[a]s a matter of terminology, mandatory statutes are usually said to be imperative and directory statutes permissive." 3 N. Singer § 57:1, at 4. Yet, under this court's analysis a statute found to be permissive under the first question may, under the second question, still be mandatory. That is confusing since permissive statutes are, by their nature, directory.

The question of whether a statutory provision has a mandatory or directory character is one of statutory construction. *Pullen v. Mulligan,* 138 Ill.2d 21, 46, 149 Ill.Dec. 215, 561 N.E.2d 585 (1990). The ordinary meaning of the language should always be favored, and the form of the verb used in a statute, such as "shall" or "may," is "the single most important textual consideration determining whether a statute is mandatory or directory." 3 N. Singer § 57:3, at 13-14. However, even that is "still not the sole determinant, and what it naturally connotes can be overcome by other considerations." 3 N. Singer § 57:3, at 14. In this way, "[a]ll pertinent intrinsic and extrinsic aids to construction are applicable when determining whether statutory provisions are mandatory or directory." 3 N. Singer § 57:3, at 11. For this reason, "shall" can be construed as directory (see, *e.g., United Illuminating Co. v. City of New Haven,* 240 Conn. 422, 692 A.2d 742 (1997)), while "may" can be construed as mandatory (see, *e.g., T.W. Morton Builders, Inc. v. von Buedingen,* 316 S.C. 388, 450 S.E.2d 87 (1994)). Whether language in a statute is mandatory or directory must be determined "on a case by case basis" with "the criterion whether such requirement is mandatory or directory is whether such requirement is essential to preserve the rights of the parties." 3 N. Singer § 57:3, at 21-22.

Here, although the General Assembly used "shall" in section 113-8, it did not set forth any specific consequences for the failure to follow the directive. Generally, "[w]hen a statute specifies what result will ensue if its terms are not complied with, the statute is deemed mandatory * * *; [h]owever, if it merely requires certain things to be done and nowhere prescribes results that follow, such a statute is merely directory." 3 N. Singer § 57:3, at 23-24. This same rule finds support in our case law:

> "The general rule in determining whether a statute is mandatory or advisory is as follows: `Where the terms of a statute are preemptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory.'" *Tuthill v. Rendelman,* 387 Ill. 321, 350,

56 N.E.2d 375 (1944), quoting *Clark v. Quick*, 377 Ill. 424, 430, 36 N.E.2d 563 (1941).

A corollary of this rule is that the lack of consequences for noncompliance "leads to a directory construction." 3 N. Singer § 57:8, at 35. Indeed, this court has held that the lack of specific consequences for noncompliance following a statutory command results in a directory construction. See *Carrigan v. Illinois Liquor Control Comm'n*, 19 Ill.2d 230, 233-34, 166 N.E.2d

[922 N.E.2d 342]

574 (1960). This is so as long as the rights sought to be protected are not affected by the failure to act. *Carrigan*, 19 Ill.2d at 233, 166 N.E.2d 574. In this case, the failure to act does not render defendant unable to challenge the validity of his guilty plea. Defendant, like any other defendant, has the ability to seek to withdraw his guilty plea on the basis of the imperfect admonishment. As Justice Kilbride points out, defendant has failed to establish in his motion that the trial court's failure to admonish him under section 113-8 injured the right the General Assembly sought to protect. 235 Ill.2d at 530, 337 Ill.Dec. at 220-21, 922 N.E.2d at 343-44 (Kilbride, J., specially concurring).

I believe the mandatory/directory analysis set forth above is more clear than that employed in today's opinion. The majority notes that the dispositive issue in this case is not whether the statute is "mandatory or permissive," but whether the statute is "mandatory or directory." 235 Ill.2d at 516, 337 Ill.Dec. at 213, 922 N.E.2d at 336. I am not sure what that means because if a statute is permissive, it is directory. *People v. Reed*, 177 Ill.2d 389, 393, 226 Ill.Dec. 801, 686 N.E.2d 584 (1997). To discern whether the statute is "mandatory or directory," the court then states that the statutory language is the most reliable evidence of the legislature's intent, and that "we presume that language issuing a procedural command to a government official indicates an intent that the statute is directory." 235 Ill.2d at 517, 337 Ill.Dec. at 213, 922 N.E.2d at 336. This presumption is overcome under either of two conditions: (1) when negative language prohibiting further action in the case of noncompliance or (2) when the right the provision is designed to protect would generally be injured under a directory reading. 235 Ill.2d at 517, 337 Ill.Dec. at 213-14, 922 N.E.2d at 336-37. I find the use of a presumption unnecessary. Consider the following hypothetical. Suppose the statute at issue had contained the following sentence after the "command"; Failure to so advise a defendant invalidates a plea of guilty. According to the analysis set forth in the majority opinion, rather than give immediate effect to that language (invalidate the plea), a court of review must first "presume" that there are no mandated consequences except if negative language appears. I fail to see why the court's presumption would arise if the statute expressly states the consequences.

In all other respects, I join in the majority's opinion.

Justice KILBRIDE, also specially concurring:

While I agree with both the judgment and the majority of this court's analysis, I disagree with its definition of the right section 113-8 was intended to protect, and consequently, with a portion of the subsequent analysis. Therefore, I specially concur in the opinion.

The majority relies heavily on the analysis in *People v. Robinson*, 217 Ill.2d 43, 298 Ill.Dec. 37, 838 N.E.2d 930 (2005). In *Robinson*, this court examined a statute requiring orders dismissing petitions for postconviction relief to be served on the petitioners within 10 days. 235 Ill.2d at 515, 337 Ill.Dec. at 212, 922 N.E.2d at 335; *Robinson*, 217 Ill.2d at 50, 298 Ill.Dec. 37, 838 N.E.2d 930. We determined that the

right the legislature intended to protect could be broadly defined as the right to appeal. 235 Ill.2d at 518, 337 Ill.Dec. at 213-14, 922 N.E.2d at 336-37; *Robinson,* 217 Ill.2d at 57, 298 Ill.Dec. 37, 838 N.E.2d 930. We reasoned that the right to appeal was not generally injured by service at a later date because sufficient time would, nonetheless, often remain for defendants to file a timely notice of appeal. We then

[922 N.E.2d 343]

concluded that the statute was directory, despite the potential harm statutory violations could cause to the appeal rights of *all* postconviction petitioners. 235 Ill.2d at 518, 337 Ill.Dec. at 213-14, 922 N.E.2d at 336-37; *Robinson,* 217 Ill.2d at 57, 298 Ill.Dec. 37, 838 N.E.2d 930.

In contrast, a violation of section 113-8 is not potentially harmful to *all* defendants. Indeed, noncompliance with section 113-8 is not potentially harmful to the rights of the vast majority of Illinois defendants because "[i]mmigration consequences—in particular, deportation—are not applicable to United States citizens." 235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337. As the majority recognizes, our legislature "clearly thought" that information "informing defendants that there could be potential immigration consequences to entering a guilty plea" was "important to a defendant when making his decision to plead guilty." 235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337. Implicit in this recognition is the fact that only defendants who are not United States citizens would find this information important in their decision-making. Unlike the statute in *Robinson,* the legislature did not intend section 113-8 to protect a broadly applicable right. Rather, the legislature intentionally targeted the statute to protect the rights of a select group of defendants, namely those whose immigration status could be affected by entering a guilty plea. Thus, the right the legislature intended section 113-8 to protect is not properly defined as the broad right of *all* defendants "to intelligently waive a jury trial and enter a guilty plea" (235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337), but rather as the right of noncitizen defendants to be informed that a guilty plea could result in negative immigration consequences.

Applying that definition of the protected right, we would next consider "whether the right that the statute intends to protect would be generally injured by a directory reading of the statute." 235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337. Instead of concluding that the protected right would not generally be injured because most defendants are citizens who are not subject to potential immigration consequences (235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337), however, this court should review defendant's conduct at the guilty plea hearing and the allegations in his motion to withdraw the guilty plea and vacate his conviction. Based on those factors, we would then decide whether defendant has adequately established that he "is not a United States citizen" and that "the crime for which [he] is entering a plea is one that could trigger immigration consequences." 235 Ill.2d at 519, 337 Ill.Dec. at 214, 922 N.E.2d at 337.

Here, defendant's motion alleged that "[a]t the time of his plea, defense counsel was unaware of defendant's immigration status. Defendant is not a United States Citizen but is a resident alien" and that "[n]either defense counsel nor the State made the court aware of the above facts concerning defendant's immigration status." During the trial court's questioning at defendant's plea hearing, however, defendant's response indicated that he was a United States citizen, creating a conflict with the allegations in the motion. No documents were attached to the motion to establish defendant's immigration status definitively. Nor did defendant's motion contain any allegation that a guilty plea to the charged offense could trigger negative

immigration consequences. Defendant has not met his burden of showing that the trial court's failure to admonish him under section 113-8 generally injured the right our legislature intended to protect.

[922 N.E.2d 344]

Consequently, I agree with the majority's conclusion that defendant has not overcome the presumption that the legislature intended a directory reading of section 113-8. 235 Ill.2d at 519, 337 Ill.Dec. at 214, 922 N.E.2d at 337. Because I respectfully disagree with the majority's definition of the right the legislature intended to protect by enacting section 113-8 and a portion of the following analysis, however, I specially concur in the opinion.

ILLINOIS STATE
BAR ASSOCIATION

Assembly Meeting
December 10, 2016

Agenda Item 13B
Legislation
(Collaborative Process Legislation)

ILLINOIS STATE
BAR ASSOCIATION

MEMORANDUM

To: ISBA Assembly

From: Jim Covington

Date: November 9, 2016

In re: Collaborative Process Legislative Proposal

You may recall that in 2013 Senate Bill 31 was filed in the Illinois General Assembly. It sought by statute to adopt the Collaborative Law Act as drafted by the Uniform Law Commission (ULC). This bill didn't become law, and at that time ISBA took a formal position opposing Senate Bill 31 because it sought to do certain things by statute that created separation of powers issues by regulating the practice of law.

Nevertheless, the collaborative process is being used by many of our family law lawyers—at the request of their clients—in an attempt to dissolve their marriages in such a way that the parties would still talk to each other afterward. Fifteen other states have enacted statutes or rules or both to standardize this limited scope representation. A short summary of the collaborative process that the 2013 version was modeled after is here.

Therefore, Immediate Past President Umberto Davi appointed a committee to take a second look at this issue. Members of the committee were Kelli Gordon, chair; Anna Krolikowska; Carlton Marcyan; Sari W. Montgomery; Lisa M. Nyuli; Hon. Donna-Jo Vorderstrasse; Rory Weiler; ISBA General Counsel Charles J. Northrup; and Jim Covington, ISBA Director of Legislative Affairs.

The ISBA committee has drafted a proposed statute and a complementing amendment to the Rules of Professional Conduct that are attached for your review. It limits the use of collaborative process to family law cases. I've added a redline version comparing the 2013 legislation to the statutory version that the ISBA Committee drafted.

To summarize, the differences between the 2013 legislation and the ISBA-proposed statute and rule are as follows:

- The ULC draft is entitled the "Uniform Collaborative Law Act" and the proposed statute is entitled the "Collaborative Process Act."

- The enacting clause has been changed from the ULC version of "AN Act concerning civil law" to "AN Act concerning alternative dispute resolution." (The Committee thought that this proposed statute fit rather neatly into the Alternative Dispute Resolution chapter here as 710 ILCS 5/50 (new) because the collaborative process is a form of alternative dispute resolution.)

- "Collaborative law" references have been changed to "collaborative process."

- The new Supreme Court Rule 2.5 replaces a number of sections of the ULC draft as does the addition in Section 2(2) in the proposed statute of the phrase "informed consent."

- The committee tried to shorten and condense the ULC draft if possible.

The proposed legislation was sent to these sections and committees:

- ADR—support.

- Bench and Bar—support but suggest reformatting of definitions that were incorporated into the ISBA draft statute.

