ILLINOIS STATE BAR ASSOCIATION

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Diversity Matters

The newsletter of the Illinois State Bar Association's Diversity Leadership Council

Editor's note

BY SANDRA BLAKE

It is an honor to once again edit this newsletter, and as editor, I am happy to take this opportunity to share my view on diversity, a view that was shaped in the late '60s and early '70s. When I was in kindergarten, Rev. Dr. Martin Luther King Jr. marched on my white ethnic neighborhood in Chicago, coinciding with the beginning of busing to integrate the school system. I remember hearing the word "boycott" for the first time, and hearing anger in many parents' voices. While many kept their children home, my mother sent me to school. Seven years later, when some local hoodlums treated the first African American family on my block to pre-Halloween decorations of eggs thrown against windows, toilet paper on bushes and trees, and shaving cream and soap on other building and driveway surfaces, my parents sent me and my siblings to help clean up. Through these experiences, I learned a life lesson to share with the readers of this newsletter. This issue of Diversity Matters recognizes the diverse membership of our Association and celebrates what unites us. ■

Transgender issues in schools and the workplace: Personal records

BY EDWARD DRUCK, JENNIFER SMITH, AND BRIANNE DUNN

The rights of transgender individuals and the application of those rights in the absence of specific laws leave schools and employers in unfamiliar territory on myriad issues. This article looks at just one: the management of records with sensitive information regarding an individual's gender transition.

The School Dilemma

Schools generate and maintain many records that could identify a student as transgender, such as birth certificates, rosters for activities separated by gender (for example, sports teams), enrollment forms, and even gender support plans. As a starting place, it is important for attorneys practicing in this area to understand what information contained in records may be sensitive. The term

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Kane judicial system changes to better reflect diversity within county

BY JUDITH MILLER, ESQ.

Mention the word "diversity" at any gathering of attorneys in Kane County and you will hear every manner of spirited opinion-making. As a member of the KCBA Diversity Committee, I have been present at many committee meetings where various issues of diversity are discussed freely and passionately. The committee's goal is "to realize the benefits of diversity and inclusion through education, training and open dialogue." And so I now openly share with you some of the dialogue at the heart of the legal system in Kane County.

"Diversity," as defined by our State's Attorney Joe McMahon, "is so much more than country of origin; it includes diversity of experience, socio-economic background, and culture." While the Kane County State's Attorney's Office (KCSAO) can point to a gender statistic where 55 percent of assistant state's attorneys are female and 45 percent are male, it keeps no record of ethnicity or race. "We look for 'richness of experience' and a desire to work with and protect the rights of crime victims," according to McMahon. In hiring, McMahon says he tries to identify candidates with a broad range of experiences, such as study abroad, clinic work, a second career, or military service. "I look at diversity from a perspective of diverse thought." This, he says, creates a more robust debate and helps inform good decision-making. Ethnicity, race, and gender are part of that, but not all of it.

Yet, in recognition that ethnicity, race and gender are part of the diversity equation, our State's Attorney created the position of Diversity Coordinator. It is the Diversity Coordinator's job to reach out to law student groups where diverse candidates can be found and draw them to the KCSAO. The hope is that exposure to the KCSAO will encourage law students of different races, ethnicities, cultures and backgrounds to stay in Kane County and become part of our legal fabric.

The first Diversity Coordinator in the KCSAO was Divya Sarang, a woman born and raised in India and who immigrated to America about 30 years ago having already earned a law degree. Full of hope in the American Dream, she went back to law school and became licensed to practice in Illinois. Her career moved from private practice to state's attorney's office to judgeship. In 2015, Judge Sarang became Kane County's newest associate judge. Judge Sarang acknowledges being "lucky to have excellent mentors who were encouraging along the way." She says she came to America – was drawn to America – because "I believed there were no barriers."

This theme of encouragement, mentoring, and no barriers is a common one among those judges who stand out for their diversity of race and ethnicity.

Retired Chief Judge Keith Brown, Kane County's one and only Black judge to date, asserts that the reason he became a judge was to create diversity within the Kane County judicial system. "You have to recognize what cultural challenges people have when they find themselves in the court system," says Judge Brown. "Minorities are not in the minority within our criminal system. You just have to look at the make-up of our prison system to see the disproportionate percentage of cases that involve minorities." While he acknowledges that "just having Black or Hispanic judges isn't going to solve all the problems in the legal system," he asserts that diversity of perspective and understanding make for a fairer system.

In order to diversify its perspective and understanding, the Kane County legal system needs to encourage diverse candidates to entry-level jobs "because they are the ones who become judges," says Judge

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Brown. "Judgeship doesn't happen overnight; it takes a 10- to 20-year period," he notes. "The judiciary is intimidating, especially for those who may feel like an outsider. My objective was to encourage diverse candidates to get engaged in the process."

When Judge Brown came to the bench as an associate in 1991, the Kane County judiciary was almost exclusively comprised of white men. Diversity, at that time, took the form of two women judges: Judge Pamela Jansen, who was appointed associate in 1987, and Judge Judith Brawka, appointed in 1991. Today 10 of the 28 presiding judges are women. Judge Judith Brawka rose to the position of chief judge in 2012, and having served as such until 2015, was followed by Judge Susan Boles as the current chief judge.

Chief Judge Boles recognizes that as a young female lawyer she benefitted from being able to witness that females can have a successful career and family life. Her professional experiences, she explains, "have been shaped, influenced and encouraged by both male and female role models. I have had the good fortune to work for and alongside some incredibly talented lawyers and judges."

Judge Brown says that he has tried to be a mentor to women judicial candidates, as he knows the feeling of paving new roads. Not only was he the first Black judge in Kane County, but for six years he held the top legal position in the 16th Judicial Circuit as he served as acting chief judge (from 2004 to 2008) and as the official chief judge (2008 to 2010). He knows first-hand that "judges have a lot of power when it comes to shaping the judicial system," which leads him to ask and answer a critical question: "Who will a judge be more inclined to listen to for ideas and opinions? Another judge."

Long before the judiciary can diversify its ranks, however, it needs to nurture a pool of candidates. That seems to be at the crux of why many Kane County judges regularly visit local schools to speak to students.

Judge Rene Cruz, who in 2012 became the first Hispanic judge of the 16th Judicial Circuit, offers: "One of my concerns -- and why I go to high schools and middle schools – is that if I'm first, but the only, then I really haven't opened the doors. I am always looking for opportunities to encourage qualified individuals. If the pool isn't there, then expectations are not raised high enough."

Judge Cruz makes a point of engaging with students during after-school programs in Aurora, the city where he settled with his family and started his legal career. During school events, he will talk to 20-30 students at a time, often in Spanish, and then meet with their parents. In this way, he helps immigrant parents to bridge the culture gap between how they were raised and the world in which their children are growing up. Born in Panama to a military family, Judge Cruz is comfortable relating to individuals of diverse backgrounds. As he says of his upbringing, "I had to learn quickly to accept others and adjust."

But accepting others and adjusting does not translate into ignoring diversity. According to Judge Cruz, there is an "obvious gap in Hispanic legal services" in Kane County. Recognizing this gap, he started his law career in one of first local law firms focused on carving out a niche within the Hispanic community. This idea, he says, is starting to catch on. He has noticed that as the Hispanic population has grown to comprise nearly 32% of those living in Kane County in 2015, law firms providing Hispanic legal services are opening up to fill the perceived gap.

With such a growth in the number of people who identify as Hispanic, it is perhaps not surprising that the 16th Judicial Circuit soon followed Judge Cruz's appointment with another Hispanic judge, Judge Robert Villa, in 2013. An active member of the Hispanic National Bar Association, Judge Village identifies with both ethnic components of his mixed Mexican-Irish parentage. Having grown up among family members whose cultures differed substantially from one another, Judge Villa opines that "the language of diversity is about inclusiveness." He believes it is the obligation and responsibility of those who wish to be accepted to "get outside your own head" and be likewise accepting. "It is counter-productive to get a seat at the table then disparage others at the table – which creates the cycle in reverse," he explains.

Just as the Kane County was opening its judicial doors to Hispanic candidates, it was also ushering in another type of diverse judicial candidate: an openly gay man. Judge John Dalton won the race for 16th Judicial Circuit Court Judge in November 2012, after having run and lost in 2010. Between these judicial races, he was elected trustee of Elgin Community College and became the first openly gay man to hold elected office in Kane County. By winning the race for Kane County circuit court judge, he became the first openly gay man in Illinois history to hold such a position outside of Cook County.

Judge Dalton came to the bench after a legal career that started in 1987 with civil litigation and ended in 2008 when his in-house attorney position with CitiGroup disappeared as the economy collapsed. This unanticipated time-off led him to a period of introspection, which led to his decision that the best use of his experience, talents and temperament was as a judge. As he explains, "I didn't run – and I don't serve – as a gay judge. Being gay is just part of who I am. It has affected me, but it does not define me." However, he affirms that it is "good to have an element of diversity (in the judiciary." Having a "broader cross-section" is a good thing, he opines.

Judge Dalton recognizes that his background and experience has colored his perspective. He remembers growing up, going through college and law school, and beginning his career as a man who felt compelled to hide his true self. "The world had not conditioned me for acceptance, but rejection," he explains. Over time, he mustered the courage to come out: first to colleagues, then friends, then siblings, and finally his parents. And as each one accepted his news, his life changed. "It was liberating," he recalls. "My relationship could be honest."

Being gay, he says, has made him more sensitive to differences and more compassionate of those who are outside the cultural norm. It has inspired him to champion human rights and he has several awards as a result, including two Martin Luther King Jr. Humanitarian awards, a "Speak Out Against Prejudice" award from the City of Elgin, and the Community Leadership award from the Illinois State Bar Association's Standing Committee on Sexual Orientation and Gender Identity. He also accepts invitations to speak at high schools, where he can share his story of growing up gay and can encourage students to show

compassion and refrain from hurtful, hateful talk.

In summary, says Judge Dalton, "The more that historical barriers fall, the more we are selecting judges by qualifications and experience, and not by accidents of birth. Change forces us to ask who would make the best judge and not just who looks like me."

This change is happening not just behind the judicial bench, but throughout the make-up of Kane County's judicial partners, according to Kelli Childress, the Kane County Public Defender since 2011. "I have seen a lot of change," she comments. "Those we serve have not changed dramatically, but as a judicial system, our judicial partners have embraced diversity and it has done wonders to the system."

According to Childress, diversity generates cultural sensitivity. "We sit in a position to pass judgment on others all the time. We need to do this from where they stand instead of where we stand." Seeing the problem or challenge from the other person's point of view, from their cultural and experiential eyes, "leads to real justice," says Childress.

Childress's interest in justice and fairness within the legal system is apparent in the active role she plays in the Illinois State Bar Association. Since 2011, she has been a member of the Human Rights Section Council. As the current chair of this council, she has earned a spot on the Diversity Leadership Council, which serves as the umbrella group that fosters communication and coordination between the ISBA's diversity-related committees and section councils. These include the Standing Committee on Women in the Law, Racial and Ethnic Minorities and the Law, Sexual Orientation and Gender Identity, Disability Law, the International Law and Immigration Section Council, as well as the Human Rights Section Council.

"There are so many reasons why diversity is important," says Childress. "People of diverse backgrounds bring better understanding and make us more emotionally intelligent."

It is clear from the voices of our legal leaders that diversity is a prized quality that they agree needs to be nurtured, encouraged, and intentionally sought. As Chief Judge Boles summarizes, "The 16th Circuit Judiciary is more diverse than in years past. However, we need to do more and continue that trend to work toward a circuit that is truly representative of the citizens and community members in which we all serve."

This article was originally published in the Kane County Bar Association's Bar Briefs April 2016 Diversity issue.

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Spotlight on Shira Truitt—Getting to know a genuine champion for diversity and defender of justice

BY MARY F. PETRUCHIUS

The Women and the Law Committee chose to nominate one of our own, Shira Truitt, for the 2016 Diversity Leadership Award. Shira is truly deserving of this award, as she has made significant contributions to the advancement of diversity within the Illinois and Missouri legal communities, within the ISBA, and through her demonstrated commitment to diversity beyond the ISBA. She has served as a member of the ISBA Standing Committee on Women and the Law since being appointed as our committee's first Diversity Fellow. Shira is a member of numerous organizations outside the ISBA that are committed to diversity. Shira evinces a truly exceptional commitment to diversity (based on gender, race, ethnicity, gender identity, and for other traditionally underserved groups). This "spotlight" on Shira is taken in large part from our nomination letter as well as current information Shira has provided me.

Shira Truitt was appointed among the very first class of Diversity Fellows in 2010. The ISBA Diversity Fellow program identifies diverse future leaders and provides them with the opportunity to find their niche within the ISBA, hopefully paving the way to future leadership roles. This program gave her an opportunity to serve on the Standing Committee on Women and the Law and to observe the workings of numerous other ISBA committees.

After completing her fellowship, Shira joined our committee as a full member, where she has held several

Shira Truitt

subcommittee chair positions and has been an outspoken voice championing diversity among our ranks. She also serves as a member of the Committee on Judicial Evaluations Outside Cook County. Shira is an elected member of the Assembly, where she proudly stands as the *only* African-American downstate representative. Clearly, through the Diversity Fellows program, Shira has found her niche and, we have no doubt, she will continue to grow as a leader within the ISBA.

My first memory of Shira was when this committee held its Spring Outreach program in LaSalle County and took a tour of the Dwight Women's Correctional Center in March of 2011. During the tour, our guide told us that the women receive shampoo and soap when they are processed and admitted to the facility. I was impressed with Shira's sensitivity to the women of color inmates when she asked our guide what hair care products were available to those inmates, as their hair grooming needs are vastly different from the other female prisoners. That issue of concern was something I would have never even considered, not being as attuned to the individual needs of non-white inmates as is Shira.

Shira serves as the Vice President and past Historian of the Mound City Bar Association, one of the oldest African-American bar associations west of the Mississippi River. In the wake of the 2014 unrest in Ferguson, Missouri, Shira rose as a champion for justice. She and other Mound City Bar Association members registered voters, wrote and printed pamphlets concerning the rights of protesters, visited jails, and worked to free detainees from jail. Shira *personally* led a campaign to respond to the needs of the community dealing with the Ferguson unrest by spearheading an effort to produce informational videos about various topics of concern to the community. She raised money, secured a camera crew, got permission to use a court building, enlisted other lawyers to participate, and shot videos about how the legal process works. Shira can be seen in a video about the importance of voting and jury service at <http://www.moundcitybar.com/#/about-us/community-videos>.

One of the duties of Vice President of the Mound City Bar Association is to oversee CLE seminars. Shira recently organized and implemented the February 29, 2016 CLE program entitled, "The Minority Conundrum: Balancing Expectations and Opportunities," held at the Urban League of Metropolitan St. Louis. The speakers' presentations focused on the differences and expectations on being a minority lawyer while balancing civic engagement, community expectations, and the **"Big Give Back"** in minority communities. The Mound City Bar Association is the only bar association for black attorneys in Southern Illinois and Shira individually contacted each attorney with an email invitation to the CLE.

In her practice, Shira Truitt knows all too well that people of color and other diverse populations often choose to remove themselves from the legal process. Her Mound City Bar Association video challenges these citizens to fully participate in legal and legislative processes and to have a stake in the outcome. In response to the crisis in Ferguson, Shira chose to leverage her talents to research and pursue changes in our laws. She also reached out to those in need of her legal expertise and other community members to turn a catastrophe into an opportunity for greater involvement in the legal system.

As a chapter affiliate, the Mound City Bar Association will host the National Bar Association's Annual Convention in St. Louis in July, 2016. The National Bar Association is the nation's oldest and largest national association of predominantly African American lawyers and judges. Being the incoming President of the affiliate chapter, Shira will have an integral role in hosting the event.

A member of the Illinois Bar since 2003, Shira is a tireless and outspoken advocate for social justice on both sides of the Mississippi. She has served as an attorney in municipal drug court, providing legal counsel for approximately 300 mothers whose children were removed from their custody as a result of drug addiction or abuse. She represents numerous local boards of education with a core specialty on special education. As a contract attorney for the St. Louis County Housing Authority, Shira helps remove dangerous tenants so that others may live in dignity, safety, and peace. She is a sought after speaker on numerous topics within her areas of expertise, including women's issues, child custody, family law, legal writing, and ethics.

Shira Truitt operates her own law firm, The Truitt Law Firm, with offices in Illinois and Missouri. Her firm is a Certified Minority/Woman Business Enterprise. In addition to her membership in the ISBA and Mound City Bar Association, Shira is a member of the Madison County Bar Association, St. Clair County Bar Association, and Metro East Bar Association. She is also an active member of the Missouri Bar Association, currently serving on its Legislation Committee.

Shira gives generously of her time with organizations serving historically disadvantaged groups through her involvement in the United Way of Greater St. Louis, the Urban League Guild, the Urban League Young Professionals of Metropolitan St. Louis, and Alpha Kappa Alpha (AKA) Sorority, Incorporated. She also is a member of the board for the Institute of Peace and Justice.

Shira leads the AKA Sorority's Environmental Responsibility Effort. The Effort focuses on recycling and on building refreshing and renewing sustainable play areas for children in primarily minority neighborhoods. She helped institute the first electronic recycling program in a minority area of St. Louis.

Shira Truitt has "adopted" family court waiting rooms, and has purchased toys, books and other items so that the children have an inviting and safe place to be while they wait for their cases to be called.

In addition to her Juris Doctorate Degree, Shira holds a Master of Social Work Degree, with a concentration in children and youth. Her background in social work makes her a uniquely effective advocate and counselor.

The Standing Committee on Women and the Law has greatly benefitted from the ISBA's Diversity Fellows program by gaining Shira Truitt as a member. I'm so proud to call Shira my hero, my friend—she's my "female Tavis Smiley." And she's OURS! ■

Mary F. Petruchius is a solo general practitioner in Sycamore, IL. She was the 2013-2014 Chair of the ISBA Standing Committee on Women & the Law. Mary is also a current member of the ISBA General Practice, Solo, and Small Firm and Child Law Section Councils. She can be reached at marypet@petruchiuslaw.com and her website is www.petruchiuslaw.com.

Transgender issues in schools and the workplace

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"transgender" encompasses multiple concepts, but has been broadly defined as an individual who "has a gender identity (one's internal sense of gender) that is different from the individual's assigned sex (i.e. the gender designation listed on one's original birth certificate)."[1] Transition is known as "the process through which transgender people begin to live as the gender with which they identify, rather than the one typically associated with their sex assigned at birth."[2] "A gender transition often includes a 'social transition,' during which an individual begins to live and identify as the sex consistent with the individual's gender identity, with or without certain medical treatments or procedures."[3] Accordingly, records that include any identification of an individual's gender, a name change, or other indications of a social transition are important in this context.

Consider 12-year-old Samantha: Samantha's birth certificate identifies her as female, and Samantha identifies as a male. Samantha wants to transition as a male and meets with the school social worker to talk about the transition process. She shares her plans to transition and has several requests for her transition: Samantha wishes to be referred to with male pronouns and to be addressed as "Sam" by classmates and faculty. Sam does not want his former name to appear in his classroom or elsewhere in school. Sam has not told his parents of his transition and does not want to tell them.

Sam is essentially requesting that the school change his student records to reflect his gender identity. This request implicates laws including the Family Educational Rights and Privacy Act ("FERPA") and the Illinois School Student Records Act ("ISSRA"). Sam's conversation itself with the social worker may be considered confidential as Section 5 of ISSRA provides that "[n]othing contained in this Act shall be construed to impair or limit the confidentiality of communications otherwise protected by law as privileged or confidential, including but not limited to, information communicated in confidence to…a school social worker or school counselor…"[4] However, Sam's transition plan in school, specifically his requests to be referred to as Sam, to have his name changed on school documents, and to be referred to using male pronouns raise the issue of whether the school needs the consent of Sam's parents to make the requested changes.

Parental involvement maybe required because Sam's request involves a change to his school records. ISSRA gives parents the right to both access and challenge their child's student records: "Parents shall have the right to challenge the accuracy, relevance, or propriety of any entry in the school student records …"[5] ISSRA broadly defines student records as, "Any writing or other recorded information concerning a student and by and which a student may be individually identified, maintained by a school or at its discretion or by an employee of a school, *regardless of how or where the information is stored.*[6] *(Emphasis added).* Accordingly, any documentation of Sam's requested name and pronoun change or document reflecting the name and pronoun change are records that may be accessed and challenged by Sam's parents.

Gender Identification through School Records

Consider a second situation: Sam starts at a new middle school *already having transitioned*. His family has not informed the new school of the gender transition, instead enrolling him using the identified male gender and his preferred name, Sam. The family is reluctant to give the school a copy of Sam's birth certificate. Sam will be known only as Sam at this new school, and if the birth certificate (which identifies Sam as female) is shared or exposed, they fear backlash and potential violence against Sam. Sam's parents contest giving the original birth certificate.

Some state laws, including two in Illinois, require that parents or guardians enrolling students in a school for the first time provide a certified copy of a student's birth certificate. The Missing Children's Records Act and the Missing Children's Registration Law require parents to provide a certified copy of a birth certificate or "other reliable proof as determined by the Department [of State Police] of the student's identity and age, and an affidavit explaining the inability to produce a copy of the birth certificate."[7]

The purpose of these laws is not to identify students as transgender, but rather to alert law enforcement to the presence of potentially missing children. Nonetheless, the discrepancy between a student's birth certificate and enrollment information will identify the student as transgender in school records. In the scenario described with Sam, the school must require the birth certificate or affidavit.

The challenges of maintaining the confidentiality of a student's gender transition go beyond the birth certificate. ISSRA allow schools to routinely share gender information with the public.[8] Schools may designate student gender as "directory information," meaning the student's gender may be released to the public. Schools may routinely share gender information publically, for example, by posting "girls" and "boys" rosters for activities. Parents or their legal counsel who seek to protect a child's gender identity must affirmatively request that gender information not be released by the school. To honor such requests, schools will need to take steps to broadly consider what public information the school releases that may identify a student's gender.

Student records are not only an issue when the student attends school: a student's name and gender are included on the student's permanent record, which the school district must maintain for 60 years

after the student leaves school. Individuals and lawyers assisting them may seek to align all of an individual's official records with a change in gender identity by requesting a change to their permanent school record. Currently, there are no legal standards governing the criteria a school district should use to process such a gender change request.

Records in the Workplace: Navigating through the Evolving Law

Illinois is one of 17 states to explicitly include gender identity under its state anti-discrimination laws.[9] While Illinois law specifically protects transgender individuals from discrimination in the workplace, it is unclear what practical implications this has for record maintenance.