- Civil Practice—oppose. Under this Act (and now without the Act) a person hires a lawyer who gets all the information and tries to help the client settle the dissolution case. The new proposed law would then require the client to hire a new lawyer if no settlement is reached. This deprives the client from the right to have the attorney the client chose handle the case if litigated. Plus, it will add costs as a new attorney would have to get all the information and analyze it, which the first lawyer already did. Plus only the ARDC rules should control attorney-client relationships, not the legislature. Again, the council was unanimously opposed." *(The Collaborative Process Committee notes: This draft puts attorney-client relationships solely under the SCT with a proposed SCT rule. The General Assembly has no role in that regulation in this draft. Whether to use the collaborative process in family law matters would be the client's choice after the attorney explains to the client the options – the required informed consent in the draft. Those options would include mediation,*

collaborative process, or litigation and the advantages and disadvantages of each. This would include the fact that if hired to represent the client in the collaborative process, the attorney would be hired for limited scope representation and the client would need to retain a new attorney if the collaborative process breaks down.)

- Child Law—TBD.
- Family Law—support.
- General Practice—support.
- Professional Conduct—now supports or least has no objection. The Special Committee on Collaborative Process originally drafted amendments to Rules 1.16 (mandatory withdrawal) and 1.10 (imputation) to the Rules of Professional Conduct. Professional Conduct raised some reasonable objections to the unintended consequences of the broadness of the proposed amendments. A couple of solutions were discussed, and a well-respected member of the Committee, who was very vocal about his concerns, offered to assist. After he performed some background research on other jurisdictions' ethical treatment of the collaborative law process, he felt more ethically comfortable with the collaborative process and what the Collaborative Process Committee was intending to accomplish. In contrast to the proposed piecemeal amendment of Rules 1.16 and 1.10, he has drafted a stand-alone rule (new Rule 2.5) to accommodate the collaborative process. His new, well-drafted Rule is attached and accomplishes the intent of the Special Committee on Collaborative Process. As a stand-alone rule, it addresses the concerns from the Professional Conduct Committee about unintended consequences from the originally proposed amendments to 1.16 and 1.10.
- Women and the Law—voted to take no position.
- YLD—oppose; neither legislation nor rule is necessary.

Legislation Committee. The Legislation Committee voted to approve the proposed statutory language and Supreme Court Rule with only one "no" vote.

ISBA Board of Governors. The Board voted to approve this proposal and recommends that the Assembly do the same.

If you have any questions, please call me. Thank you.

LRB10000354HEP10358b

100TH GENERAL ASSEMBLY

State of Illinois

2017 and 2018

INTRODUCED _____, BY

SYNOPSIS AS INTRODUCED:

New Act

Creates the Collaborative Process Act. Defines terms. Provides that the Act applies to collaborative process participation agreements that meet the requirements of the Act signed on or after the effective date of the Act. Contains provisions concerning: requirements of collaborative process participation agreements; the beginning and conclusion of the collaborative process; proceedings before the court; disclosure of information; standards of professional responsibility and mandatory reporting; confidentiality; and privileges. Provides that the Act is subject to the supervisory authority of the Illinois Supreme Court.

LRB100 00354 HEP 10358 b

A BILL FOR

AN ACT concerning alternative dispute resolution.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Short title. This Act may be cited as the Collaborative Process Act.

Section 5. Definitions. In this Act:

(1) "Collaborative process communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative process; and

(B) occurs after the parties sign a collaborative process participation agreement and before the collaborative process is concluded.

(2) "Collaborative process participation agreement" means a written agreement by persons acting with informed consent to participate in a collaborative process, in which the persons agree to discharge their collaborative process lawyer and law firm if the collaborative process fails.

(3) "Collaborative process" means a procedure intended to resolve a collaborative process matter without intervention by a court in which persons:

(A) sign a collaborative process participation

agreement; and

(B) are represented by collaborative process lawyers.

(4) "Collaborative process lawyer" means a lawyer who represents a party in a collaborative process and helps carry out the process of the agreement, but is not a party to the agreement.

(5) "Collaborative process matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which is described in a collaborative process participation agreement and arises under the family or domestic relations law of this State, including:

(A) marriage, divorce, dissolution, annulment, legal separation, and property distribution;

(B) significant decision making and parenting time of children;

(C) maintenance and child support;

(D) adoption;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

(6) "Law firm" means:

(A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and

(B) lawyers employed in a legal services organization, law school or the legal department of a corporation or

other organization.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative process lawyer, that participates in a collaborative process.

(8) "Party" means a person other than a collaborative process lawyer that signs a collaborative process participation agreement and whose consent is necessary to resolve a collaborative process matter.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Proceeding" means a judicial or other adjudicative process before a court, including related prehearing and post-hearing motions, conferences, and discovery.

(11) "Prospective party" means a person that discusses with a prospective collaborative process lawyer the possibility of signing a collaborative process participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative process matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative process matter.

(14) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

Section 10. Applicability. This Act applies to a collaborative process participation agreement that meets the requirements of Section 15 signed on or after the effective date of this Act.

Section 15. Collaborative process participation agreement; requirements.

(a) A collaborative process participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties' intention to resolve a collaborative process matter through a collaborative process under this Act;

(4) state the parties' agreement to discharge their collaborative process lawyers and law firms if the collaborative process fails.

(5) describe the nature and scope of the matter;

(6) identify the collaborative process lawyer who represents each party in the process; and

(7) contain a statement by each collaborative process

lawyer confirming the lawyer's representation of a party in the collaborative process.

(b) Parties may agree to include in a collaborative process participation agreement additional provisions not inconsistent with this Act.

Section 20. Beginning and concluding the collaborative process.

(a) A collaborative process begins when the parties sign a collaborative process participation agreement.

(b) A court may not order a party to participate in a collaborative process over that party's objection.

(c) A collaborative process is concluded by:

(1) resolution of a collaborative process matter as evidenced by a signed record of the parties;

(2) resolution of a part of the collaborative process matter, evidenced by a signed record of the parties, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process.

(d) A collaborative process terminates:

(1) when a party gives notice to other parties in a record that the process is ended;

(2) when a party:

(A) begins a proceeding related to a collaborative process matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) initiates a pleading, motion, order to show cause, or request for a conference with the court;

(ii) requests that the proceeding be put on the court's active calendar; or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (g), when a party discharges a collaborative process lawyer or a collaborative process lawyer withdraws from further representation of a party.

(e) A party's collaborative process lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative process with or without cause.

(g) A collaborative process continues, despite the discharge or withdrawal of a collaborative process lawyer, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative process lawyer required by subsection (e) is sent to the parties:

(1) the unrepresented party engages a successor collaborative process lawyer; and

(2) in a signed record:

(A) the parties consent to continue the process by

reaffirming the collaborative process participation agreement;

(B) the agreement is amended to identify the successor collaborative process lawyer; and

(C) the successor collaborative process lawyer confirms the lawyer's representation of a party in the collaborative process.

(h) A collaborative process does not conclude if, with the consent of the parties, a party requests a court to approve a resolution of the collaborative process matter or any part thereof as evidenced by a signed record.

(i) A collaborative process participation agreement may provide additional methods of concluding a collaborative process.

Section 25. Proceedings pending before a court; status report.

(a) Persons in a proceeding pending before a court may sign a collaborative process participation agreement to seek to resolve a collaborative process matter related to the proceeding. The parties shall file promptly with the court a notice of the agreement after it is signed. Subject to subsection (c) and Sections 30 and 35, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the court notice in a record when a collaborative process concludes. The stay of

the proceeding, if granted, under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A court in which a proceeding is stayed under subsection (a) may require the parties and collaborative process lawyers to provide a status report on the collaborative process and the proceeding. A status report may include only information on: (i) whether the process is ongoing or concluded; or (ii) the anticipated duration of the collaborative process.

(d) A court may not consider a communication made in violation of subsection (c).

(e) A court shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

Section 30. Emergency order. Nothing in the collaborative process may prohibit a party from seeking an emergency order to protect the health, safety, welfare, or interest of a party or person identified as protected in Section 201 of the Illinois Domestic Violence Act of 1986.

Section 35. Approval of agreement by the court. A court may approve an agreement resulting from a collaborative process. An agreement resulting from the collaborative process shall be

presented to the court for approval if the agreement is to be enforceable.

Section 40. Disclosure of information. Voluntary informal disclosure of information related to a matter is a defining characteristic of the collaborative process. Except as provided by law other than this Act, during the collaborative process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative process matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative process.

Section 45. Standards of professional responsibility and mandatory reporting not affected. This Act does not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this State.

Section 50. Confidentiality of collaborative process communication. A collaborative process communication is

confidential to the extent agreed by the parties in a signed record or as provided by law of this State other than this Act.

Section 55. Privilege against disclosure for collaborative process communication; admissibility; discovery.

(a) Subject to Sections 60 and 65, a collaborative process communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative process communication.

(2) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative process communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative process.

Section 60. Waiver and preclusion of privilege.

(a) A privilege under Section 55 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty

participant.

(b) A person that makes a disclosure or representation about a collaborative process communication which prejudices another person in a proceeding may not assert a privilege under Section 55, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

Section 65. Limits of privilege.

(a) There is no privilege under Section 55 for a collaborative process communication that is:

(1) available to the public under the Freedom of Information Act or made during a session of a collaborative process that is open, or is required by law to be open, to the public;

(2) a threat or statement of a plan to inflict bodily injury or commit a crime of violence as defined in Section 1-10 of the Alcoholism and Other Drug Abuse and Dependency Act;

(3) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

(4) in an agreement resulting from the collaborative process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under Section 55 for a collaborative

process communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless a child protective services agency or adult protective services agency is a party to or otherwise participates in the process.

(c) There is no privilege under Section 55 if a court finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative process communication is sought or offered in:

(1) a court proceeding involving a felony or misdemeanor; or

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative process communication is subject to an exception under subsection (b) or (c), only the part of the communication necessary for the application of the exception

may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) does not make the evidence or any other collaborative process communication discoverable or admissible for any other purpose.

(f) The privileges under Section 55 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative process is not privileged. This subsection does not apply to a collaborative process communication made by a person that did not receive actual notice of the agreement before the communication was made.

Section 70. Authority of the Illinois Supreme Court. This Act is subject to the supervisory authority of the Illinois Supreme Court.

Redline comparison between 2010 Uniform Law Commission proposal and the ISBA Committee

ULC Note for enacting states: *The provisions for regulation of collaborative law are presented in two formats for enactment- by court rules or legislation. The substantive provisions of each format are identical with the exception of several standard form clauses typically found in legislation. Each state considering adopting the Uniform Collaborative Law Court Rules (UCLR) or the Uniform Collaborative Law Act (UCLA) should review its practices and precedent to first determine whether the substantive provisions are best adopted by court rule or statute. The decision may vary from state to state depending on the allocation of authority between the legislature and the judiciary for regulation of contracts, alternative dispute resolution and the legal profession. States may also decide to enact part of the substantive provisions by court rule and part by legislation. Specific comments following some particular rules or sections indicate whether the Drafting Committee recommends enactment by court rule or legislation. Drafting agencies may need to renumber sections and cross references depending on their decision concerning the appropriate method of enactment.*

AN Act concerning alternative dispute resolution. ~~AN Act concerning civil law.~~

UNIFORM COLLABORATIVE LAW ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the ~~Uniform~~ Collaborative Process ~~Law~~ Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Collaborative process ~~law~~ communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative ~~law~~ process; and

(B) occurs after the parties sign a collaborative process ~~law~~ participation agreement and before the collaborative ~~law~~ process is concluded.

(2) "Collaborative process ~~law~~ participation agreement" means a written agreement by persons acting with informed consent to participate in a collaborative ~~law~~

process in which the persons agree to discharge their collaborative process lawyer and law firm if the collaborative process fails.

(3) "Collaborative ~~law~~ process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative process ~~law~~ participation agreement; and

(B) are represented by collaborative process lawyers.

(4) "Collaborative process lawyer" means a lawyer who represents a party in a collaborative ~~law~~ process and helps carry out the process of the agreement but is not a party to the agreement.

(5) "Collaborative process matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which is described in a collaborative process ~~law~~ participation agreement and arises under the family or domestic relations law of this state, including:

(A) marriage, divorce, dissolution, annulment, and property distribution;

(B) child custody, visitation, and parenting time;

(C) alimony, maintenance, and child support;

(D) adoption;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

(ISBA draft adds to this list significant decision making and parenting time of children.)

(6) "Law firm" means:

(A) lawyers who practice law together in a partnership, professional

corporation, sole proprietorship, limited liability company, or association; and

(B) lawyers employed in a legal services organization, law school, or the legal department of a corporation or other organization.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative process lawyer, that participates in a collaborative ~~law~~ process.

(8) "Party" means a person other than a collaborative process lawyer that signs a collaborative process ~~law~~ participation agreement and whose consent is necessary to resolve a collaborative process matter.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery.~~; or~~

~~(B) a legislative hearing or similar process.~~

(11) "Prospective party" means a person that discusses with a prospective collaborative prospective lawyer the possibility of signing a collaborative ~~law~~ process participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative process matter" means involving the same parties,

transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative process matter.

(14) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means:

(A) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter. ~~; or~~

~~(B) a legislative body conducting a hearing or similar process.~~

SECTION 3. APPLICABILITY. This [act] applies to a collaborative process ~~law~~ participation agreement that meets the requirements of Section 4 signed [on or] after [the effective date of this [act]].

SECTION 4. COLLABORATIVE PROCESS ~~LAW~~ PARTICIPATION AGREEMENT; REQUIREMENTS.

(a) A collaborative process ~~law~~ participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties' intention to resolve a collaborative process matter through ~~a~~ collaborative ~~law~~ process under this [act];

(4) state the parties' agreement to discharge their collaborative process

lawyers and law firms if the collaborative process fails;

(5) describe the nature and scope of the matter;

(6) identify the collaborative process lawyer who represents each party in the process; and

(6) contain a statement by each collaborative process lawyer confirming the lawyer's representation of a party in the collaborative ~~law~~ process.

(b) Parties may agree to include in a collaborative process ~~law~~ participation agreement additional provisions not inconsistent with this [act].

SECTION 5. BEGINNING AND CONCLUDING COLLABORATIVE ~~LAW~~ PROCESS.

(a) A collaborative ~~law~~ process begins when the parties sign a collaborative ~~law~~ process participation agreement.

(b) A tribunal may not order a party to participate in a collaborative ~~law~~ process over that party's objection.

(c) A collaborative ~~law~~ process is concluded by a:

(1) resolution of a collaborative process matter as evidenced by a signed record;

(2) resolution of a part of the collaborative process matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process.

(d) A collaborative ~~law~~ process terminates:

(1) when a party gives notice to other parties in a record that the process is

ended;

(2) when a party:

(A) begins a proceeding related to a collaborative process matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

(ii) requests that the proceeding be put on the [tribunal's active calendar]; or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (g), when a party discharges a collaborative process lawyer or a collaborative process lawyer withdraws from further representation of a party.

(e) A party's collaborative process lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative ~~law~~ process with or without cause.

(g) ~~Notwithstanding the discharge or withdrawal of a collaborative lawyer, a~~ A collaborative ~~law~~ process continues, despite the discharge or withdrawal of a collaborative process lawyer, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative process lawyer required by subsection (e) is sent to the parties:

(1) the unrepresented party engages a successor collaborative process

lawyer; and

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the collaborative process ~~law~~ participation agreement;

(B) the agreement is amended to identify the successor collaborative process lawyer; and

(C) the successor collaborative process lawyer confirms the lawyer's representation of a party in the collaborative process.

(h) A collaborative ~~law~~ process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative process matter or any part thereof as evidenced by a signed record.

(i) A collaborative process ~~law~~ participation agreement may provide additional methods of concluding a collaborative ~~law~~ process.

SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

(a) Persons in a proceeding pending before a tribunal may sign a collaborative process ~~law~~ participation agreement to seek to resolve a collaborative process matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Sections 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding, if granted, under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for

termination of the process.

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on: (i) whether the process is ongoing or concluded; or (ii) the anticipated duration of the collaborative process. ~~It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.~~

(d) A tribunal may not consider a communication made in violation of subsection (c).

(e) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

SECTION 7. EMERGENCY ORDER. Nothing in the collaborative process may prohibit a party from seeking an emergency order to protect the heath, safety, welfare, or interest of a party or person identified as protected in Section 201 of the Illinois Domestic Violence Act of 1986. ~~During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].~~

SECTION 8. APPROVAL OF AGREEMENT BY TRIBUNAL. A tribunal may approve an agreement resulting from a collaborative ~~law~~ process. An agreement resulting from the collaborative process shall be presented to a tribunal for approval if the

agreement is to be enforceable by the courts, an administrative agency, or any other tribunal.

~~**SECTION 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.**~~

~~(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.~~

~~(b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).~~

~~(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:~~

~~(1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or~~

~~(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.~~

~~(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor~~

~~lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.~~

~~**SECTION 10. LOW INCOME PARTIES.**~~

~~(a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a party with or without fee.~~

~~(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Section 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:~~

~~(1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;~~

~~(2) the collaborative law participation agreement so provides; and~~

~~(3) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.~~

~~**SECTION 11. GOVERNMENTAL ENTITY AS PARTY.**~~

~~(a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.~~

~~(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a~~

~~matter related to the collaborative matter if:~~

~~(1) the collaborative law participation agreement so provides; and~~

~~(2) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.~~

SECTION 12. DISCLOSURE OF INFORMATION. Voluntary informal disclosure of information related to a matter is a defining characteristic of the collaborative process. Except as provided by law other than this [act], during the collaborative ~~law~~ process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative process matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative ~~law~~ process.

SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED. This [act] does not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state.

~~**SECTION 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.** Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:~~

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

(B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Section 9(c), 10(b), or 11(b).

SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

(b) Throughout a collaborative law process, a collaborative lawyer reasonably and

~~continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.~~

~~(c) If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:~~

~~(1) the party or the prospective party requests beginning or continuing a process; and~~

~~(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.~~

SECTION 16. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATION. A collaborative process ~~law~~ communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than this [act].

SECTION 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE PROCESS ~~LAW~~ COMMUNICATION; ADMISSIBILITY; DISCOVERY.

(a) Subject to Sections 18 and 19, a collaborative process ~~law~~ communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative process ~~law~~ communication.

(2) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative process ~~law~~ communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative process ~~law~~ process.

SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 17 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

(b) A person that makes a disclosure or representation about a collaborative ~~law~~ process communication which prejudices another person in a proceeding may not assert a privilege under Section 17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

SECTION 19. LIMITS OF PRIVILEGE.

(a) There is no privilege under Section 17 for a collaborative process ~~law~~ communication that is:

(1) available to the public under [state open records act] or made during a session of a collaborative ~~law~~ process that is open, or is required by law to be open, to the public;

(2) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(3) intentionally used to plan a crime, commit or attempt to commit a

crime, or conceal an ongoing crime or ongoing criminal activity; or

(4) in an agreement resulting from the collaborative ~~law~~ process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under Section 17 for a collaborative process ~~law~~ communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative ~~law~~ process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(c) There is no privilege under Section 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative process ~~law~~ communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative ~~law~~ process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative process ~~law~~ communication is subject to an exception under subsection (b) or (c), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) does not make the evidence or any other collaborative ~~law~~ process communication discoverable or admissible for any other purpose.

(f) The privileges under Section 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative ~~law~~ process is not privileged. This subsection does not apply to a collaborative ~~law~~ communication made by a person that did not receive actual notice of the agreement before the communication was made.

~~**SECTION 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.**~~

~~(a) If an agreement fails to meet the requirements of Section 4, or a lawyer fails to comply with Section 14 or 15, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if they:~~

~~(1) signed a record indicating an intention to enter into a collaborative law participation agreement; and~~

~~(2) reasonably believed they were participating in a collaborative law process.~~

~~(b) If a tribunal makes the findings specified in subsection (a), and the interests of justice require, the tribunal may:~~

~~(1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;~~

~~(2) apply the disqualification provisions of Sections 5, 6, 9, 10, and 11; and~~

~~(3) apply a privilege under Section 17.~~

~~**SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.~~

~~**SECTION 22. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).~~

~~**[SECTION 23. SEVERABILITY.** If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]~~

Section 70. Authority of Supreme Court. This Act is subject to the supervisory authority of the Supreme Court.

ILLINOIS STATE
BAR ASSOCIATION

Assembly Meeting
December 10, 2016

Agenda Item 13C
Legislation
(Family Leave Insurance Act Legislation)

ILLINOIS STATE
BAR ASSOCIATION

MEMORANDUM

To: ISBA Assembly

From: Jim Covington

Date: November 10, 2016

In re: Family Leave Insurance Act

The Standing Committee on Women and the Law respectfully requests that the ISBA Assembly support passage of the Family Leave Insurance Act. A copy is attached of the proposed legislation that was introduced in July and will be re-introduced in January in the new General Assembly. Also attached is a short memo from WATL in support of this request.

These were recently sent to the following sections and committees for their review and comments:

- Corporate Law Section Council
- Employee Benefits Section Council
- Labor and Employment Section Council
- Standing Committee on Disability Law
- Family Law Section Council
- Child Law Section Council
- Young Lawyers Division
- Health Care Section Council
- Human Rights Section Council
- Insurance Law Section Council
- General Practice Section Council
- Standing Committee on SOGI
- Standing Committee on Law Office Management and Economics

Please call if you have any questions. Thank you.

MEMORANDUM

TO: Illinois State Bar Association Assembly

FROM: Standing Committee on Women and the Law

DATE: September 30, 2016

RE: Family Leave Insurance Act

The Standing Committee on Women and the Law (WATL) urges the ISBA to support passage of the Family Leave Insurance Act. This memorandum briefly explains the benefits of family leave insurance and the current status of similar programs in place outside of Illinois, and summarizes the Illinois Family Leave Insurance Act, in its current form.

The United States is the only industrialized nation in the world that does not have a mandatory workplace-based program that provides paid-time off of work for mothers who give birth or adopt a child. The United States is only one of nine industrialized countries that have no such program in place for fathers. Likewise, the United States stands essentially alone in its failure to have a system in place that mandates time off for an employee's own sickness, to take care of a sick family member or to take a vacation.[1] We are a nation that supports family values without any substance to support that claim. We value American families by taking steps to preserve the family structure, which is accomplished through the enactment of laws that protect our mothers and fathers, and our sons and daughters, in the workplace. Women are more likely to be the primary caregiver in the family and increasingly are becoming the primary breadwinners as well. As of 2013, 40% of all households with children under the age of 18 included mothers who were either the sole or the primary source of income for the family.[2] Paid family leave programs promote equality in the workplace by alleviating the stigma that women with children face which results in denied or delayed career advancement and equal wages.[3] Paid family leave programs increase the likelihood that a new mother or father will return to the workplace with increased productivity as the result of improved loyalty and morale.[4] In addition, as our workforce ages, so do their parents. The share of the population age 65 and older is larger today than it was at any point during the 20th century.[5] It is therefore necessary and desirable for the State of Illinois to develop a system that helps families adapt to the competing interests of work and home while benefiting employer productivity and profit. Having a similar system in Illinois will allow smaller businesses to compete with larger businesses.

Four states, California, New Jersey, Rhode Island and most recently, New York, along with many businesses, have adopted paid family leave programs. California's employers all reported positive outcomes associated with its program, with small to medium-sized businesses reporting

[1] http://www.npr.org/sections/itsallpolitics/2015/07/15/422957640/lots-of-other-countries-mandate-paid-leave-why-not-the-us

[2] http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/

[3] http://pubadvocate.nyc.gov/sites/advocate.nyc.gov/files/publicadvocate-paidfamilyreport_may_2015_1.pdf

[4] http://www.nationalpartnership.org/research-library/work-family/paid-leave/paid-leave-good-for-business.pdf

[5] https://www.whitehouse.gov/sites/default/files/docs/leave_report_final.pdf

the most positive outcomes overall. [6] Very few employers suspect abuse and even fewer have reported abuse.[7] In each of these states, the paid family leave is working. Millions of employees have taken paid leave to bond with a new child, to attend doctor appointments, breastfeed, and recover from childbirth. Businesses, both small and large, overwhelmingly have reported an easy adjustment with little to no administration costs and in fact, have seen cost savings.[8] It is the public policy of the State of Illinois to promote legislation that balances workplace protections for Illinois families with business-friendly solutions. The Illinois State Bar Association has been a strong and vocal leader for the advancement of work-life balance. Support for substantive legislation furthers that goal and is consistent with these values.