The Workplace Dilemma

The Illinois Human Rights Act ("IHRA") provides "freedom from discrimination against any individual because of his or her race, color, religion, sex, age…sexual orientation…in *connection with employment*, real estate transactions, access to financial credit, and the availability of public transactions."[10] (Emphasis added). Sexual orientation, as defined in the IHRA, includes "gender-related identity, whether or not traditionally associated with the person's designated sex at birth."[11]

Consider employee Samantha: Samantha's birth certificate identifies her as female, and Samantha identifies as a male. Samantha wishes to transition at his job. He requests to be referred to as Sam by the employer and employees. He requests to change his personnel records to reflect his changed name and gender and to have his paychecks reflect his new name. Sam has not made any formal changes to his personal identification documents (including his state ID, driver's license, or birth certificate). Sam's employer wants to maintain legally compliant personnel records.

At present, there is no law directly applicable to situations like the one presented by Sam's request. The Illinois Personnel Record Review Act ("IPRRA"), which provides for access, review and production of employee records, does contain a general provision allowing for the correction of personnel records by an employee. IPRRA's Section 6 states, "If the employee disagrees with any information contained in the personnel record, a removal or correction of that information may be mutually agreed upon by the employer and the employee."[12]

The IPRRA does not require an employer to make all requested changes to personnel records. If the employer does not agree with a requested change, then Section 6 of IPRRA provides that the employee may submit a written statement explaining the employee's position and the employer must then attach the employee's statement to the disputed portion of the personnel record. The IPRRA process is not well suited to this dispute, as any statement of disagreement attached to a personnel record would only serve to highlight the individual's transgender status.

However, the IPRRA is not the only legal consideration. Advocates for transgender individuals have successfully argued that current laws provide a right to privacy that applies to an individual's transgender status. For example, in *Love v. Johnson*, the United States District Court in the Eastern District of Michigan recently found that requiring an individual to disclose her transgender status implicates a constitutional right to privacy.[13] The court based its decision, in part, on its determination that disclosure of one's transgender status "creates a very real threat to Plaintiffs' personal security and bodily integrity."[14] It is unclear whether this logic could support a discrimination claim under the IHRA or other anti-discrimination laws.

Evolving Issue

Even when looking only at the single issue of records management for transgender individuals, the law is highly complex and evolving. This leaves all parties and their legal representatives to make practical decisions balancing not only the current state of the law, but also where the law may go in the weeks, months and years to come. ■

This article was originally published in the Kane County Bar Association's *Bar Briefs* April 2016 Diversity issue.

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Brianne Dunn is an Education Law Practicum Student for Franczek Radelet P.C.

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13. *Love v. Johnson*, No. 15-11834, 2015 WL 7180471, at *5 (E.D. Mich. Nov. 16, 2015) reconsideration denied, No. 15-11834, 2016 WL 106612 (E.D. Mich. Jan. 10, 2016).
14. *Id.*

The IHRA: Extending protections for pregnant women in the workplace

BY CATHERINE D. BATTISTA, ESQ. AND MICHAEL WONG, ESQ.

On June 26, 2014, the Illinois Legislature passed and sent House Bill 8 (HB-8) to the Governor to be signed. HB-8 amended the Illinois Human Rights Act ("IHRA") to prohibit employers with more than one employee from discriminating against employees based on pregnancy, childbirth and conditions related to pregnancy or childbirth. Additionally, HB-8 requires that employers with more than one employee provide reasonable accommodations to employees suffering from conditions related to pregnancy or childbirth.

In passing HB-8 the General Assembly found that current workplace laws in Illinois proved inadequate to protect pregnant workers from enjoying equal employment opportunities.[1] The General Assembly further recognized that women represent nearly 50 percent of all workers in Illinois,[2] and that "failing to provide reasonable accommodations to pregnant women leads to lost wages, periods of unemployment, and lost employment opportunities and job benefits such as seniority, all of which have lifelong repercussions on women's economic security and advancement and the well-being of their families."[3] The General Assembly also noted that "most women work during pregnancy,"[4] and that by continuing to work, "women can maintain and advance their economic security."[5] Further, if women can work throughout their pregnancies with accommodation, they may be able to take longer periods of leave after they give birth "which in turn facilitates breastfeeding, bonding with and caring for a new child, and recovering from childbirth."[6]

On August 26, 2014, the Governor signed HB-8 with the changes to the IHRA going into effect January 1, 2015.

Now before addressing the changes, it is important to note that prior to HB-8 being passed and signed into law, the IHRA already prohibited discrimination based upon pregnancy.[7] However, the 2015 amendments to the IHRA not only greatly expanded the protections under the IHRA, but also added that employers must now provide reasonable accommodations to pregnant employees when requested.

The discrimination protections provided under the IHRA to pregnant employees were expanded in two ways. First the IHRA pregnancy discrimination protections were modified to cover more employers by changing the definition of employer for pregnancy discrimination from "15 or more employees" to "one or more employees."[8] Additionally, the IHRA definition of pregnancy was expanded from covering pregnancy and "related medical conditions", to pregnancy and "common conditions related to pregnancy," meaning that some conditions protected may not necessarily be medical in nature.[9] While these were two major changes, the most significant change to the IHRA was the language that required employers to provide reasonable accommodations for employees who are pregnant or have conditions related to pregnancy.

The IHRA now specifically defines "reasonable accommodations" in relation to pregnancy and provides that reasonable accommodations may include, but are not limited to:

> "more frequent or longer bathroom breaks, breaks for increased water intake, and breaks for periodic rest; private non-bathroom space for expressing breast milk and breastfeeding; seating; assistance with manual labor; light duty; temporary transfer to a less strenuous or hazardous position; the provision of an accessible worksite; acquisition or modification of equipment; job restructuring; a part-time or modified work schedule; appropriate adjustment or modifications of examinations, training materials, or policies; re-assignment to a vacant position; time off to recover from conditions related to childbirth; and leave necessitated by pregnancy, childbirth, or medical or common conditions resulting from pregnancy or childbirth."[10]

An employer may be excused from making a requested accommodation if it can demonstrate that the accommodation "would impose an undue hardship on the ordinary operation of the business of the employer."[11] Additionally, an employer may request that the employee provide documentation from the employee's physician regarding the need for the requested accommodation "if the employer's request for documentation is job-related and consistent with business necessity."[12] When such a request is made, the employee must promptly respond to the employer's request for medical documentation.[13] As such, these changes are very similar to the interactive process that most employers are already required to engage in under the American with Disabilities Act ("ADA").

However, the changes to the IHRA included language that provides a specific divergence from the ADA. Under the IHRA amendment, employers cannot force an "accommodation" on a pregnant employee that the employee neither wanted nor requested – nor may the employer force an employee to take leave if the employer could offer a reasonable accommodation.[14] This language and procedure is markedly different than the ADA which requires

employers to provide reasonable accommodations, but also provides that it is the employer's prerogative to choose a reasonable accommodation; an employer is not required to provide the particular accommodation that an employee requests.[15]

As noted above, one of the accommodations that can be provided is time off. Much like the ADA, the IHRA does not provide any specific reference as to how much time off must be provided under the statute. However, it does provide that employers must reinstate a pregnant employee or employee affected by childbirth "to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other applicable service credits…unless the employer can demonstrate that the accommodation would impose an undue hardship on the ordinary operation of the business of the employer."[16]

The amendments to the IHRA are in line with the EEOC Guidance on Pregnancy Discrimination issued on July 14, 2014, and its amendments on June 25, 2015.[17] It is also in line with the federal Pregnancy Discrimination Act (PDA) and decision in *Young v. United Parcel Serv., Inc.*, in which the Supreme Court held a pregnant employee could create a genuine issue of material fact to overcome summary judgment by providing evidence that an employer accommodated non-pregnant employees with similar restrictions.[18] Prior to *Young*, Courts had traditionally interpreted the PDA as requiring employers to ignore a female employee's pregnancy and treat that employee the same as it would if she were not pregnant, including with respect to absences and time off.[19] It should also be noted, that the Supreme Court in *Young* further recognized that under the 2008 amendments to the ADA, the plaintiff's work restrictions due to her pregnancy would likely fall within the expanded ADA definition of a disability requiring the employer to provide an accommodation.[20]

Pregnant workers in Illinois now have significant protection not only under the IHRA, but also under the federal PDA and ADA. In terms of the purpose and intention in providing the additional protections under the IHRA, it is a step in the right direction. However, these changes will likely create many logistical problems and headaches for Illinois employers as they seek to comply with the law. ■

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1. Public Act 098-1050.
2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Ill. Rev. Stat. 2014, ch. 68 par. 1-102(I).
8. Ill. Rev. Stat. 2014, ch. 68 par. 1-101(B)(1); 775 ILCS 5/2-101(B)(1)(b).
9. 775 ILCS 5/2-102(I).
10. Id.
11. 775 ILCS 5/2-102(J)(1).
12. Id.
13. Id.
14. 775 ILCS 5/2-102(J)(3).
15. *Swanson v. Vill. of Flossmoor*, 794 F.3d 820, 827 (7th Cir. 2015); *Jay v. Intermet Wagner, Inc.*, 233 F.3d 1014, 1017 (7th Cir.2000).
16. 775 ILCS 5/2-102(J)(4).
17. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, <http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm>.
18. 135 S. Ct. 1338 (2015)
19. *Piraino v. Int'l Orientation Resources, Inc.*, 84 F.3d 270, 274 (7th Cir.1996); *Dormeyer v. Comerica Bank–Illinois*, 223 F.3d 579, 583 (7th Cir.2000) ("[T]he Pregnancy Discrimination Act does not protect a pregnant employee from being discharged after her absence from work even if her absence is due to pregnancy or to complications of pregnancy, unless the absences of nonpregnant employees are overlooked.").
20. 135 S. Ct. 1348.

We are all in this together

BY UMBERTO S. DAVI

Diversity is about all of us, and about us having to figure out how to walk through this world together.

-Jacqueline Woodson

Diversity is not about how we differ.

Diversity is about embracing one another's uniqueness.

-Ola Joseph

Diversity is the art of thinking independently together.

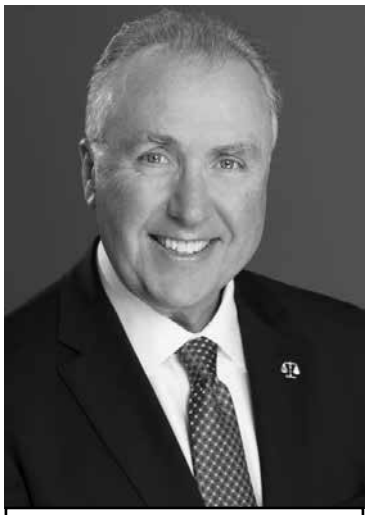
-Malcolm Forbes

Our workforce and our entire economy are strongest when we embrace diversity to its fullest, and that means opening doors of opportunity to everyone and recognizing that the American Dream excludes no one.

-Thomas Perez

Many meaningful and profound quotes can be found on the topic of diversity. These are just a few of my favorites which, in my opinion, capture the essence of diversity. These quotes also offer reasons how and why we should embrace diversity throughout all facets of our society. I agree with Roger Wilkins who said: "We have no hope of solving our problems without harnessing the diversity, the energy, and the creativity of all our people." And yet, perhaps the last quote above speaks to me the most. The term "American Dream" has been prevalent throughout my ISBA presidency this past year--and for good reason.