Illinois Legislative Action

On July 5, 2016, Senator Daniel Biss filed the Family Leave Insurance Act as Senate Amendment 1 to Senate Bill 260. No action will likely be taken until the 100th General Assembly convenes in January, 2017. The Family Leave Insurance Act, as filed, provides an eligible employee with up to twelve (12) week of family leave within a twenty-four (24) month period, for the birth or adoption of a child, to care for a family member with a serious health condition or to recover from his/her own health condition. An eligible employee must be employed by the same employer in the State of Illinois for twelve (12) months or more or with a base of 1,200 hours worked during the preceding twelve (12) month period. For purposes of this Act, an employer is anyone who employees one or more employees, with certain exceptions. The Family Leave Insurance Act provides job protections during the period that the employee is entitled to take leave. Specifically, upon return from leave the employee must be restored to the same or an equivalent position of employment. Like the other states, the program is funded by an employee payroll premium deduction of .3% of taxable wages, with (a current) annual total contribution cap of $38.88 per employee. The employee is compensated at two-thirds (2/3) of his/her average weekly wage. The program would be administered by the Department of Employment Security. Illinois' Family Leave Insurance Act is solely funded by employees and has no mandatory contribution by employers.

Proposed Action

We ask the ISBA Assembly to vote in favor of a resolution in support of the Family Leave Insurance Act.

---

[6] Applebaum, E., & Milkman, R. (2011, January 19). Paid Family Leave Pays Off in California. Harvard Business Review, HBR Blog Network. Retrieved 5 March 2015, from http://blogs.hbr.org/2011/01/paid-family-leave-pays-off-in/

[7] See note 6.

[8] http://www.nationalpartnership.org/research-library/work-family/paid-leave/paid-leave-good-for-business.pdf

Sen. Daniel Biss

Filed: 7/5/2016

AMENDMENT TO SENATE BILL 260

AMENDMENT NO. 1. Amend Senate Bill 260 by replacing everything after the enacting clause with the following:

"Section 1. Short title. This Act may be cited as the Family Leave Insurance Act.

Section 5. Declaration of policy and intent.

(a) Many employees do not have access to family and medical leave programs, and those who do may not be in a financial position to take family or medical leave that is unpaid, and employer-paid benefits meet only a relatively small part of this need. It is the public policy of this State to protect working families against the economic hardship caused by the need to take time off from work to care for themselves or family members who are suffering from a serious illness or to care for a newborn or a newly adopted child.

Moreover, many women are single mothers or the primary

breadwinners for their families. If any of these women take an unpaid maternity leave, her whole family, and Illinois, suffers.

The United States is the only industrialized nation in the world that does not have a mandatory workplace-based program for such income support.

It is therefore desirable and necessary to develop systems that help families adapt to the competing interests of work and home which not only benefit workers, but also benefit employers by reducing employee turnover and increasing worker productivity.

(b) It is the intent of the General Assembly to create a family leave program to relieve the serious menace to health, morals, and welfare of Illinois families, to increase workplace productivity, and to alleviate the enormous and growing stress on working families of balancing the demands of work and family needs.

Section 10. Definitions. In this Act:

(1)(A) "Average weekly wage" means the amount derived by dividing a covered employee's total wages earned from the employee's most recent covered employer during the base weeks in the 8 calendar weeks immediately preceding the calendar week in which a period of family leave commenced by the number of such base weeks.

(B) If the computation in paragraph (A) yields a result

that is less than the employee's average weekly earnings in employment with all covered employers during the base weeks in such 8 calendar weeks, then the average weekly wage shall be computed on the basis of earnings from all covered employers during the base weeks in the 8 calendar weeks immediately preceding the week in which the period of family leave commences.

(C) For periods of family leave, if the computations in paragraphs (A) and (B) both yield a result which is less than the employee's average weekly earnings in employment with all covered employers during the base weeks in the 26 calendar weeks immediately preceding the week in which the period of family leave commenced, then the average weekly wage shall, upon a written request to the Department by the employee on a form provided by the Department, be computed by the Department on the basis of earnings from all covered employers of the employee during the base weeks in those 26 calendar weeks.

(2) "Base hours" means the hours of work for which an employee receives compensation. "Base hours" includes overtime hours for which the employee is paid additional or overtime compensation and hours for which the employee receives workers' compensation benefits. "Base hours" also includes hours an employee would have worked except for having been in military service. At the option of the employer, "base hours" may include hours for which the employee receives other types of compensation, such as administrative, personal leave, vacation

or sick leave.

(3) "Care" includes, but is not limited to, physical care, emotional support, visitation, arranging for a change in care, assistance with essential daily living matters, and personal attendant services.

(4) "Child" means a biological, adopted, or foster child, stepchild, or legal ward of an eligible employee, child of a spouse of the eligible employee, or child of a civil union partner of the eligible employee, who is less than 19 years of age or is 19 years of age or older, but incapable of self-care because of a mental or physical impairment.

(5) "Civil union" means a civil union as defined in the Illinois Religious Freedom Protection and Civil Union Act.

(6) "Consecutive leave" means leave that is taken without interruption based upon an employee's regular work schedule and does not include breaks in employment in which an employee is not regularly scheduled to work. For example, when an employee is normally scheduled to work from September through June and is not scheduled to work during July and August, a leave taken continuously during May, June, and September shall be considered a consecutive leave.

(7) "Department" means the Department of Employment Security.

(8) "Director" means the Director of Employment Security and any transaction or exercise of authority by the Director shall be deemed to be performed by the Department.

(9) "Eligible employee" means an employee employed by the same employer, as defined in paragraph (10), in the State of Illinois for 12 months or more who has worked 1,200 or more base hours during the preceding 12-month period. An employee is considered to be employed in the State of Illinois if:

(A) the employee works in Illinois; or

(B) the employee routinely performs some work in Illinois and the employee's base of operations or the place from which the work is directed and controlled is in Illinois.

(10) "Employer" means any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or person that has in its employ one or more employees performing services for it within this State. "Employer" also includes any employer subject to the Unemployment Insurance Act, except the State, its political subdivisions, and any instrumentality of the State. All employees performing services within this State for any employing unit that maintains 2 or more separate establishments within this State shall be deemed to be employed by a single employing unit for all purposes of this Act.

(11) "Family member" means an eligible employee's child, spouse, party to a civil union, parent, or any other individual related by blood or whose close relationship with the employee is the equivalent of a family relationship.

(12) "Family leave" means leave taken by an eligible employee from work with an employer: (A) to participate in the providing of care, including physical or psychological care, for the employee or a family member of the eligible employee made necessary by a serious health condition of the family member; (B) to be with a child during the first 12 months after the child's birth, if the employee, the employee's spouse, or the party to a civil union with the employee, is a biological parent of the child, or the first 12 months after the placement of the child for adoption or foster care with the employee; (C) for the employee's own serious health condition; or (D) because of any qualifying exigency as interpreted under the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(a)(1)(E) and 29 CFR 825.126) arising out of the fact that the spouse, party to a civil union, child, parent of the employee, or any other individual related by blood or whose close relationship with the employee is equivalent to a family relationship is on active duty (or has been notified of an impending call or order to active duty) in the armed forces as of the United States. "Family leave" does not include any period of time during which an eligible employee is paid benefits pursuant to the Workers' Compensation Act or the Unemployment Insurance Act because the employee is unable to perform the duties of the employee's employment due to the employee's own disability.

(13) "Family leave benefits" means any payments that are payable to an eligible employee for all or part of a period of

family leave.

(14) "Health care provider" means any person licensed under federal, State, or local law or the laws of a foreign nation to provide health care services or any other person who has been authorized to provide health care by a licensed health care provider.

(15) "Intermittent leave" means a non-consecutive leave consisting of intervals, each of which is at least one, but fewer than 12, weeks within a consecutive 12-month period.

(16) "Parent of an eligible employee" means a biological parent, foster parent, adoptive parent, or stepparent of the eligible employee or a person who was a legal guardian of, or who stood in loco parentis to, the eligible employee when the eligible employee was a child.

(17) "Placement for adoption" means the time when an eligible employee adopts a child or becomes responsible for a child pending adoption by the eligible employee.

(18) "Serious health condition" means an illness, injury, impairment, or physical or mental condition that requires inpatient care in a hospital, hospice, or residential medical care facility or continuing medical treatment or continuing supervision by a health care provider.

(19) "12-month period" means, with respect to an employee who establishes a valid claim for family leave benefits during a period of family leave, the 365 consecutive days that begin with the first day that the employee first establishes the

claim.

Section 15. Family leave program.

(a) Subject to appropriation, the Department shall establish and administer a family leave program.

(b) The Department shall establish procedures and forms for filing claims for benefits under this Act.

(c) The Department shall use information sharing and integration technology to facilitate the disclosure of relevant information or records by the Department of Employment Security.

(d) Information contained in the files and records pertaining to an employee under this Act is confidential and not open to public inspection, other than to public employees in the performance of their official duties. However, the employee or an authorized representative of an employee may review the records or receive specific information from the records on the presentation of the signed authorization of the employee. An employer or the employer's duly authorized representative may review the records of an employee employed by the employer in connection with a pending claim. At the Department's discretion, other persons may review records when such persons are rendering assistance to the Department at any stage of the proceedings on any matter pertaining to the administration of this Act.

An employer must keep at its place of business records of

employment from which the information needed by the Department for purposes of this Act may be obtained. The records shall at all times be open to the inspection of the Department pursuant to rules adopted by the Department.

(e) The Department shall develop and implement an outreach program to ensure that individuals who may be eligible to receive family leave benefits under this Act are made aware of these benefits. Outreach information shall explain, in an easy to understand format, eligibility requirements, the claims process, weekly benefit amounts, maximum benefits payable, notice requirements, reinstatement and nondiscrimination rights, confidentiality, and coordination of leave under this Act and other laws, collective bargaining agreements, and employer policies. Outreach information shall be available in English and in languages other than English that are spoken as a primary language by a significant portion of the State's population, as determined by the Department.

Section 20. Eligibility for benefits.

(a) The Department may require that a claim for family leave benefits under this Section be supported by a certification issued by a health care provider who is providing care to the employee or the employee's family member if applicable.

(b) An employee is not eligible for family leave benefits under this Section for any week for which the employee receives

paid family leave from his or her employer. If an employer provides paid family leave, the employee may elect whether first to use the paid family leave or to receive family leave benefits under this Section. An employee may not be required to use paid family leave to which the employee is entitled before receiving family leave benefits under this Section.

(c) This Section does not limit an employee's right to take leave from employment under other laws or employer policy.

(d) The eligibility of an employee for benefits is not affected by a strike or lockout at the factory, establishment, or other premises at which the employee is or was last employed.

(e) An employee who has received benefits under this Section may not lose any other employment benefits, including seniority or pension rights, accrued before the date that family leave commenced. However, this Section does not entitle an employee to accrue employment benefits during a period of family leave or to a right, benefit, or position of employment other than a right, benefit, or position to which the employee would have been entitled had the employee not taken family leave.

(f) This Section does not diminish an employer's obligation to comply with a collective bargaining agreement or an employment benefits program or plan that provides greater benefits to employees than the benefits provided under this Section.

(g) An agreement by an employee to waive the employee's rights under this Section is void as contrary to public policy. The benefits under this Section may not be diminished by a collective bargaining agreement or another employment benefits program or plan entered into or renewed after the effective date of this Act.

(h) Nothing in this Act shall be deemed to affect the validity or change the terms of bona fide collective bargaining agreements in force on the effective date of this Act. After that date, requirements of this Act may be waived in a bona fide collective bargaining agreement, but only if the waiver is set forth explicitly in such agreement in clear and unambiguous terms.

(i) This Section does not create a continuing entitlement or contractual right.

Section 25. Disqualification from benefits.

(a) An employee is disqualified from family leave benefits under this Act if the employee:

(1) willfully makes a false statement or misrepresentation regarding a material fact, or willfully fails to disclose a material fact, to obtain benefits;

(2) seeks benefits based on an intentionally self-inflicted serious health condition; or

(3) seeks benefits based on a serious health condition that resulted from the employee's commission of a felony.

(b) A disqualification for family leave benefits is for a period of 2 years, and commences on the first day of the calendar week in which the employee filed a claim for benefits under this Act. An employee who is disqualified for benefits is liable to the Department for a penalty in an amount equal to 15% of the amount of benefits received by the employee.

Section 30. State Benefits Fund.