I am extremely proud to have served as the 139th President of the Illinois State Bar Association. I am even more proud to say that, having been born in Sicily, I am the ISBA's first immigrant President. The time for this diversity has finally been realized, although I can well remember when it was not as it is today. When I first came to this country back 1964, my widowed mother, with three young children, was not provided the opportunity to realize the "American Dream" for herself and her young family. Even though she was willing, able, and in need of work to support her children, it was difficult for her to find that work and society was not as accepting of her situation as it is today in promoting equal opportunity.



Umberto S. Davi

The times were changing though, and by 1977, Carole Kamin Bellows was sworn in as the ISBA's 101st and first woman President. She was also the first woman president of a state bar association in the United States. While three women presidents followed Carole Bellows--Cheryl Niro, Irene F. Bahr and Paula H. Holderman--we still have more progress to make on this front.

In just a few short weeks Vincent F. Cornelius will be sworn in as the 140th President of the Illinois State Bar Association. Mr. Cornelius will be our first African American bar president. I am proud to say he is among my dear friends and we can all be proud of the progress this symbolizes for our organization. It confirms and underscores that, as an organized group, we are addressing and embracing diversity within our profession. And yet, we must continue to ask ourselves, what more can we do? Which group or individuals are we missing and have not reached yet? We must press on in our quest to be all inclusive.

I know that the challenge for this quest to be all inclusive will continue within the ISBA and its leadership. However, we can be proud of the progress our Association has made over the years, which has included the creation and work of: Task Forces on Gender Bias in the Courts, and Diversity; Standing Committees on Women and the Law, Disability Law, Sexual Orientation and Gender Identity; Section Councils on Human Rights, International Law and Immigration; the Diversity Leadership Council; the Diversity Pipeline; and, the Law and Leadership Institute. We have also developed the Diversity Leadership Award and the Diversity Fellows Program, and sponsored diversity related Continuing Legal Education seminars. These are just a few of the many on-going initiatives and activities where the ISBA is leading in the area of inclusiveness.

While I praise the advancements of how far our profession has come, I fear that I am implying that where we are today is ideal. However, there is still much work that remains to be done. Attorneys serve diverse populations and we need to continue to increase the pool of diversity within the profession. As attorneys we are a voice for the underserved and the unrepresented, and we have a responsibility to ensure justice. Bar associations must continue to create and support committees and task forces with the focus of enhancing the diversity of their members and leadership by increasing opportunities for minority groups.

The law school classes of today are also starkly different than those of decades past. When I attended law school at The John

Marshall Law School in the early 1980s, the classrooms were mostly white males, similar to most others in the nation at that time. Today, it is with great pleasure I say that my alma mater is known as one of the most diverse law schools in the nation.[1]

Today one-fifth of law school graduates are black, Latino, Asian American, or Native American.[2] However, such groups still constitute less than 7% of law firm partners.[3] Additionally, women now comprise over one-third of the profession, but they are still two to five times less likely to make partner than a male counterpart.[4]

Law schools and bar associations are cognizant of these statistics and are working on increasing diversity through various initiatives and committees. Bar associations realize the need to increase not just the composition of their members, but more importantly, in order to effectuate meaningful and long-term change, diversify the leadership within their governing bodies. The ISBA has done and will continue to do this. We can look forward to further progress in the areas of diversity and inclusiveness while maintaining our core values and highest standards of professionalism within the legal community.

Together we will continue to promote diversity and inclusiveness within our organization. It has been a privilege and an honor to serve as the 139th and first immigrant ISBA president. I congratulate and thank all my fellow officers, the members of our Board of Governors, Assembly, Standing Committees, Section Councils and other committees for all their work and contributions to the preeminent bar association in the country – our ISBA! ■

1. <http://news.jmls.edu/featured-news/john-marshalls-student-body-ranked-as-one-of-the-most-diverse-in-the-country/>

2. Women and Minorities in Law Firms by Race and Ethnicity—An Update, NALP (Apr. 2013), <http://www.nalp.org/0413research>.

3. Women and Minorities in Law Firms by Race and Ethnicity—An Update, NALP (Apr. 2013), <http://www.nalp.org/0413research>.

4. <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/>.

Letter from the Chair

BY CORY WHITE

Hello All,

As chair of the DLC during this past year, I have had a lot of time to think about diversity within the Association, how far we've come, and how far we need to go. Like all great tasks, striving for a diverse Association and a diverse profession is a mission that that is far from complete; however, we should take stock of where we are, what we've accomplished, and what still needs to get done.

In the past year, the DLC has identify that diversity is only one-half of the equation, the other being inclusion. It is extremely important that the Association be as inclusive as possible, and that diverse individuals have the opportunity to participate in all aspects of the Association and its business. The goal is to have the diversity and inclusion efforts of the Association influence the broader legal profession. The DLC is and should continue to be at the front of that process. More than just coordinating the diversity efforts of the Association, the DLC should be setting the agenda and guiding the process.

In past year, both the DLC and its constituent committees have taken significant steps in advancing the diversity and inclusion mission of the Association. We successfully hosted the Annual Diversity Reception at this year's Mid Year Meeting. Our constituent committees have presented remarkable CLE programing, including programing related to the epidemic of sexual violence against women that has become too commonplace on our college campuses. Later this summer the Association, through the efforts of the DLC, will host the Fourth Annual Minority Bar CLE Conference. We have partnered with the Filipino American Lawyers Association, Chinese American Bar Association, Asian American Bar Association, Hispanic Lawyers Association of Illinois, South Asian Bar Association, Black Women Lawyers' Association of Greater Chicago, The Lesbian and Gay Bar Association of Chicago, and the Korean American Bar Association. We hope to make the Association's participation in the Conference an annual event. Finally, the DLC needs to continue pushing the diversity and inclusion agenda of the Association through thoughtful programing and partnerships, while working with current Association leadership to assure the message is heard and that action is taken.

Why place such importance on diversity and inclusion? The answer to the question is both simple and complex. Having a diverse profession that includes all voices and all lawyers of every background is, quite simply, good. Those diverse voices lead to a more robust profession, more diversity of opinion, and will ultimately, if we choose to listen to those opinions, make us better lawyers and, more importantly, better people.

Thanks to all the members of the DLC, the Board of Governors, the Association staff, and everyone else who contributed to our efforts this year. The future is bright. Let's get there together.

Sincerely,

Cory White ■

Book review: *Breaking Through Bias* is a great how-to manual for women to get ahead

BY BETHANY WHITTLES HARRIS

On a recent Sunday afternoon, my husband took a call from work. He's a nurse manager of a hospital surgical unit, and the call surrounded an issue of hospital policy as it applied in a specific patient situation. I overheard bits of his end of the discussion (read: debate) and was reminded, almost instantly, of why Andrea (Andie) Kramer and her husband Al Harris' new book is so essential for professional women. I got a chance to read an advanced copy of *Breaking Through Bias*, which hit bookshelves on May 17, 2016, and am convinced it's an essential tool for women lawyers and professionals. Here's why.

During that phone call, my husband didn't have to think about how he was being perceived as he made his arguments or curb his approach. He didn't wonder, for example, "Am I coming on too strong in making my point and defending it?" And that's the bottom line of *Breaking Through Bias.* Communication in the professional world is largely dominated by rules, cues and mores constructed by men, for men. This book does not teach women how to communicate like men. But it does teach women how to think about, and when necessary, adjust their communication techniques to make it more effective in the status quo.

What started as perhaps Andie's reaction to the recently well-publicized notion that women cannot, in fact, have it all, has resulted in a full-fledged book with specific methods and tools that women can utilize as they seek to advance their careers in step with male peers. Andie was kind enough to send me pieces of her book as they came to being and ask for my thoughts and comments. I initially questioned the extent to which the biases Andie and Al focused on actually exist, but I now see the effects of these biases around me. Plus, the book is rife with data-driven studies and other empirical evidence to quench the thirst of any healthfully skeptical attorney.

Reading this book in its different stages has left me ample time to contemplate the prevalence of gender-based bias in the workplace, but I am still shocked by some of the data. Take for example the following: "Only 16 percent of Americans believe a mother should work full-time outside of the home." This is a bias held, clearly, by not only men but by *working women,* too. Many of us will have to encounter and react to this commonly held belief during the course of our careers. Luckily, there are mechanisms for coping with this and many other gender-based biases in a way that allows women to avoid the detrimental effects on their careers while staying true to themselves.

As lawyers, we are used to counseling. I have been in the position, though, of feeling like I could use some advice myself regarding professional advancement and some of the hurdles I've faced early on *because* I'm a woman. Unlike my dear husband, I have had to curb my approach, so as not to be perceived as coming on too strong in a discussion with opposing counsel. I have had to consider how I was perceived as a new attorney. And along the way, having touchstones from Andie and Al's book helped me reflect on my own communication style and contemplate how to more effectively approach particular situations.

The communication techniques we utilize as professional women, whether consciously or subconsciously, affect our chances for advancement. *Breaking Through Bias* has convinced me of that. But there are ways to affect the perceptions others have of us as women in order to advance at our desired pace. There are methods for overcoming workplace biases against women, working mothers and women leaders. In my experience, they're worth learning and implementing. Step One: read Andie and Al's book. They'll take it from there.

Breaking Through Bias is available for sale now through Amazon, Barnes & Noble and local retailers. For information on bulk orders or book customization, contact Jill Friedlander at jill@bibliomotion.com. ■

Bethany Whittles Harris is a member of the Women's Bar Association of Illinois, and a Co-Chair of its Mentorship Committee. She is also actively involved with the WBAI's Community Outreach Committee, The Women's Treatment Center in Chicago, and serves on the Leadership Board of Big Brothers Big Sisters of Metro Chicago. Bethany is an associate at Mossing & Navarre, LLC, where her practice includes prosecuting medical malpractice, complex personal injury, and nursing home negligence cases.

Standing Committee on Racial & Ethnic Minorities and the Law

BY ATHENA T. TAITE

In 2015-2016, members of the Standing Committee on Racial and Ethnic Minorities focused on presenting continuing legal education programs that were engaging and practical. In September 2015, we presented a program titled *The Hiring Process: An Applicant's Background and the Legal Issues Facing Employers*. The program was an in-depth discussion with an EEOC attorney and a private practitioner. In November 2015, we co-sponsored the *Symposium on Sexual Assaults on Campus*, which took place over a period of two days. An upcoming issue of REM's newsletter, *The Challenge*, will include a comprehensive summary of the program and a list of resources for students, survivors, researchers and volunteers. In January 2016, we presented a program on the expungement of criminal records of adults and juveniles.

We are working on programs for the 2016-2017 bar year and reviewing certain U.S. Supreme Court cases, including *Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* and *Fisher v. University of Texas at Austin*. The first case, which the Court decided in June 2015, concerned disparate impact claims under the Fair Housing Act. *Fisher* concerns the use of racial preferences in undergraduate admissions. *Fisher* was originally before the Court in 2012-2013. The current matter is *Fisher II*.

We look forward to serving you in the next bar year. ■

Athena T. Taite, 2015-16 Chair if the ISBA Standing Committee on Racial and Ethnic Minorities can be contacted at ataite@iardc.org.