(a) The State Benefits Fund is created as a special fund in the State treasury. Subject to appropriation, moneys in the Fund may be used for the payment of family leave benefits and for the administration of this Act. All interest and other earnings that accrue from investment of moneys in the Fund shall be credited to the Fund.

(b) An employer shall retain from all employees a payroll premium deduction in the amount of 0.3% of wages as defined in Section 235 of the Unemployment Insurance Act. The Department shall by rule provide for the collection of this payroll premium deduction.

The amount of the payroll premium imposed under this Section, less refunds authorized by this Act, and all assessments and penalties collected under this Act shall be deposited into and credited to the Fund.

(c) A separate account, to be known as the Administration Account, shall be maintained in the Fund. An amount determined by the Department sufficient for proper administration, not to

exceed, however, 0.1% of wages as defined in this Section, shall be credited to the Administration Account. The expenses of the Department in administering the Fund and its accounts shall be charged against the Administration Account. The costs of administration of this Act shall be charged to the Administration Account.

(d) A separate account, to be known as the Family Leave Benefits Account, shall be maintained in the Fund. The account shall be charged with all benefit payments. Prior to July 1 of each calendar year, the Department shall determine the average rate of interest and other earnings on all investments of the Fund for the preceding calendar year. If there is an accumulated deficit in the Family Leave Benefits Account in excess of $200,000 at the end of any calendar year after interest and other earnings have been credited as provided in this Section, the Department shall determine the ratio of the deficit to the total of all taxable wages paid during the preceding calendar year and shall make an assessment against all employers in an amount equal to the taxable wages paid by them during the preceding calendar year to employees, multiplied by the ratio, but in no event shall any such assessment exceed 0.1% of such wages. The amounts shall be collectible by the Department in the same manner as provided for the collection of employer contributions under the Unemployment Insurance Act. In making this assessment, the Department shall furnish to each affected employer a brief

summary of the determination of the assessment. The amount of such assessments collected by the Department shall be credited to the Family Leave Benefits Account. As used in this Section, "wages" means wages as provided in Section 235 of the Unemployment Insurance Act.

(e) A board of trustees, consisting of the State Treasurer, the Secretary of State, the Director of Labor, the Director of Employment Security, and the State Comptroller, is hereby created. The board shall invest and reinvest all moneys in the Fund in excess of its cash requirements in obligations legal for savings banks.

(f) The Department may adjust rates, not to exceed the amount established in subsection (b) of this Section, for the collection of premiums pursuant to subsection (b) of this Section. The Department shall set rates for premiums in a manner that minimizes the volatility of the rates assessed and so that at the end of the period for which the rates are effective, the cash balance shall be an amount approximating 12 months of projected expenditures from the Fund, considering the functions and duties of the Department under this Act.

(g) An employer required to pay premiums under this Section shall make and file a report of employee hours worked and amounts due under this Section upon a combined report form prescribed by the Department. The report shall be filed with the Department at the times and in the manner prescribed by the Department.

(h) If the employer is a temporary employment agency that provides employees on a temporary basis to its customers, the temporary employment agency is considered the employer for purposes of this Section.

(i) When an employer quits business or sells out, exchanges, or otherwise disposes of the business or stock of goods, any premium payable under this Section is immediately due and payable, and the employer shall, within 10 days thereafter, pay the premium due. A person who becomes a successor to the business is liable for the full amount of the premium and shall withhold from the purchase price a sum sufficient to pay any premium due from the employer until the employer produces a receipt from the Department showing payment in full of any premium due or a certificate that no premium is due. If the premium is not paid by the employer within 10 days after the date of the sale, exchange, or disposal, the successor is liable for the payment of the full amount of the premium. The successor's payment of the premium is, to the extent of the payment, a payment upon the purchase price, and if the payment is greater in amount than the purchase price, the amount of the difference is a debt due the successor from the employer.

A successor is not liable for any premium due from the person from whom the successor has acquired a business or stock of goods if the successor gives written notice to the Department of the acquisition and no assessment is issued by

the Department within one year after receipt of the notice against the former operator of the business.

Section 35. Compensation for family leave.

(a) An individual's weekly benefit rate shall be two-thirds of his or her average weekly wage, subject to a maximum of 53% of the Statewide average weekly wage paid to workers by employers, as determined pursuant to Section 401 of the Unemployment Insurance Act, provided, however, that the individual's benefit rate shall be computed to the next lower multiple of $1 if not already a multiple thereof. The amount of benefits for each day of family leave for which benefits are payable shall be one-seventh of the corresponding weekly benefit amount; provided that the total benefits for a fractional part of a week shall be computed to the next lower multiple of $1 if not already a multiple thereof.

(b) With respect to any period of family leave and while an individual is an eligible employee, family benefits not in excess of the individual's maximum benefits shall be payable with respect to the first day of leave taken after the first one-week period following the commencement of the period of family leave and each subsequent day of family leave during that period of family leave; and if benefits become payable on any day after the first 3 weeks in which leave is taken, then benefits shall also be payable with respect to any leave taken during the first one-week period in which leave is taken. The

maximum total benefits payable to any eligible individual commencing on or after the effective date of this Act shall be 12 times the individual's weekly benefit amount or one-third of his or her total wages in his or her base year, whichever is the lesser; provided that the maximum amount shall be computed in the next lower multiple of $1 if not already a multiple thereof.

(c) All of the family leave benefits paid to an eligible employee during a period of family leave with respect to any one birth or adoption shall be for a single continuous period of time, except that the employer of the eligible employee may permit the eligible employee to receive the family leave benefits during non-consecutive weeks in a manner mutually agreed to by the employer and the eligible employee and disclosed to the Department by the employer.

(d) Nothing in this Act shall be construed to prohibit the establishment by an employer, without approval by the Department, of a supplementary plan or plans providing for the payment to employees, or to any class or classes of employees, of benefits in addition to the benefits provided by this Act or to prohibit the collection or receipt of additional voluntary contributions from employees toward the cost of the additional benefits. The rights, duties, and responsibilities of all interested parties under the supplementary plans shall be unaffected by any provision of this Act.

Section 40. Family leave; duration. An eligible employee may take 12 weeks of family leave within any 24-month period in order to provide care made necessary by reasons identified in Section 10. An eligible employee may take family leave on an intermittent schedule in which all of the leave authorized under this Act is not taken sequentially.

Section 45. Annual reports; contents.

(a) The Department shall issue and make available to the public, not later than July 1, 2018 and July 1 of each subsequent year, annual reports providing data on family leave benefits claims involving pregnancy and childbirth, and family leave benefits, including separate data for each of the following categories of claims: the employee's own serious illness; care of newborn children; care of newly adopted children; care of sick children; care of sick spouses; and care of other sick family members. The reports shall include, for each category of claims, the number of workers receiving the benefits, the amount of benefits paid, the average duration of benefits, the average weekly benefit, and any reported amount of sick leave, vacation, or other fully paid time which resulted in reduced benefit duration. The report shall provide data by gender and by any other demographic factors determined to be relevant by the Department. The reports shall also provide, for all family leave benefits, the total costs of benefits and the total cost of administration, the portion of

benefits for claims during family leave, and the total revenues from employer assessments, where applicable; employee assessments; and other sources.

(b) The Department may, in its discretion, conduct surveys and other research regarding, and include in the annual reports descriptions and evaluations of the impact and potential future impact of the costs and benefits resulting from the provisions of this Act for:

(1) employees and their families, including surveys and evaluations of what portion of the total number of employees taking leave would not have taken leave, or would have taken less leave, without the availability of benefits; what portion of employees return to work after receiving benefits and what portion are not permitted to return to work; and what portion of employees who are eligible for benefits do not claim or receive them and why they do not;

(2) employers, including benefits such as reduced training and other costs related to reduced turnover of personnel, and increased affordability of family leave through the State, with special attention given to small businesses; and

(3) the public, including savings caused by any reduction in the number of people receiving public assistance.

(c) The total amount of any expenses that the Department

determines are necessary to carry out its duties pursuant to this Section shall be charged to the Administration Account of the Fund.

Section 50. Hearings. A person aggrieved by a decision of the Department under this Act may request a hearing. The Department shall adopt rules governing hearings and the issuance of final orders under this Act in accordance with the provisions of the Illinois Administrative Procedure Act. All final administrative decisions of the Department under this Act are subject to judicial review under the Administrative Review Law.

Section 55. Prohibited acts. No employer, temporary employment agency, employment agency, employee organization, or other person shall discharge, expel, or otherwise discriminate against a person because the person has filed or communicated to the employer an intent to file a claim, a complaint, or an appeal or has testified or is about to testify or has assisted in any proceeding, under this Act, at any time.

Section 60. Penalties.

(a) A person who makes a false statement or representation, knowing it to be false, or knowingly fails to disclose a material fact to obtain or increase any family leave benefit during a period of family leave, either for himself or herself

or for any other person, shall be liable for a civil penalty of $250 to be paid to the Department. Each such false statement or representation or failure to disclose a material fact shall constitute a separate offense. Upon refusal to pay such civil penalty, the civil penalty shall be recovered in a civil action by the Attorney General on behalf the Department in the name of the State of Illinois. If, in any case in which liability for the payment of a civil penalty has been determined, any person who has received any benefits under this Act by reason of the making of such false statements or representations or failure to disclose a material fact shall not be entitled to any benefits under this Act for any leave occurring prior to the time he or she has discharged his or her liability to pay the civil penalty.

(b) A person who willfully violates any provision of this Act or any rule adopted under this Act for which a civil penalty is neither prescribed in this Act nor provided by any other applicable law shall be subject to a civil penalty of $500 to be paid to the Department. Upon the refusal to pay such civil penalty, the civil penalty shall be recovered in a civil action by the Attorney General on behalf of the Department in the name of the State of Illinois.

(c) A person, employing unit, employer, or entity violating any provision of this Section with intent to defraud the Department is guilty of a Class C misdemeanor. The fine upon conviction shall be payable to the Fund. Any penalties imposed

by this subsection shall be in addition to those otherwise prescribed in this Section.

Section 70. Leave and employment protection.

(a) During a period in which an employee receives family leave benefits under this Act, the employee is entitled to family leave and, at the established ending date of leave, to be restored to a position of employment with the employer from whom leave was taken as provided under subsection (b).

(b) Except as provided in subsection (f), an employee who receives family leave benefits under this Act for the intended purpose of the family leave is entitled, on return from the leave:

(1) to be restored by the employer to the position of employment held by the employee when the family leave commenced; or

(2) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment at a workplace within 20 miles of the employee's workplace when the family leave commenced.

(c) The taking of family leave under this Act may not result in the loss of any employment benefits accrued before the date on which the family leave commenced.

(d) Nothing in this Section entitles a restored employee to:

(1) the accrual of any seniority or employment benefits

during any period of family leave; or

(2) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled to had the employee not taken the family leave.

(e) Nothing in this Section prohibits an employer from requiring an employee on family leave to report periodically to the employer on the status and intention of the employee to return to work.

(f) An employer may deny restoration under subsection (b) to a salaried employee who is among the highest paid 10% of the employees employed by the employer within 75 miles of the facility at which the employee is employed if:

(1) denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(2) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that the injury would occur; and

(3) the family leave has commenced and the employee elects not to return to employment after receiving the notice.

Section 75. Notice to employer.

(a) If the necessity for family leave for the birth or placement of a child is foreseeable based on an expected birth or placement, the employee shall provide the employer with not

less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave for the birth or placement of a child, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(b) If the necessity for family leave for an employee's or a family member's serious health condition is foreseeable based on planned medical treatment, the employee:

(1) must make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer; and

(2) must provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave for his, her, or a family member's serious health condition, except that if the date of the treatment requires leave to begin in less than 30 days, the employee must provide such notice as is practicable.

Section 80. Employment by same employer. If spouses who are entitled to leave under this Act are employed by the same employer, the employer may require that spouses not take such leave concurrently.

Section 85. Coordination of leave.

(a) Family leave taken under this Act must be taken

concurrently with any leave taken under the federal Family and Medical Leave Act of 1993.

(b) An employer may require that family leave taken under this Act be taken concurrently or otherwise coordinated with leave allowed under the terms of a collective bargaining agreement or employer policy, as applicable, for the birth or placement of a child. The employer must give his or her employees written notice of this requirement.

Section 90. Rules. The Department may adopt any rules necessary to implement the provisions of this Act. In adopting rules, the Department shall maintain consistency with the regulations adopted to implement the federal Family and Medical Leave Act of 1993 to the extent such regulations are not in conflict with this Act.

Section 95. Authority to contract. The Department may contract or enter into interagency agreements with other State agencies for the initial administration of the Family Leave Program.

Section 175. Severability. The provisions of this Act are severable under Section 1.31 of the Statute on Statutes.

Section 900. The State Finance Act is amended by adding Section 5.875 as follows:

(30 ILCS 105/5.875 new)

Sec. 5.875. The State Benefits Fund.

Section 999. Effective date. This Act takes effect upon becoming law.".

Assembly Meeting
December 10, 2016

Informational Report B
Professional Conduct Opinions
(16-01 thru 16-06)

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-01
June 2016

Subject: Law Firms; Law Firm Name and Letterhead; Multijurisdictional Practice

Digest: A law firm organized as a professional corporation in a state other than Illinois, and registered as a law firm in its state of incorporation, is required to register as a law firm with the Illinois Supreme Court if one of its shareholders, admitted to the Illinois bar, practices law in Illinois in the name of the professional corporation.

References: Illinois Supreme Court Rules 721 and 722
Ford Motor Credit Co. v. Sperry, 214 Ill.2d 371, 827 N.E.2d 422, 292 Ill.Dec. 893 (2005)

Joseph P. Storto, P.C. v. Becker, 341 Ill.App.3d 337, 792 N.E.2d 384, 275 Ill.Dec. 153 (2003)

FACTS

A State X professional corporation, registered to practice law in State X, has two shareholders, both admitted to the bar in the state of incorporation and one also admitted in Illinois. The professional corporation is not registered to practice in Illinois under Rule 721 of the Rules on Admission and Discipline of Attorneys, but the Illinois-admitted attorney practices law in Illinois. The Illinois-admitted lawyer corresponds with clients on letterhead that identifies the law firm as a professional corporation. Also, the Illinois-admitted lawyer corresponds with clients by email with an email signature block that identifies the law firm as a professional corporation.

QUESTION

Is the professional corporation engaged in the practice of law in Illinois as the practice of law is contemplated in Rule 721(a) of the Rules on Admission and Discipline of Attorneys, so that the professional corporation must apply to the Illinois Supreme Court for a certificate of registration?

ANALYSIS

Illinois Supreme Court Rule 721(c) reads as follows:

> No corporation, association, limited liability company, or registered limited liability partnership shall engage in the practice of law in Illinois, or open or maintain an establishment for that purpose in Illinois, without a certificate of registration issued by this court.

As long as at least one shareholder of an out-of-state professional corporation is admitted to practice law in Illinois, such a firm may obtain a certificate of registration in Illinois. Rule 721(a). Only if a firm is registered under Rule 721 may its shareholders benefit from the limited liability for errors and omissions

afforded by Rule 722, provided, of course, that the firm maintains minimum insurance or proof of financial responsibility in accordance with Rule 722(b). That is so because a firm must be "engaged in the practice of law in Illinois pursuant to Rule 721" in order to be considered a "limited liability entity" as defined in Rule 722(a)(1).

"Rule 721 is designed to permit duly licensed lawyers the business option of organizing in professional service corporations as a means of providing them with limited liability protection." *Ford Motor Credit Co. v. Sperry*, 214 Ill.2d 371, 384, 827 N.E.2d 422, 430, 292 Ill. Dec. 893, 901 (2005) (holding that an award of attorney fees to a client that was represented by an unregistered law firm should not have been vacated by the trial court, as such representation did not constitute the unauthorized practice of law). *See also, Joseph P. Storto, P.C. v. Becker*, 341 Ill.App.3d 337, 792 N.E.2d 384, 275 Ill. Dec. 153 (2003) (holding that a firm's failure to register did not render void a client's agreement to pay the legal fees she owed the firm, absent any harm to the client resulting from the failure to register). Because the Illinois-admitted shareholder practices law in Illinois and represents the practice as that of a professional corporation, it is the Committee's opinion that the firm's registration under Rule 721 is required.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-02
June 2016

Subject: Court Obligations; Frivolous Arguments; Reporting Lawyer Misconduct

Digest: A lawyer may not withhold controlling legal authority from a tribunal as a trial strategy to insure reversible error on appeal. Lawyers reading about the contemplated strategy on an online discussion group have no duty to report the posting lawyer.

References: *Black's Law Dictionary* 1542 (Bryan A. Garner, ed., 10th ed., 2014).
Walls v. Bowersox, 151 F.3d 827 (8th Cir. 1998)

U.S. v. Day, 969 F.2d 39, 46 n.9 (3rd Cir. 1992)

In re Smith, 168 Ill.2d 269 (1995)

In re Winthrop, 219 Ill.2d. 526 (2006)

In re Karavidas, 2013 IL 115767

In the Matter of Grammer, No. 04-SH-119 (Hearing Board, August 25, 2005) *approved and confirmed* M.R. 20521 (January 13, 2006).

Skolnick v. Altheimer & Gray, 191 Ill.2d 214 (2000).

Illinois Rule of Professional Conduct 8.4(d)

Illinois Rule of Professional Conduct 3.3(a)(1)

Illinois Rule of Professional Conduct 8.3(a)

FACTS

Lawyer is a criminal defense attorney representing a client whom Lawyer believes is guilty of a lesser charged offense but also likely the primary charged offense. Lawyer presents a motion to the court to give a certain jury instruction citing case A as authority for the motion. The Prosecutor opposes the motion. In conducting further research on the motion, Lawyer identifies case B which is non-distinguishable and binding on the court and which requires the court to give Lawyer's proposed instruction. Case B also holds that it is reversible error for the court not to give the proposed instruction. Lawyer contemplates not informing the court of case B knowing that if the court does not grant Lawyer's motion it will have committed reversible error. Lawyer seeks opinions of other lawyers on the contemplated strategy on internet lawyer discussion groups.

QUESTIONS

1. Does Lawyer violate the Rules of Professional Conduct by failing to inform the court of case B?

2. Do lawyers reading Lawyer's proposed trial strategy on the online discussion group have a duty to report Lawyer to the appropriate disciplinary agency?

ANALYSIS

1. Disclosure of Controlling Authority

The conduct contemplated by Lawyer is a form of "sandbagging." Black's Legal Dictionary defines it as: "the act or practice of a trial lawyer remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem." *Black's Law Dictionary* 1542 (Bryan A. Garner, ed., 10th ed., 2014). Although beyond the scope of this Committee's analysis, sandbagging as a substantive trial strategy has been criticized as unreasonable and appears to be ineffective in any case. *See Walls v. Bowersox*, 151 F.3d 827 (8th Cir. 1998)(Commenting on counsel's trial strategy of acting such as to provide the defendant with a claim of ineffective assistance of counsel on review, the court noted "We add that any type of "sandbagging" is 'not only unethical, but usually bad strategy as well'" *citing U.S. v. Day*, 969 F.2d 39, 46 n.9 (3rd Cir. 1992)). Nevertheless, the Committee takes no position on whether Lawyer's contemplated strategy would be successful.

As a matter of professional responsibility, the proposed trial strategy as described in the facts above is improper.

A. RPC 8.4

Illinois Rule of Professional Conduct 8.4(d) provides:

"**Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice.

…"

The Illinois Supreme Court has said that the practice of law is a public trust and lawyers are trustees of that system. *In re Smith*, 168 Ill.2d 269 (1995). As part of that system, lawyers owe a duty to assist the court in administering justice and in arriving at correct conclusions. Id. at 287; *In re Winthrop*, 219 Ill.2d. 526 (2006)("a lawyer's high vocation is to correctly inform the court upon the law and the facts of the case and to aid it in doing justice and arriving at correct conclusions.").

The lawyer's obligation to assist the court in administering justice is expressed, in part, in IRPC 8.4(d). The Court has long noted that a lawyer violates IRPC 8.4(d) (or its predecessors) when he or she undermines the judicial process, such as having an effect on the outcome of a case (*In re Karavidas*, 2013 IL 115767 [P87 – 97]); failing to aid the court in expeditiously considering and disposing of cases (*In re Smith*, 168 Ill.2d at 287); or causing additional proceedings or delaying resolution of a case (*In the Matter of Grammer*, No. 04-SH-119 (Hearing Board, August 25, 2005 approved and confirmed M.R. 20521 (January 13, 2006).

In the scenario presented above, Lawyer's conduct, if successful, will have an effect on the outcome of the case. Indeed, through Lawyer's strategy of failing to apprise the tribunal of controlling authority, it is Lawyer's intent to establish reversible error and compel additional judicial proceedings thereby extending the ultimate resolution of the case. Accordingly, Lawyer's proposed course of conduct, if carried out and successful, will violate RPC 8.4(d) and is improper.

B. IRPC 3.3

Illinois Rule of Professional Conduct ("IRPC") 3.3 provides:

"**Rule 3.3: Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

…"

The Court's pronouncements in *In re Smith* and *In re Winthrop* noted above about a lawyer's obligation to assist a court in arriving at correct decisions, are mirrored in this Rule's Comments. IRPC 3.3, Comment [4] explains that the purpose behind this prohibition "is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." IRPC 3.3, Comment [4]. Only after a tribunal is armed with a correct statement of the law can it render appropriate and legitimate legal decisions.

In assisting a court in rendering correct legal decisions, a lawyer's obligations when appearing before a tribunal are clear. RPC 3.3, Comment [2] provides "[T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows is false." Further, Comment [4] similarly provides that "a lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities…" These Comments, as well as the case law cited above, point to the foundational importance of lawyers candidly and truthfully advising the tribunal on the applicable law.

But if Lawyer fails to identify the controlling law to the court, either in oral argument or failing in some fashion to amend the written motion, has Lawyer made a "false statement of law" in violation of IRPC 3.3(a)(1)? After all, the law that Lawyer is relying upon does support the same outcome as the controlling law has made conclusive. Nevertheless, such a fine distinction does not insulate Lawyer. The plain meaning of "false" is: (1) "not real or genuine;" or "not true or accurate; especially: deliberately untrue: done or said to fool or deceive someone." Meriam-Webster, www.merriam-webster.com (last visited April 13, 2016). Regardless of whether the law relied upon by Lawyer supports or is consistent with Lawyer's arguments, the law cited is not an accurate statement of the existing law. Furthermore, Lawyer knows the law cited is not accurate or controlling and Lawyer's failure to cite it is specifically designed to deceive the court. Finally, as noted above, the overriding purpose of 3.3(a)(1), is to ensure that a lawyer assists the court in rendering correct decisions. If Lawyer fails to advise the court of the controlling law, the purpose of IRPC 3.3(a)(1) is frustrated. Accordingly, the Committee believes Lawyer will violate IRPC 3.3(a)(1) if Lawyer does not disclose the controlling authority.

In reaching this conclusion, the Committee wants to make clear that it is not opining on a situation where a lawyer fails to find controlling law or who does not cite such authority because he or she believes in good faith it is distinguishable or otherwise not applicable.

2. Reporting Obligations

Lawyer has sought advice on his proposed trial strategy by posting it on an internet lawyer discussion group. Lawyer asks whether lawyers *reading* the posting have any obligation to report Lawyer for the proposed trial strategy.

IRPC 8.3 provides in relevant part:

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

As described in ISBA Advisory Opinion 12-15, the use of online discussion groups is not improper and can be a useful educational resource for lawyers. Nevertheless, as described in that Opinion, there are ethical issues that a user must be mindful of, including most significantly the prohibitions on revealing confidential client information.

In the scenario presented in this Opinion, a lawyer reading about Lawyer's proposed strategy clearly has no duty to report Lawyer for his or her proposed trial strategy. The duty to report under IRPC 8.3 is triggered by knowledge of certain conduct. Knowledge is defined in the RPC as "actual knowledge of the fact in question." RPC 1.0(f). The Illinois Supreme Court has further explained that in the context of Rule 8.3, this means something more than "a mere suspicion" but less than "absolute certainty." *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214 (2000). Merely reading (or responding to) a question about the propriety of contemplated conduct does not vest the reader with any knowledge about whether the contemplated conduct is (or has been) engaged in. Whether Lawyer might ultimately carry out the contemplated conduct is speculation on the part of a reader. Furthermore, as a matter of policy, imposing a reporting requirement for posting or reading an ethical inquiry on an online discussion group would be a chilling effect on the use of such online discussion groups and defeat their usefulness as a means to improve the professional competence and conduct of lawyers. Accordingly, a lawyer reading Lawyer's proposed trial strategy on an online discussion group has no duty to report Lawyer under RPC 8.3.