Standing Committee on Women and the Law: Our mission

BY EMILY N. MASALSKI

The Standing Committee on Women and the Law's mission statement embodies our core purpose and focus. This year, we continued to "**study and to focus on areas of law uniquely affecting women**" and launched a spirited campaign to have the ISBA support the Equal Rights Amendment ("ERA") to the United States Constitution. In December 2015, the ISBA's Assembly overwhelmingly supported our proposed resolution on the ERA.

Our November 2015 Symposium on College Sexual Assaults enabled our committee to work jointly with numerous bar associations and supporting organizations to "**assess, design, and implement programs designed to satisfy women's unmet legal needs**" as well as "**provide a forum for action relating to women's issues.**" A detailed synopsis of the Symposium will be featured in the ISBA's Racial and Ethnic Minorities and the Law newsletter.

Through the Symposium, we met Dr. Gail Stern of Catharsis Productions. She was only allotted 10 minutes of time to speak at the Symposium and we knew we needed to hear more. Dr. Stern graciously agreed to serve as our featured speaker at our March 2016 Celebrating Laughter in the Law luncheon and she definitely had us laughing about unexpected topics. Her determination to advocate for women and comedic spirit is inspiring. As part of our membership outreach, committee members invited several law students to attend the luncheon and share our camaraderie.

Our committee's ongoing efforts to "**study and recommend legislation uniquely affecting women"** resulted in the passage of the Lactation Accommodation in Airports Act (410 ILCS 140/) in August 2015. We worked with ISBA staff to provide lactation accommodation at the Annual Meeting and at the ISBA Chicago Regional Office. Attendees who are in need of a clean private place to pump breast milk while attending the conference may utilize a private lactation room. A key for the room will be available at the ISBA Registration room at the Annual Meeting. Private lactation space is also available at the ISBA Chicago Regional Office for nursing mothers. A huge thank you to Kim Weaver, Jeanne Heaton, and Melissa Burkholder!

Our committee had great success in our efforts to "**explore ways to encourage women in their involvement in the legal community at all levels**." I am so proud to be surrounded by such

accomplished, hardworking, and inspiring award recipients. At the time of press, we congratulate several award recipients (who were nominated by our Standing Committee) for the following ISBA awards:

- **Cindy Galway Buys** selected as the 2016 recipient of the ISBA Human Rights Section Council's Gertz Award (nomination prepared by Kelly Parfitt)
- **Annemarie E. Kill** selected as the 2016 recipient of the ISBA Matthew Maloney Tradition of Excellence Award (nomination prepared by Lori Levin)
- **Debra Stark and the John Marshall Domestic Violence Clinical Advocacy Program**, selected as the 2016 recipient of the Legal Education award (nomination prepared by Sherry Mundorff)
- **Shira Truitt**, selected as the 2016 recipient of the ISBA Diversity Leadership Award (nomination prepared by Mary Petruchius)
- **Erin Wilson**, selected as the 2016 recipient of the ISBA Young Lawyer of the Year Award (Cook County) (nomination prepared by Kristen Prinz)

Congratulations to all of the award winners who will be recognized at the ISBA Assembly Meeting on Saturday, June 18, 2016 at 9:00 a.m. ■

Emily N. Masalski is Counsel at Rooney Rippie & Ratnaswamy LLP (R3) and a member of the firm's environmental and natural resources, health and safety, and litigation practice groups. She can be reached at emily.masalski@r3law.com.

Homeland Security publishes new STEM OPT rule

BY SONGHEE SOHN

On March 10, 2016, the Department of Homeland Security published the new STEM Optional Practical Training ("OPT") final rule in the Federal Register. The effective date of this new final rule is May 10, 2016, the date that the existing STEM OPT rule expires due to a federal court injunction. This rule applies to F-1 status foreign national students who are completing degree programs in certain designated Science, Technology, Engineering, and Mathematics (STEM) fields at a DOE-accredited and SEVP-certified U.S. educational institution. The rule governs the employment authorization these students can receive at the conclusion of their educational program and extends the employment authorization period beyond the initial 12-months that all F-1 students who complete a degree program in the United States receive.

As we describe below, this new rule makes far-reaching changes to the existing program and contains both opportunities and responsibilities for U.S. employers that employ recent foreign national graduates.

Summary of the new STEM OPT Rule

Most significantly, the STEM OPT extension will now allow for 24 months of employment authorization as opposed to the current 17 months.

Another very significant change is the creation of a new "Mentoring and Training Plan" obligation imposed on employers and employees, coupled with DHS' enhanced ability to verify the employer's compliance with OPT program requirements. We describe these changes in greater detail below:

Training and Mentoring Plan (Form I-983): Employers and foreign workers must create a Training and Mentoring Plan identifying learning objectives and a plan to achieve these objectives within the 24 month STEM OPT period. This training plan must address the following key points:

- The employer has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity;
- The student will not replace a full or part-time, temporary or permanent U.S. worker; AND
- The opportunity will help the student achieve his or her training objectives;

Site visits: DHS has extended its authority to conduct site visits to verify the employment of OPT workers and the employer's compliance with the training and mentoring plan requirements as represented by the employer in Form I-983. While DHS will normally provide 48-hour notice before conducting a site visit the agency reserves the right to conduct a visit without notice if "a complaint or other evidence of noncompliance with the STEM OPT extension regulations triggers the visit." This is an ominous sign for employers, who must treat their obligations as described in their Form I-983 with the utmost seriousness.

Reporting Requirements: The student and employer must report annually on their compliance with the training plan. Additionally, a mid-point evaluation must also be provided during the first 12-month interval, and a final evaluation must be completed prior to the conclusion of the STEM OPT extension. This results in a total of four (4) evaluations that must be provided during the 24-month period, including the initial Form I-983.

However, some OPT practices remain unchanged from the existing rule:

A U.S. employer must be **registered with E-Verify** to employ a foreign worker with a STEM OPT extension;

The **"cap-gap"** will continue to provide an automatic extension of employment authorization and/or "duration of status" (D/S) through October 1 to a student if he/she is the beneficiary of a timely filed H-1B petition and change of status request that is pending with or approved by USCIS. The practical impact is that employers can continue to employ, through October 1 of any given year, a student whose OPT authorization expires between April 1 and October 1.

Analysis and Insights

On one hand, the new OPT STEM rule provides great opportunities to employers seeking to hire international STEM workers who have been educated at accredited and SEVP-certified U.S. educational institutions. On the other hand, the new rule significantly increases the regulation of employers hiring OPT STEM trainees. Due to the scope and significance of these regulations, and the upcoming May 10, 2016 deadline, we recommend that employers hiring international STEM workers quickly determine and develop a process for creating and maintaining the Mentoring and Training Program (Form I-983) and determine how to comply with new reporting requirements. Much like I-9 responsibilities, it is essential that individuals designated with the Form I-983 responsibility familiarize themselves with the form and the various reporting requirements. DHS has already published the Form I-983. The new final rule also provides a compelling reason for employers, who may have a need for international talent in STEM fields, to consider enrolling in E-Verify to benefit from this program.

On April 21st, 2016, Franczek Radelet is offering a complimentary program on the new OPT STEM rule featuring the Director of the International Student Services Office at the University of Illinois in Urbana Champaign, Mr. Martin McFarlane, and immigration counsel, Tejas Shah. ■

This article was originally published in the April 2016 issue of the ISBA's Section on International & Immigration Law newsletter.

Songhee Sohn received her J.D. from Loyola University of Chicago School of Law, an M.S. from New York University and a B.S. in Industrial and Labor Relations from Cornell University. She served as an intern with the U.S. Attorney's Office, Northern District of Illinois and a Judicial Extern for the Honorable Mary Anne Mason in the Circuit Court of Cook County, Illinois and the Honorable Young B. Kim in the Northern District of Illinois. She may be reached by email at sws@franczek.com.

Batson turns 30 but still has growing pains

BY TOM SCHANZLE-HASKINS, UNITED STATES MAGISTRATE JUDGE

In 1986, the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), held that a prosecutor's exercise of race-based peremptory challenges to jurors violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The original holding of *Batson* has been substantially extended, however, the granting of a writ of certiorari in *Foster v. Chatman*, No. 14-8349, which is currently pending before the United States Supreme Court, indicates that the ruling of the Court in *Batson* still remains difficult to implement.

In her opinion in *McWinston v. Boatwright*, 649 F.3d 618 (7th Cir., 2011), Chief Judge Diane Wood succinctly reviewed the Supreme Court's efforts to eliminate discrimination in jury selection as follows:

> For more than 130 years, federal courts have held that discrimination in jury selection offends the Equal Protection Clause. See, e.g., *Smith v. Texas*, 311 U.S. 128, 130–32, 61 S.Ct. 164, 85 L.Ed. 84 (1940); *Norris v. Alabama*, 294 U.S. 587, 599, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Neal v. Delaware*, 103 U.S. 370, 397–98, 26 L.Ed. 567 (1881). Early cases focused on the systemic exclusion of racial minorities from juries through state statutes, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); later, attention turned to the race-based use of peremptory challenges by prosecutors. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). More recently, the constitutional prohibition on discrimination in jury selection has been extended beyond race to gender. Moreover, the fact that society as a whole has an interest in the integrity of the jury system has been acknowledged. The anti-discrimination principle is thus not just a privilege of the criminal defendant; it constrains prosecutors, criminal defense lawyers, and civil litigants alike. Intentional discrimination by any participant in the justice system undermines the rule of law and, by so doing, harms the parties, the people called for jury duty, and the public as a whole. See *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (applying *Batson* to gender-based peremptory strikes); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (applying *Batson* to criminal defense counsel); *Edmonson*

v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (applying *Batson* to civil litigants); *Powers v. Ohio*, 499 U.S. 400, 405–07, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (describing the harms of discrimination in juror selection); *Batson*, 476 U.S. at 86–88, 106 S.Ct. 1712. As this case illustrates, however, discrimination in the selection of jurors has not yet been eradicated.

While a litigant is not entitled to a jury composed of members of his or her race or gender, *Nehan v. J.B. Hunt Transportation, Inc.*, 179 Fed.Appx. 954 (7th Cir., 2006) (see also *U.S. v. Nururdin*, 8 F.3d 1187, 1189-90 (7th Cir., 1993), discrimination in the exercise of peremptory challenges when selecting jurors is unconstitutional.

Expansion of the coverage of *Batson*

In *Edmonson v. Leesville Concrete Co*., 500 U.S. 614 (1991), the Supreme Court applied *Batson* to civil litigants as well as criminal defendants. In *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994), the Supreme Court held that gender, like race, is an unconstitutional basis for exercising peremptory challenges. In *Powers v. Ohio*, 499 U.S. 400, 402 (1991), the Supreme Court held that a litigant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the objecting party and the excluded juror share the same race.

Courts have, however, declined to expand the application of *Batson* to apply to disparate impact as a basis for sustaining a *Batson* challenge. In rejecting a *Batson* challenge suggesting that the proffered explanation for the strike, bias against law enforcement, is not race-neutral because African-Americans are disproportionately affected by negative interactions with law enforcement, the Seventh Circuit recently noted that defendant must show discriminatory intent because disparate impact does not violate *Batson. U.S. v. J.B. Brown, Jr.*, 809 F.3d 371, 375-376 (7th Cir., 2016). See *Hernandez v. New York*, 500 U.S. 352, (1991)(plurality opinion).