CONCLUSION

Lawyer may not knowingly withhold controlling legal authority from a tribunal as a trial strategy to insure reversible error on appeal. Lawyers reading about the contemplated strategy on an online discussion group have no duty to report the posting lawyer.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-03
June 2016

Subject: Conflict of Interest; Former Client.

Digest: A lawyer who represents the second wife in obtaining child support for her two young children from a former husband has a conflict of interest with the first wife of the same husband under Rule 1.9 because of his previous representation of the first wife in obtaining child support from that same husband for her child who is now 15 years old. The lawyer also has a "material interest" conflict under Rule 1.7 in connection with his representation of the second wife in her child support claim. These two Rules require the lawyer to obtain the informed consent of both wives in order to undertake the representation.

References: Illinois Rules of Professional Conduct 1.9

Illinois Rules of Professional Conduct 1.7

Illinois Rules of Professional Conduct 1.6

Illinois Marriage and Dissolution of Marriage Act, Section 505 (750 ILCS 501 et seq)

FACTS

The inquirer asks whether the inquirer has a conflict of interest by representing the second wife in a child support matter seeking support for two minor children. The lawyer previously represented a prior wife of the same husband and obtained child support for a child who is now 15 years old.

QUESTION

Do the Rules of Professional Conduct preclude the inquirer from representing the second wife in a child support claim while the husband is under child support obligations to his first wife whom the lawyer also represented?

ANALYSIS

Rule 1.9 is entitled "Duties to Former Clients". For purposes of this opinion, we have assumed that the Inquirer is no longer representing the first wife. Therefore, the first wife is a "former client" of the Inquirer and Rule 1.9 applies to the matter at hand.

Under Rule 1.9, the inquirer is precluded from representing another person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives consent". A concern underlying the Rule is the possibility of the lawyer revealing or misusing confidential information learned in the prior matter.

The two representations appear to be "substantially related" in that the Inquirer is seeking additional child support payments from the same person from whom his former client is currently receiving payments. Moreover, Section 505 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 501 et seq) sets forth detailed "guidelines" regarding the percentage of a parent's net income that the court may order for child support. The court may deviate from the guidelines if, after considering the best interests of a child, the "financial resources and needs" of a parent warrant the deviation. Because the same parent (i.e., the husband) is involved in both matters, the representation of the second wife is substantially related to the representation of the first wife, whose minor child is continuing to receive support from the husband.

The question then is whether the interests of the second wife are "materially adverse" to the interests of the first wife. We believe they are insofar as an award of child support in the second case may affect the ability of the husband to continue to make the required payments for the support ordered in the first case, even though under court order to do so.

Although we do not have any facts regarding the ability of the husband to pay support for all three children, as noted above, the success of the lawyer in pursuing the second claim may affect the ability of the husband to continue the payments to the first child. Therefore, depending on the circumstances, the interests of the second client could be viewed as "materially adverse" to the interests of the former client, and informed consent should be obtained from the first wife in order to avoid a violation of Rule 1.9. In this regard, in obtaining the consent, the lawyer should apprise his former client of the potential consequences an award in the second matter may have on the ability of the husband to pay the original support, including a discussion of the application of the guidelines and criteria for support awards as set forth in 750 ILCS 505.

We also believe the lawyer's representation of the second wife may be problematic, and that under Rule 1.7 she also must give informed consent to the representation. Rule 1.7 is the general conflict rule. It prohibits "concurrent" conflicts of interest. Such a conflict may exist under either of two situations: first, "where the representation of one client will be directly adverse to another client" (1.7(a)(1)); and second, where there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"(1.7(a)(2). This latter conflict may be waived under certain circumstances.

We do not believe the present situation involves a "concurrent conflict" under section 1.7(a)(1). There is no direct adversity between the two wives, and the lawyer is seeking support only for the children of the second wife.

However, we believe there is a "material interest" conflict under section 1.7(a)(2) because the ability of the husband to pay continued support to the child of the first wife is likely to determine his ability to pay support to the children of the second wife. Thus the lawyer may be less than vigorous in pursuing support in the latter instance, knowing that the husband may not have the capability of making the required payment for all three children. However, if the inquirer reasonably believes he or she can provide competent and diligent representation of the second wife, the lawyer can do so by obtaining the "informed consent" of the second wife to the continued representation, as she is the person who is "affected" by the potential conflict of interest. Consent need not be obtained from the first wife under 1.7, because the lawyer is no longer representing her in a child support claim, but, as discussed initially, consent from the first wife is likely to be required by IRPC 1.9 if the lawyer wishes to continue the representation.

Finally, we note that the confidentiality requirements of Rule 1.6 and Rule 1.9 must be followed. Under the Rules, a lawyer cannot "reveal" information relating to the representation of a client (Rule 1.6(a)) or a former client (Rule 1.9(c)(2)), and under Rule 1.9(c)(1), a lawyer may not "use" information relating to the representation of a client to the client's disadvantage. We do not have any facts to indicate that the lawyer will, in representing the second wife, reveal or use information relating to the representation of first wife. Because the informed consent of the first wife is required under Rule 1.9, it will be a simple task for the inquirer to also obtain her consent to reveal or use information about the representation if the lawyer believes that will be necessary.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-04
October 2016

Subject: Conflict of Interest; Former Client.

Digest: A lawyer who represents the second wife in obtaining child support for her two young children from a former husband has a conflict of interest with the first wife of the same husband under Rule 1.9 because of his previous representation of the first wife in obtaining child support from that same husband for her child who is now 15 years old. The lawyer also has a "material interest" conflict under Rule 1.7 in connection with his representation of the second wife in her child support claim. These two Rules require the lawyer to obtain the informed consent of both wives in order to undertake the representation.

References: Illinois Rules of Professional Conduct 1.9

Illinois Rules of Professional Conduct 1.7

Illinois Rules of Professional Conduct 1.6

Illinois Marriage and Dissolution of Marriage Act, Section 505 (750 ILCS 501 et seq)

FACTS

The inquirer asks whether the inquirer has a conflict of interest by representing the second wife in a child support matter seeking support for two minor children. The lawyer previously represented a prior wife of the same husband and obtained child support for a child who is now 15 years old.

QUESTION

Do the Rules of Professional Conduct preclude the inquirer from representing the second wife in a child support claim while the husband is under child support obligations to his first wife whom the lawyer also represented?

ANALYSIS

Rule 1.9 is entitled "Duties to Former Clients". For purposes of this opinion, we have assumed that the Inquirer is no longer representing the first wife. Therefore, the first wife is a "former client" of the Inquirer and Rule 1.9 applies to the matter at hand.

Under Rule 1.9, the inquirer is precluded from representing another person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives consent". A concern underlying the Rule is the possibility of the lawyer revealing or misusing confidential information learned in the prior matter.

The two representations appear to be "substantially related" in that the Inquirer is seeking additional child support payments from the same person from whom his former client is currently receiving payments. Moreover, Section 505 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 501 et seq) sets forth detailed "guidelines" regarding the percentage of a parent's net income that the court may order for child support. The court may deviate from the guidelines if, after considering the best interests of a child, the "financial resources and needs" of a parent warrant the deviation. Because the same parent (i.e., the husband) is involved in both matters, the representation of the second wife is substantially related to the representation of the first wife, whose minor child is continuing to receive support from the husband.

The question then is whether the interests of the second wife are "materially adverse" to the interests of the first wife. We believe they are insofar as an award of child support in the second case may affect the ability of the husband to continue to make the required payments for the support ordered in the first case, even though under court order to do so.

Although we do not have any facts regarding the ability of the husband to pay support for all three children, as noted above, the success of the lawyer in pursuing the second claim may affect the ability of the husband to continue the payments to the first child. Therefore, depending on the circumstances, the interests of the second client could be viewed as "materially adverse" to the interests of the former client, and informed consent should be obtained from the first wife in order to avoid a violation of Rule 1.9. In this regard, in obtaining the consent, the lawyer should apprise his former client of the potential consequences an award in the second matter may have on the ability of the husband to pay the original support, including a discussion of the application of the guidelines and criteria for support awards as set forth in 750 ILCS 505.

We also believe the lawyer's representation of the second wife may be problematic, and that under Rule 1.7 she also must give informed consent to the representation. Rule 1.7 is the general conflict rule. It prohibits "concurrent" conflicts of interest. Such a conflict may exist under either of two situations: first, "where the representation of one client will be directly adverse to another client" (1.7(a)(1)); and second, where there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"(1.7(a)(2). This latter conflict may be waived under certain circumstances.

We do not believe the present situation involves a "concurrent conflict" under section 1.7(a)(1). There is no direct adversity between the two wives, and the lawyer is seeking support only for the children of the second wife.

However, we believe there is a "material interest" conflict under section 1.7(a)(2) because the ability of the husband to pay continued support to the child of the first wife is likely to determine his ability to pay support to the children of the second wife. Thus the lawyer may be less than vigorous in pursuing support in the latter instance, knowing that the husband may not have the capability of making the required payment for all three children. However, if the inquirer reasonably believes he or she can provide competent and diligent representation of the second wife, the lawyer can do so by obtaining the "informed consent" of the second wife to the continued representation, as she is the person who is "affected" by the potential conflict of interest. Consent need not be obtained from the first wife under 1.7, because the lawyer is no longer representing her in a child support claim, but, as discussed initially, consent from the first wife is likely to be required by IRPC 1.9 if the lawyer wishes to continue the representation.

Finally, we note that the confidentiality requirements of Rule 1.6 and Rule 1.9 must be followed. Under the Rules, a lawyer cannot "reveal" information relating to the representation of a client (Rule 1.6(a)) or a former client (Rule 1.9(c)(2)), and under Rule 1.9(c)(1), a lawyer may not "use" information relating to the representation of a client to the client's disadvantage. We do not have any facts to indicate that the lawyer will, in representing the second wife, reveal or use information relating to the representation of first wife. Because the informed consent of the first wife is required under Rule 1.9, it will be a simple task for the inquirer to also obtain her consent to reveal or use information about the representation if the lawyer believes that will be necessary.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-05
October 2016

Subject: Conflict of Interest; Government Representation; Nonlawyer Assistants

Digest: A law firm may continue to represent a city in municipal matters even though a paralegal employed by the firm is a member of the city council and the council has authority over the work and whether the firm's bills get paid.

References: IRPC 1.7;

IRPC 5.3;

ISBA Opinion 12-12

FACTS

The inquirer asks whether the firm will be involved in a conflict of interest if a paralegal of the firm is appointed or elected to city council. The firm has a contract to provide legal services to the city, and the city council has the ultimate authority over the work of the firm and the payment of its bills.

QUESTION

Does membership on the city council by an employee of the firm give rise to an actual or potential conflict or the appearance of impropriety on the part of the firm?

ANALYSIS

Rule 1.7 is the general conflict rule. It prohibits "concurrent" conflicts of interest. Such a conflict may exist under either of two situations: first, "where the representation of one client will be directly adverse to another client" (1.7(a)(1)); and second, where there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"(1.7(a)(2). This latter conflict may be waived under certain circumstances.

We do not believe the present situation poses a risk of violation of either of the above sections of Rule 1.7. The firm and the paralegal are not adverse within the meaning of 1.7, and there is only one client involved. Thus there is no direct adversity under 1.7(a)(1).

Nor do we believe there is a material interest conflict under section 1.7(a)(2). While it is conceivable that the paralegal might take a position on an issue involving the firm's representation of the city contrary to the city's majority position, we do not believe this poses a "significant risk" that the representation of the city by the firm would be "materially limited" in any way. We do not believe there is a substantial risk that the firm would not represent the city to the best of its ability just because the paralegal may have voted against the action the firm will be taking on behalf of the city. Moreover, and more importantly, it is likely that the ethics rules of the city may well preclude the paralegal from voting on issues involving the firm.