Procedure for use of *Batson* challenges

Under *Batson*, discriminatory peremptory challenges are evaluated using a three-part test. First, the opponent of the strike must make a prima facie showing that the striking party exercised the challenge because of a discriminatory reason. Second, the striking party must proceed to articulate a race or gender-neutral reason for the challenge. After the race or gender-neutral reason is stated by the striking party, the Court must determine whether the opponent of the strike has carried his burden of proving purposeful discrimination. The ultimate burden of persuasion regarding race or gender-based motivation rests with and never shifts from the opponent of the strike. *Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 939-940 (7th Cir., 2001).

Batson is not self-executing. It is the duty of the party challenging the opponent's peremptory challenge to make a *Batson* objection. The Court should wait for an objection before intervening in the process of jury selection to set aside a peremptory challenge. *Doe v. Burnham*, 6 F.3d 476, 478 (7th Cir., 1993).

The Court of Appeals cannot reverse a trial court's finding that a proffered, race-neutral reason for a strike was credible unless the District Court's finding is clearly erroneous, even if the Court of Appeals finds the reason dubious. While the striking party's explanation "need not rise to the level justifying exercise of a challenge for cause", it must be "clear and reasonably specific" and "related to the particular case to be tried". *Dunham v. Frank's Nursery & Crafts, Inc.*, 967 F.2d 1121, 1124 (7th Cir., 1992).

Problems with application of *Batson* rules

As noted above, a reviewing court gives deference to the finding of the District Court in determining whether a *Batson* violation occurred and will reverse only if the findings of the trial court are clearly erroneous. The Seventh Circuit has noted that ordinarily this deference is accorded because the trial court generally conducts the *Batson* inquiry contemporaneously with the voir dire procedure and is in the best position to witness statements of the party challenging the juror and to assess the credibility of the party exercising the challenge when they justify the exercise of their peremptory challenge under the *Batson* procedures. *Holder v. Welborn*, 60 F.3d 383, 388 (7th Cir., 1995).

The Court in *Holder*, however, conducted a de novo review because *Batson* was decided during the pendency of Holder's appeal and the *Batson* hearing was held in a habeas corpus proceeding years after the original impanelment of the jury. In *Holder*, the Court held that a prosecutor's concern that an African-American juror would harbor feelings of selective prosecution against the prosecutor's office based on the fact that the murder charges against a white suspect in the shooting death of the African-American juror's brother were dropped within two years of Holder's trial was a race-neutral justification for the exercise of a peremptory strike. In finding there was no *Batson* violation, the Court reviewed the Supreme Court's Opinion in *Batson* and noted that the Equal Protection Clause only forbids the prosecutor to challenge potential jurors solely (emphasis in original) on account of their race. *Holder v. Welborn*, Id. at 388.

The Seventh Circuit affirmed the District Court's denial of Holder's petition for habeas relief. In *Holder*, Judge Cudahy dissented. He asserted that "It is no answer, contrary to the majority's opinion, to suggest that *Batson* only prohibits strikes occurring 'solely' on the basis of race", and suggested that the case be remanded to the trial court to determine whether or not there were mixed motives in which race played an impermissible role for striking the African-American juror. *Holder v. Welborn*, *Id*. at 391.

The difficulty in applying the "sole motive" test to *Batson* challenges is illustrated by the holding of the Seventh Circuit Court in *Pettiford v. Durm*, 175 F.3d 1020, unpublished opinion (7th Cir., 1999). The Court in *Pettiford* dealt with the application of *Batson* during the trial of a

civil rights complaint filed under 42 U.S.C. §1983. In that case, the plaintiff asserted that the defense had used a peremptory challenge to strike an African-American juror for racial reasons. The following is the colloquy regarding the contention that the juror was impermissibly struck on the basis of race:

> THE COURT: The record needs to reflect that there is one African-American on this jury remaining and the defendants have just struck that defendant-or that juror and they need to articulate a rational reason for that, a race neutral reason for that strike.
>
> MR. BYRON [defendants' attorney]: The reason we are striking is because we believe that she might be biased with regard to race.
>
> THE COURT: It has to be a different reason than that. Got to have an articulable reason that has to do with something other than race.
>
> MR. BYRON: I need to go back and look at our card.
>
> THE COURT: Wait a minute, just a second. Unless the plaintiff doesn't care.
>
> MR. HENDREN [plaintiff's attorney]: Your Honor, we-
>
> THE COURT: You do care?
>
> MR. HENDREN: Yes, sir.
>
> THE COURT: Okay.
>
> (Counsel conferred outside record)
>
> (At the bench)
>
> THE COURT: All right, Mr. Byron.
>
> MR. BYRON: Yes. Number one, she's not working; and number two, she has been a claims rep and has litigation experience.
>
> THE COURT: Do you have any comment you want to make?
>
> MR. HENDREN: Yes, your Honor. I think they already stated the reason on the record for striking her was because of her race, and these are [pretextual] reasons, neither one of which would impugn her ability to fairly judge the evidence in the case.
>
> THE COURT: Well, an articulable reason is an articulable reason, and it doesn't have to be much. And the fact that there is a history with an insurance company is enough statement to make, and so I'm going to excuse her. Thank you.

From this colloquy, it clearly appears that a motivating reason for striking the juror was the juror's race. However, the Seventh Circuit, relying upon the holding in *Holder*, found there was no *Batson* violation where both racially discriminatory and race-neutral reasons are given for the strike. The Seventh Circuit in *Pettiford* ruled that, so long as a juror is not struck *solely* (emphasis added) on account of race, no equal protection issues arise.

Although *Holder* has not specifically been reversed by the Seventh Circuit, its current vitality appears to be questionable. In *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), the Supreme Court evaluated a *Batson* challenge in a Louisiana death penalty case. In *Snyder*, the prosecutor had used peremptory strikes to eliminate African-American prospective jurors. One of the jurors struck by the prosecutor was an African-American college student. The prosecutor gave two allegedly race-neutral reasons for striking the juror. The first was that the juror looked nervous. The second reason was that the student was concerned his jury service or sequestration could interfere with his student-teaching obligations needed for his college course. The Court, however, contacted the Dean of the juror's college who indicated he would work with juror to make up lost teaching time if he missed student teaching due to the trial. The prosecutor's reason for excluding the student was that the student may have been inclined to find the defendant guilty of a lesser included offense to obviate the need for a death penalty phase of the trial in order to return to his student teaching. The Court found this reasoning "highly speculative and unlikely" in light of the offer of the college dean to work with the student to make up missed student teaching time and the short duration of the trial which was known to the prosecutor. *Snyder*, *Id*. at 128 S.Ct. 1204-1205. In reaching this conclusion, Justice Alito commented:

> In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. (citation omitted) We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context.

Snyder, *Id*. at 128 S.Ct. 1212.

If the Seventh Circuit holding in *Holder* is viewed under the substantial or motivating factor test discussed above, it could create a question as to whether a racial reason for a peremptory challenge is a "substantial or motivating factor" as opposed to the "sole factor" under the test used by the *Pettiford* court.

Batson returns to the Supreme Court

The petition for writ of certiorari in *Foster v. Chatman*, No. 14-8349, was filed on January 30, 2015. The U.S. Supreme Court granted the petition for a writ of *certiorari* on May 26, 2015. The Court heard oral argument on November 2, 2015

and will issue an opinion in 2016.

Foster v. Chatman provides a look into the pretextual exercise of peremptory challenges and how they may have been used by prosecutors. Timothy Foster is an African-American man who has been on death row for the past 28 years in Georgia. He claims that the prosecutors at his trial violated *Batson* by striking four African-American prospective jurors during jury selection. Foster was tried, convicted, and sentenced to death by an all-white jury.

At trial, Foster objected to the use of four peremptory challenges by the prosecutors. The prosecutors gave seemingly race-neutral reasons for their peremptory challenges and the trial judge and reviewing courts agreed that the race-neutral reasons were sufficient. Foster, however, was able to obtain the prosecutors' notes years later through the Georgia Open Records Act. The notes revealed that the prosecutors were working from a jury list that was color coded by race, juror cards that indicated race, and a list of "definite no's" that included all the prospective African-American jurors. Foster argues that the notes reveal the prosecutors were taking race into account at every step of jury selection in violation of the Supreme Court's holding in *Batson*.

At oral argument in the *Foster* case, the Court asked counsel for Foster to first address whether the case should be remanded to the Georgia Supreme Court to require that court to accept the review of the writ of certiorari, which they had denied. The Court then went on to hear arguments on the merits of the case. The questioning of Justice Sotomayor indicates a willingness to apply the substantial and motivating factor test discussed by Justice Alito in *Snyder*. This could implicate a change in holdings such as the Seventh Circuit's decision in *Holder* which permits a peremptory challenge if it was not "solely" motivated by race.

The following colloquy between counsel for petitioner illustrates the Court's interest in examining the reliance on one legitimate reason for striking a juror when other reasons are present:

> JUSTICE SOTOMAYOR: -- I have found some circuit courts who have a rule on appeal or on habeas which is if they can find one legitimate reason for striking a juror --
>
> MR. BRIGHT*(counsel for petitioner Foster)*: Yes.
>
> JUSTICE SOTOMAYOR: -- that's enough to defeat a Batson challenge. Do you believe that's an appropriate rule? Are you suggesting a different approach to the question?
>
> MR. BRIGHT: Well, it can't -- I -- I would suggest it -- it can't possibly be. Because this Court said in Justice Alito's opinion in Snyder v. Louisiana that where the peremptory strike was shown to have been motivated in substantial part by race, that it could not be sustained. And -- excuse me -- I -- I would suggest to you, it shouldn't even really say substantial. Because if this Court, as it said so many times, is engaged in unceasing efforts to end race discrimination in the criminal courts, then a strike that -- strikes motivated by race cannot be tolerable.
>
> And, of course, as -- as pointed out here in the -- in the amici, this is a serious problem, not just in this case, but in other cases where people come to court with their canned reasons and just read them off. That happened in this case, where one of the reasons that was given was just taken verbatim out of a -- two of the reasons given were taken verbatim out of a reported case. So you don't have the reason for the lawyer in this case. He said my personal preference. It wasn't his personal preference. It was the personal preference of some U.S. attorney in Mississippi who gave that reason, and then it was upheld on appeal by -- by the Fifth Circuit.

It will be of interest to see what the Court does with this opportunity to revisit *Batson*. A recent and well researched article, "Foster v. Chatman: A Watershed Moment for Batson and the Peremptory Challenge?"[1] by Nancy S. Marder, Professor of Law and Director of Justice John Paul Stephens Jury Center, IIT Chicago-Kent College of Law, outlines, in detail, options open to the Supreme Court in reviewing *Foster v. Chatman*.

Professor Marder notes, in her abstract to the lengthy and well-reasoned article, that the Court could either take a minimalist approach in which it could simply find a *Batson* violation, or could tweak the *Batson* test in different ways, such as giving more weight to discriminatory effects of practices or by devising a stronger remedy. In the view of Professor Marder, the only remedy that is adequate to the task is the one that Justice Marshall suggested in his *Batson* concurrence 30 years ago, the elimination of the peremptory challenge.

Thus, though the *Batson* holding has been in effect for thirty years, the Courts and commentators still grapple with how to best implement it in the trial court. ■

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1. Marder, Nancy S., *Foster v. Chatman*: A Watershed Moment for Batson and the Peremptory Challenge? (2015). Available at SSRN: <http://ssrn.com/abstract=2681390> or <http://dx.doi.org/10.2139/ssrn.2681390>.

Will climate change come soon to college campuses?

A Coalition of Diverse Bar Groups Hosts a Historic Symposium on Emerging Law and Other Interventions to Address the Ongoing Scourge Of Sexual Assault on College Campuses

BY SHARON EISEMAN

This past November 6, an incredible all-day Symposium on Sexual Assaults on Campus took place at Chicago's School of the Art Institute, preceded the previous evening by a showing at Columbia College of a powerful documentary "The Hunting Ground" (premiered at Sundance) followed by a panel discussion in which one of the participants is an assault *survivor*—and now an effective activist. If you watched this year's Academy Awards show in February, you likely learned that "Til It Happens To You" from "The Hunting Ground", co-written by songstress Lady Gaga and Diane Warren, was one of five Oscar nominees for best song from a movie, and surely you will recall Lady Gaga's astounding performance of that song. And you will also remember—and probably won't soon forget—the image of the mass of young sexual assault survivors, both women and men, who slowly but definitively and in unison walked onto the stage to surround Lady Gaga as she sang of their heartbreak and triumph. I can assure you that no one in my home was dry-eyed listening to the urgency and power of the words and the commanding melody, understanding a little better what those brave survivors have endured—but also what compassion and support they and their cause are garnering. Performing that night of the Oscars turned out to be the first time that Lady Gaga so publicly shared her long-kept secret that she was sexually abused at the age of 19.

We return now to the Symposium. In another section of this Newsletter you will find a list of the hard-working Symposium Planning Committee members and its leaders, including co-chairs Yolaine Dauphin and the Director of the Salvation Army Promise Program; Symposium moderators Ann Breen-Greco and Carol Casey; Emily Masalski, coordinator for the November 5 evening program at Columbia; and Tracy Douglas who oversaw the implementation of the remote transmission of the Symposium at the Southern Illinois University site in Carbondale and the University of Illinois site in Springfield. Also listed are the names of the many co-sponsoring organizations that lent their financial support, input and other resources to the development and implementation of the Symposium which featured more than twelve topics and twenty speakers. Counting those present at the three locations, we estimate that 250 people were in attendance, representing a broad spectrum of professions with an interest in the subject, including those in the legal field and in social services, law enforcement, academia, psychology and health care—to a large extent mirroring the disciplines of the speakers who, during the day long program, shared their deep experience with victimized, predominantly female college students to help shed light on the nature and extent of the problem—now being called a 'crisis'. Beyond that as a starting point, the audience anticipated being—and was—informed of (1) the efforts of some college administrations to address the problem or, as has been reported, to hide or minimize the problem while simultaneously failing to provide investigative, counselling and other support services for the women—and men—who report the sex crimes; (2) avenues for victims to seek legal redress of their grievances; (3) the psychological, emotional and physical damage experienced by the assault victims and potential recovery interventions; and (4) the developing legal and other tools available to attack the crisis at its source.

Also evident as the day progressed was a dim but expanding light at the end of a long path suggesting that new and vigorously applied existing laws, focused attention on the issue of sexual violence on campus, and a broader awareness of survivors' stories can make a difference in the lives of female and male college students by forcing a change in the culture of male dominated sexual aggression and bravado that has long been imbedded in college life. Speakers expressed hope that the new laws and heightened awareness can also lead to an increase in the level of safety that students hope for and deserve while pursuing their higher education and post-graduation dreams—because we all agreed that it is *not acceptable* that, as many studies have shown, one in five women students are victims of sexual violence during the course of their college careers. As Catherine Lhamon, Assistant Secretary of the U.S. Department of Education's Office for Civil Rights (OCR) so frankly observed during her presentation, "We are past the time when we say "It's your fault" to girls who get raped. We are past the time when we teach our kids in school that this is what you can expect. We are too late in our history to be having that conversation." Along with this perspective, we heard the message that it also is not acceptable that 6.1% of male students and an unverified number of gay students are victims of sexual violence during the course of their college careers.

The day's ambitious program was introduced with appropriate gravity befitting such a serious subject by Illinois Supreme Court Justice Thomas Kilbride, a staunch advocate for equal access to justice. Symposium speakers represented government entities charged with regulatory enforcement and various

educational institutions responsible for student safety and included Illinois Attorney General Lisa Madigan and her Office's Civil Rights Bureau Chief; Keynote Speaker Catherine Lhamon from the OCR, previously mentioned; Cook County Sheriff Thomas Dart; Diane Rosenfeld, Director of Harvard Law School's Gender Violence Program; Dean of Students Ashley Knight from DePaul University; Linda McCabe Smith who serves as Associate Chancellor for Institutional Diversity and Title IX Coordinator at Southern Illinois University; and Dr. Alan Berkowitz, a psychologist, trainer, popular speaker and independent consultant to educational institutions on programming for rape and sexual violence prevention, focused particularly on educating men on their responsibility for preventing sexual assault.

Besides other distinguished scholars, educators, policy-makers, government officials and social service providers, attendees were privileged to meet Sofie Karasek, a rape survivor who transformed her trauma into a positive force by co-founding and now serving as Director of 'End Campus Rape', a movement dedicated to informing the public about the extent of the problem of sexual violence on college campuses and enabling victims to be heard and to obtain justice from the educational institutions that should maintain a safe environment for all of their students. Ms. Karasek is also a featured survivor in "The Hunting Ground" and served on a panel following the viewing of that film on the Thursday evening before the Symposium.

IS CAMPUS RAPE A NEW CRIME—OR ARE WE JUST DISCOVERING IT?

If you momentarily thought this kind of act must be rare on college campuses, that thought was incorrect. But the error is understandable because, until recently, most citizens hadn't heard much about such crimes taking place in that presumably welcoming environment, and even parents about to send their young adult children off to college—and college debt—have mostly been unaware that such a danger might be lurking on the very campus their daughter or son will call home for the next four years. But suddenly, we are reading and hearing regularly about this problem which has been aptly characterized as a 'crisis'. As we learned during the Symposium, however, one piece of information to weigh against this recognition is data from some studies showing it is a more limited number of perpetrators that commit a greater number of the attacks, meaning that many of those committing such acts of sexual violence are—and have self-reported to be—serial criminals. If those studies are accurate, we do have to consider different approaches to identifying such individuals and determining how to restrict their access to the colleges and how to train law enforcement to catch the criminals before they strike again.

President Barack Obama, who initiated a campaign in September of 2014 to increase awareness of sexual violence on campus called 'It's On Us', deserves credit for demanding that the shocking statistics reflecting a high percentage of sexual assaults on college campuses must be investigated and appropriately addressed. This first-of-its-kind White House campaign on the topic of campus sexual assault was no doubt inspired, in part, by the momentum following the U.S. Department of Education's 2011 publication of the first in a now periodic dissemination of *Dear Colleague Letters*; a press conference held in early 2013 by students from several colleges regarding their jointly filed federal complaints alleging campus sexual assault is a national problem; and an on-line posting of federal complaints filed against universities by the U. S. Department of Education (DOE) showing the number having doubled—all of which information we learned from Sofie Karasek.

Yet, it is the President's leadership in voicing concerns about sexual assault taking place in institutions of higher learning across the nation that has propelled the subject into the public conscience and public discourse. Moreover, *The First Report of the White House Task Force to Protect Students From Sexual Assault*, released in April of 2014 before the 'It's On Us' campaign was launched and meaningfully entitled NOT ALONE, definitively identified the crisis on college campuses and ways to combat the crisis, including how to effectively respond when a student is sexually assaulted. (Find the Report at www.notalone.gov/assets/report.pdf along with helpful data and resources for students and schools.) On that website, you will also notice the number of the National Sexual Assault Hotline: 800-656-4673.) One critical outcome from the Obama Administration's focus on this problem was a 'discovery' that assaults of this nature have been taking place for a long time and have continued for many reasons, including victims' fear of repercussions for reporting the crime, or a belief, reinforced by examples, that the reports will not be taken seriously or fully investigated.

Worse yet, we have learned that in many instances, after a student has reported the violation, the school seriously delayed its investigation of the complaint or did nothing to punish the perpetrator even when the allegations were validated. As a consequence, if the victim decides to continue her or his education at the same school, that student is often forced to endure ongoing contact with the offender on campus and in classes. Due to this stressful situation, victims will often 'choose' to drop out of school, thereby deferring or giving up their dream of a successful career and more. We know that unfortunate result will only exacerbate the financial, social and psychological damage that the sexual assault set in motion.

WHAT LEGAL REMEDIES AND SUPPORT SERVICES CAN STATES AND LOCAL GOVERNMENTS PROVIDE TO VICTIMS?

Thankfully, recent public awareness of the extent of campus sexual assault and of the trauma experienced by the victims has prompted *state legislatures* to pass laws concerning such conduct. These laws that govern institutions of higher learning have their roots in our nation's recognition of individual civil rights and the civil responsibilities of government and other covered entities to provide equal opportunity in education to their students. Thus, they focus on encouraging

the reporting and proper investigation of allegations of rape; addressing the impact on victims and the protections they need; the establishment of victim services; and specific actions by the schools and law enforcement to foster changes in existing campus culture that so often enables, even rewards, sexual aggression against (mostly) women. Illinois is one state—in addition to California and New York—that has very recently passed a bill, P.A. 99-426 entitled 'Preventing Sexual Violence in Higher Education Act' (110 ILCS 155/1 et seq.), which takes effect on August 1, 2016.

At the Symposium, we heard about this important new Act from Illinois Attorney General Lisa Madigan who drafted the bill and advocated for its passage, and Karyn Bass Ehler, Chief of the Office's Civil Rights Bureau, who worked with Attorney General Madigan on this important civil statute. Current federal laws and recommendations on this issue – outlined in statutes, regulations and federal guidance – are diffuse, making it confusing for some higher education institutions to understand and translate them into effective policies and programs on their campuses. Illinois colleges (and college students) may find Illinois' recently enacted legislation especially helpful because it provides a roadmap to federally-mandated responsibilities and also includes two new requirements, described below, which have been identified as best and recommended practices.

In its mandate that all covered institutions of higher education develop, publish and implement a "comprehensive policy" covering sexual violence, domestic violence, dating violence and stalking that includes reporting procedures and university response guidelines, and in the other requirements imposed upon the school administrators, the Act makes it clear that schools must have defined and consistent responses to student complaints. (See Section 155/10 of the Act.) Furthermore, the schools must notify survivors of their rights; offer a "fair and balanced" procedure to resolve complaints—unlike the 'hearings' in some schools where the athletic director adjudicates complaints against student athletes who are in the sports programs that the director or his/her coaching staff oversee; provide training for students and school employees with the goal of increasing awareness of and responsiveness to complaints of assault; and offer protections to 'bystanders' so they are discouraged from reinforcing the perpetrator's actions and instead are motivated to aid the victim and support her/his reporting of the attack.

Additionally, under Section 205/9.21(b), the schools must submit annual reports to the Office of the Attorney General as to incidents, trainings and complaint resolution outcomes among other mandated information. As a result of these reporting requirements and other responsibilities defined in the new Act, Illinois institutions of higher learning will be held accountable for creating safe environments for their students, for providing means for students to report assaults, and for following appropriate processes for investigating complaints and disciplining the attackers. The new Act includes two provisions not found in federal law: (1) a requirement to provide a "confidential advisor" for the survivor; and (2) a mandate for the schools to create a campus-wide task force or participate in a regional task force that must meet twice a year to review the schools' policies and procedures as well as their education and outreach efforts.