IRPC 5.3 should also be considered. This Rule sets out the responsibilities of a lawyer and law firm regarding nonlawyer assistance. The Rule requires lawyers having firm managerial authority or a lawyer with supervisory authority over a nonlawyer employee to "ensure that the person's conduct is compatible with the professional obligations of the lawyer" and "be responsible for conduct of such person that would be a violation of the Rules of Professional Conduct . . . ." IRPC 5.3(a)-(c). While this Rule would apply to the paralegal's work for the firm, we do not believe the Rule applies to the outside activities of the paralegal such as serving as a member of city council. Comment 1 to the Rule talks about insuring that nonlawyers who "work on firm matters act in a way compatible with the professional obligations of the lawyer." We do not believe that service on the city council by the paralegal is tantamount to work on firm matters. Thus, while the paralegal might be more than willing to approve a fee payment to the paralegal's firm, we believe such a "conflict" must be resolved by the city, not the law firm.

The "appearance of impropriety" is no longer an ethical issue in Illinois. See ISBA Opinion 12-12 (May 2012) for a detailed discussion of its demise.

Finally, it should be noted that this opinion attempts to address only issues arising under the Rules of Professional Conduct. Illinois statutes, local ordinances, and other rules regarding conflicts of interest may be relevant to lawyers who represent, or appear before, public entities or to employees of law firms engaged in activities outside the firm.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-06
October 2016

Subject: Client Files; Confidentiality; Law Firms

Digest: A lawyer may use cloud-based services in the delivery of legal services provided that the lawyer takes reasonable measures to ensure that the client information remains confidential and is protected from breaches. The lawyer's obligation to protect the client information does not end once the lawyer has selected a reputable provider.

References: Illinois Rules of Professional Conduct, Rules 1.1, 1.6, 5.1 and 5.3

Illinois Rules of Professional Conduct, Rule 1.1, Comment 8 (amended effective Jan. 1, 2016)

ISBA Op. 10-01 (2009)

American Bar Association, Legal Technology Resource Center, www.americanbar.org.

Alabama Ethics Opinion 2010-2 (2010)

Arizona Ethics Op. 09-04 (2009)

Iowa Ethics Opinion 11-01 (2011)

Nevada Formal Opinion No. 33 (2006)

Tennessee Formal Ethics Op. 2015-F-159 (2015)

Washington State Bar Association Advisory Op. 2215 (2012)

FACTS

A lawyer wants to use cloud-based services in her delivery of legal services by contracting with a third party provider. The cloud service will include storage, processing and transmission of information in a shared infrastructure and a shared application, multi-tenant environment. The data will include client personal identifiable information, opposing party documents, financial information, health information and any other confidential and public information relevant to the delivery of legal services. The lawyer plans to conduct due diligence when selecting a third party provider to ensure the controls are in place to maintain confidentiality of the client information and data.

QUESTION

May the lawyer use a third party provider for cloud-based services? If so, is the lawyer's due diligence at the time of entering into an agreement with the provider adequate to avoid an ethical violation if a breach of confidentiality should occur through a failure of the provider or through the action of hackers?

ANALYSIS

Cloud-based services allow a lawyer to store and access software and data in the "cloud," a remote location which is not controlled by the lawyer but is controlled by a third party internet service provider. Lawyers are increasingly choosing to use cloud-based services because the services offer increased flexibility and ease of access to data.

We have previously determined that a lawyer may retain or work with a private vendor to monitor the firm's computer server and network, provided that the lawyer takes reasonable steps to ensure that the vendor protects the confidentiality of client information. *See,* ISBA Op. 10-01 (2009). A similar approach is appropriate when choosing and using cloud-based services. We believe that a lawyer may use cloud-based services. However, because cloud-based services store client data on remote servers outside the lawyer's direct control, the use of such services raises ethics concerns of competence, confidentiality and the proper supervision of non-lawyers.

Rule 1.1 provides that lawyers must provide competent representation to their clients. The Illinois Supreme Court recently amended Comment 8 to Rule 1.1 to provide that as part of a lawyer's duty of competence, lawyers must keep abreast of changes in law and its practice "including the benefits and risks associated with relevant technology." Accordingly, lawyers who use cloud-based services must obtain and maintain a sufficient understanding of the technology they are using to properly assess the risks of unauthorized access and/or disclosures of confidential information.

Lawyers must protect as confidential "all information relating to the representation of the client" pursuant to Rule 1.6. Rule 1.6(e), as recently adopted, provides that a lawyer must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to," confidential information. Factors to be considered in determining the reasonableness of the lawyer's efforts are set forth in Comment 18 to the Rule.

A lawyer's use of an outside provider for cloud-based services is not, in and of itself, a violation of Rule 1.6, provided that the lawyer employs, supervises and oversees the outside provider. *See, e.g.*, Rule 5.3, Comment 3. As stated in a Nevada opinion that discussed a lawyer's use of an outside agency to store electronic client information:

The use of an outside data storage or server does not necessarily require the revelation of the data to anyone outside the attorney's employ. The risk, from an ethical consideration, is that a rogue employee of the third party agency, or a "hacker" who gains access through the third party's server or network, will access and perhaps disclose the information without authorization. In terms of the client's confidence, this is no different in kind or quality than the risk that a rogue employee of the attorney, or for that matter a burglar, will gain unauthorized access to his confidential paper files. The question in either case is whether the attorney acted reasonable (sic) and competently to protect the confidential information.
Nevada Formal Opinion No. 33 (2006), pp. 2-3.

Because technology changes so rapidly, we decline to provide specific requirements for lawyers when choosing and utilizing an outside provider for cloud-based services. Lawyers must insure that the provider reasonably safeguards client information and, at the same time, allows the attorney access to the data.

At the outset, as recognized by the inquiring lawyer here, lawyers must conduct a due diligence investigation when selecting a provider. Reasonable inquiries and practices could include:

1. Reviewing cloud computing industry standards and familiarizing oneself with the appropriate safeguards that should be employed;
2. Investigating whether the provider has implemented reasonable security precautions to protect client data from inadvertent disclosures, including but not limited to the use of firewalls, password protections, and encryption;
3. Investigating the provider's reputation and history;
4. Inquiring as to whether the provider has experienced any breaches of security and if so, investigating those breaches;
5. Requiring an agreement to reasonably ensure that the provider will abide by the lawyer's duties of confidentiality and will immediately notify the lawyer of any breaches or outside requests for client information;
6. Requiring that all data is appropriately backed up completely under the lawyer's control so that the lawyer will have a method for retrieval of the data;
7. Requiring provisions for the reasonable retrieval of information if the agreement is terminated or if the provider goes out of business.

Our opinion is consistent with the advisory opinions issued by other state bar associations. Other states that have addressed the issue of cloud computing have also generally concluded that lawyers may use cloud-based services if they take reasonable steps to protect client information and address the potential risks. *See e.g.*, Alabama Ethics Opinion 2010-2 (2010)(lawyer may outsource storage of client files through cloud computing if the lawyer takes reasonable steps to make sure data is protected); Iowa Ethics Opinion 11-01 (2011)(lawyer should conduct appropriate due diligence before storing files electronically); Tennessee Formal Ethics Opinion 2015-F-159 (2015)(a lawyer may allow client information to be stored in the cloud provided the lawyer takes reasonable care to assure that the information remains confidential and that reasonable safeguards are employed to protect the information from breaches, loss or other risks). *See generally*, "Cloud Ethics Opinions Around the U.S.", American Bar Association, Legal Technology Resource Center, www.americanbar.org.

The inquiring lawyer also asks whether the lawyer's due diligence at the time of entering into an agreement with the provider will be adequate to avoid an ethical violation if a breach of confidentiality should occur through a failure of the provider or through the action of hackers. We do not believe that the lawyer's obligations end when the lawyer selects a reputable provider. Pursuant to Rules 1.6 and 5.3, a lawyer has ongoing obligations to protect the confidentiality of client information and data and to supervise non-lawyers. Future advances in technology may make a lawyer's current reasonable protective measures obsolete. Accordingly, a lawyer must conduct periodic reviews and regularly monitor existing practices to determine if the client information is adequately secured and protected. *See, e.g.*, Arizona Ethics Op. 09-04 (2009); Washington State Bar Association Advisory Op. 2215 (2012).

CONCLUSION

A lawyer may use cloud-based services to store confidential client information provided the attorney uses reasonable care to ensure that client confidentiality is protected and client data is secure. A lawyer must

comply with his or her duties of competence in selecting a provider, assessing the risks, reviewing existing practices, and monitoring compliance with the lawyer's professional obligations.

ILLINOIS STATE
BAR ASSOCIATION

Assembly Meeting
December 10, 2016

Informational Report C
Election Notice

Notice of ISBA Election 2017

Office of Third Vice-President
5 – Seats on the Board of Governors
21 – Seats on the Assembly (Cook County)

There follows a listing of the offices in the Illinois State Bar Association to be filled by the 2017 annual election. Those elected to the Board of Governors and Assembly take office at the opening of the Annual Meeting on June 15, 2017 and the third vice-president takes office at the close of the Annual Meeting on June 17, 2017.

Third Vice-President - 1 to be elected
no incumbent[1]

Board of Governors, 3 year term

Cook – 2 to be elected
Incumbents:
Mark L. Karno – Chicago
Stephen M. Komie – Chicago[2]

Under Age 37 – Downstate – 1 to be elected
Incumbent:
Chantelle Porter, Lombard

Under Age 37 – Cook – 2 to be elected
Incumbents:
Anna P. Krolikowska, Northbrook
Dennis Lynch, Chicago

Assembly, 3 year Term
Cook County –21 to be elected
Incumbents:

Stephanie Sainsbury Angliss, Chicago
Deidre Baumann – Chicago[2]
Deane B. Brown – Chicago[2]
Timothy J. Chorvat – Chicago[2]
Geraldine (Geri) A. D'Souza, Chicago
Michael Favia, Chicago
Richard S. Gutof, Northfield[2]
Matthew R. Huff, Chicago[2]
Michael Huguelet, Orland Park[2]
Elizabeth Kaveny, Chicago
Marron Mahoney, Chicago
Brian Murphy, Chicago
Bob Oleszkiewicz, Chicago[2]
Maren Ronan, Palos Heights
Curtis Bennett Ross, Chicago[2]
Naomi H. Schuster, Chicago[2]
Julie Ann Sebastian, Vienna, VA[3]
Edna Turkington-Viktora, Chicago
Patrick Wartan, Chicago
John C. Wroblewski, Chicago[2]

[1] Under the bylaws the third vice-president automatically succeeds to the office of second vice-president; therefore, there is no incumbent for this office.
[2] Ineligible to succeed due to term limitations.
[3] Ineligible to succeed due to voting address.

Nomination

Members who wish to be candidates for office must reside in the proper geographic jurisdiction, must meet other requirements for a particular office, and must be in good standing with the ISBA at the close of the nominating period.

Voting Address: Bylaws Sec. 1.11 reads: For purposes of voting and candidacy for ISBA elected office, a member's voting address shall be his or her primary legal office as designated by the member. If a member's primary legal office is not within the state of Illinois, such member may designate their Illinois residence as their voting address; if no voting address is designated, the member shall be considered a non-resident member.

Nominating petitions must be in writing and in the substantial form set forth in Para. 3.2. of the ISBA Policy and Procedures on Association Elections. Nominating petitions are available on the ISBA website under "About>Leadership" or directly at www.isba.org/elections.

Nominating petitions may be filed no earlier than Tuesday, January 3, 2017 and must be filed by 4:30 p.m. on Tuesday, January 31, 2017 at either the Illinois Bar Center, 424 South Second Street, Springfield or the ISBA Chicago Office at 20 S. Clark Street, 9th Floor, Chicago. Petitions must be physically submitted with original signatures. Petitions submitted via email or fax will not be accepted. *(Para. 3.4., ISBA Policy and Procedures on Association Elections.)*

The ISBA Bylaws and Policy and Procedures on Association Elections, additional pertinent information and petition forms for each category of candidacy may be found on the ISBA website under "About>Leadership" or directly at www.isba.org/elections.

Voting

All members of the Association in good standing (except non-lawyer members) are eligible to vote for the office of third vice-president.

Eligible members residing in the areas in which there are contested elections may vote in the appropriate Board of Governors and Assembly race.

The 2017 Election will be conducted by electronic voting. Paper ballots will be utilized in some instances. Full details on the voting process will be provided to the full active membership well in advance of the formal election.

September 2016

Robert E. Craghead
Executive Director

By policy, a member's dues must be paid by March 1, 2017 for the period ending June 30, 2017, in order to be eligible to vote in ISBA Elections.