Significantly, *these institutions are required to include, in their policies, a definition of 'consent'* which must meet identified minimum requirements but may establish stricter standards. In this context, it is reassuring to see that Section 10(1) of the Act recognizes "knowing consent" is not possible when the person is incapacitated due to drugs or alcohol, or if she or he is asleep or unconscious. Such a provision takes into account the reality that the incapacitated state in which many rape victims are attacked is rarely of their own doing and instead is a condition into which they are forced or lured by the aggressor(s).

It is critical to recognize that when educational institutions comply with state laws and with the federal Violence Against Women Act by responding effectively and promptly to complaints, all students, including victims and the accused alike as well as the general student body, are the beneficiaries. These laws recognize the need to balance a school's ability to respond appropriately to reports of violence without impinging on the rights of the accused student. Moreover, the new Illinois law requires schools to incorporate several elements into the complaint resolution procedure to promote consistency and accountability.

We were also fortunate to hear from several County officials about how they discover and investigate allegations of sexual violence, including on local campuses, and how they work with campus law enforcement. One locally prominent speaker was Cook County State's Attorney Anita Alvarez who has publicly lamented and taken action to curb sex trafficking of women and children. State's Attorney Alvarez also committed her Office's resources to prosecuting offenders under the State's Criminal Code when intervention by school officials and the school's law enforcement personnel is not effective or sufficient. Similarly, Cook County Sheriff Thomas Dart and Jan Russell, Senior Policy Counsel for Sheriff Dart's Violence Against Women Program, expressed their Office's commitment to support victims, including through the provision of sexual assault training for campus police. Lieutenant Karen Sullivan of the Chicago Police Department's Bureau of Detectives, along with Northern Illinois University's Police & Public Safety Chief Thomas Phillips and Vice President of Human Resources Mike Nicolai of the School of the Art Institute of Chicago, in turn advised us of their respective protocols for receiving and efficiently processing complaints of sexual violence and their responsibility for treating the complainants at the start with respect rather than suspicion.

It was important to learn of the multiple sources that notify the CPD of sexual assaults besides the victims themselves, including hospitals, rape crisis centers and college administrations. These law enforcement officials seemed to recognize that unless a victim is assured that her

or his report is accepted as credible and that she or he will not be blamed for what happened, that person will hesitate to report incidents, allowing crucial evidence to be lost by delays in reporting the crime, and enabling aggressors to continue such conduct with impunity. From ongoing media reports of significant delays in the processing of rape kits and other physical evidence by local crime labs, we know we must keep pressuring those facilities to timely do their job so that the opportunity for bringing a case against a perpetrator is not unnecessarily lost. Failing to report an assault also deprives the victim of opportunities for receiving trauma intervention services to assist in her or his recovery.

Among the Symposium materials provided to the attendees was NIU's manual on *Title IX Policy and Procedures* addressing sex-based misconduct, a publication which is readily accessible and applies to all students and University employees. The content is comprehensive in its reach, covering all the bases that would apply to any incident of sexual assault or sex discrimination including definitions; how and to whom a complaint can be reported; a list of resources for confidential counselling; the responsibilities of the institution for safeguarding its student population; the rights of a victim and of a respondent against whom a complaint is filed; the investigative process; what remedies are available and how to file a Title IX complaint; and what rights and rules apply to any hearings conducted pursuant to a complaint, all of which is a good segue into an overview of victim rights under federal law.

WHAT ABOUT FEDERAL LAW?

At the federal level, laws that address school related sexual violence and sexual harassment are useful and effective tools against institutions which foster a campus climate that allows sexual aggressors free reign. Those laws include the Violence Against Women (VAWA) Reauthorization Act and Title IV-A which require colleges to comply with the Clery Act, enforced by the U. S. Department of Education. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, passed by Congress in 1990 following the rape and murder of nineteen year old student Jeanne Clery in her college dorm, addresses dating violence, sexual violence and stalking in educational institutions. While other federal laws already required colleges to submit Annual Security Reports, The Clery Act added a Victim's Bill of Rights that requires colleges to provide awareness training programs, to disclose possible sanctions against aggressors, and to offer counselling and other protective measures to victims such as options for changes in both academic and living situations, whether or not the victim makes a formal complaint.

As we learned from survivor-activist Sofie Karasek, another important tool for the Federal Office of Civil Rights and for private litigants seeking monetary damages is Title IX which mandates gender equity in education programs and activities receiving federal financial assistance—a mandate that affects a great number of schools. (See 20 U.S.C. 1681(a)). Title IX also enforces, in K12 and higher educational institutions, Titles II, VI and other federal laws. Thus, students at covered institutions should expect their schools to "prevent, address and eliminate hostile environments" and assure their student bodies are free from sexual harassment and sexual assault. Furthermore, all students must be guaranteed equal access to educational opportunities, including in the areas of research, programming, occupational training and extracurricular activities. When a meaningful number of female students and/or gay students on a college campus are victims of sexual violence and the assaults are reported or otherwise become known to the school administration, and the administration does not appropriately respond, a case can be made that the college is allowing or even fostering an environment hostile to the female gender or to the LGBT community. Under Title IX, that school is illegally engaging in sex-based discrimination and can/should be reported to the OCR for investigation and possible intervention. As Ms. Lhamon advised and Ms. Karasek reinforced, the OCR also has the option of referring any case it receives to the U.S. Department of Justice.

FRATERNITIES, SPORTS AND THE ETHOS OF MALE 'MACHISMO'

Several speakers, including Harvard Law School Lecturer Diane Rosenfeld, previously mentioned, and educator, curriculum developer and author Dr. Gail Stern, addressed the problem of the macho-driven climate at many colleges and universities that encourages aggressive sexual actions against women in particular but also against male students. Ms. Rosenfeld described fraternity houses where pornography is played continuously, and she showed a photograph posted on-line of a female student with her hands and feet tied behind her back, reminiscent of the way hogs are tied down.

Likely many of us have also read news reports of schools that decided to ban certain fraternities from campus because of sexual misconduct and other kinds of violent actions fraternity members committed during wild parties where alcohol flows freely and a state of extreme inebriation is applauded. In such situations, the fraternity members' deadening of 'normal' inhibitions prompts them to treat women as objects of sexual conquest and engage in competitions to see who can drug and have sex with a woman at the party first, or how many will be invited to watch the sexual attack or join in as other aggressors to pin down and rape the drugged, drunk or unconscious woman, dragged to an upstairs bedroom in the fraternity house while a party is in progress.

In an unusual approach using humor and dramatic phrasings, Dr. Stern, who has advised and developed training programs for law enforcement personnel and members of the military, probably startled a number of audience members into realizing that the male attitude toward women and sexual engagement with women is almost comically barbaric and thus subject to deconstruction, and that the important goal is to make people comfortable discussing the issues so that these difficult topics can be more openly explored. When the taboo against raising and publicly airing matters of a sexual nature is overridden, students

may find it easier to assess situations that are dangerous, trust their judgment and choose a better alternative. They may also become more comfortable reporting incidents of sexual violence that have been committed against them or someone they know to the school administration or law enforcement authorities.

While closing down the fraternity and its group residence is a reasonable action for college administrators to take in instances where female and male students are abused, the colleges often ignore earlier and widely-known instances of misconduct, like the recent incident of a fraternity member pressured into texting a female student during 'rush' season with a request that she post a photo of her exposed 'boobs' painted with the fraternity's Greek letters, that escalates over time into opportunities for uncontrolled violence. Escalation of that nature occurs because no one at the institution asserts effective oversight to insure that the fraternity and its members are held accountable for these early instances of misconduct. Moreover, fraternity members who are disturbed by the exhibitions of male sexual aggression they witness are often afraid to criticize their 'frat brothers' for fear of being spurned or isolated by the group. These individual students may even be the ones who choose not to participate in the victimization of women and instead assume the role of 'bystanders', observing the degradation and assaults but doing nothing to intervene, verbally protest or report what they have witnessed to the college authorities or the police. In recognition of such occurrences, legislation concerning campus sexual assaults and policies issued by the educational institutions are beginning to include consideration of the **bystander phenomenon** and to require that it be addressed in training and through counselling services for the bystanders in an effort to discourage passive involvement in an assault. This specific kind of intervention recognizes the abusive culture that has taken root in many institutions of higher education and aims to change that culture. Another resource for understanding and addressing the problem of bystanders failing to respond appropriately when they witness an assault is Isabella Rotman's "Not On My Watch, A Bystanders' Handbook for the Prevention of Sexual Violence" which The School of the Art Institute of Chicago distributed to Symposium attendees.

The situation in the extremely popular 'arena' of sports is similar: acts of aggression by some male heroes of football, basketball and hockey are minimized and ultimately dismissed or forgotten so that our citizenry can continue to cheer for their favorite teams which, we must have collectively concluded, cannot function properly without these men. When such incidents are ignored, the message sent to the public and to the players is that uncontrolled anger and acts of physical and sexual aggression are acceptable ways to communicate with women and men, especially those who are ill-equipped to defend themselves or too afraid of suffering repercussions greater than the initial attacks if they try. If you think otherwise, just remember Baltimore Ravens running back Ray Rice caught by surveillance video dragging his unconscious fiancée out of a hotel elevator, for which he received a mere two-game suspension. When the next video of what transpired *in* the elevator surfaced publicly, Rice was seen punching his fiancée and pushing her to the ground when she tried to fight back. It took that second revelation—and mounting public pressure and simultaneous disclosure of the more severe penalties imposed upon players who are caught using 'party drugs' and marijuana—for the Ravens to fire Rice and for NFL Commissioner Roger Goodell to suspend him indefinitely from the League. No wonder that so many of us have become inured to the revelations of violent acts committed by players and have also lowered our expectations of what constitutes good behavior and how promptly and seriously those who commit acts of violence against women will be punished.

Understanding how the culture in a particular community operates is key to behavior modification. Symposium speaker Dr. Alan Berkowitz offered his insights into how **social norms** in certain environments influence behaviors of individuals within those specific communities. With regard to the prevalence of sexual violence at institutions of higher learning, all the disciplines that interact with the survivors as well as the accused and the school administrations must understand both the nature and the power of such norms, particularly in the generally closed and isolated environment existing on many college and university campuses, if we hope to change how people conduct themselves in that environment. One of the approaches Dr. Berkowitz utilizes to help reduce the prevalence of sexual violence against women is to work on changing the attitudes of men that can contribute to domestic violence and violent actions against women in other contexts. After all, men are an integral part of the equation so it is encouraging that Dr. Berkowitz applies his training, experience and research skills in implementing sexual assault prevention programs that cover men's responsibility and in expanding our understanding of bystander intervention theory that may contribute to the campus culture change we all would like to see.

WHAT IS THE IMPACT OF ASSAULT ON VICTIMS AND WILL SUPPORT SERVICES HELP?

It is sad to know that so many women—as well as men and individuals who identify as members of the LGBT community—become victims of sexual assault during their stay on college campuses, yet it is encouraging that, as time progresses and we make strides toward eliminating this threat, the social services and counselling 'industry' seems to be getting better at understanding the nature and extent of damage suffered by survivors. Such understanding leads to the development of more specific resources for survivors to enable them to heal and return to their communities of choice. At the Symposium we heard about some of these resources from Sofie Karasek and also from Anne Bent, founder of Porchlight Counselling Services. This not-for-profit agency runs a 'confidential' hotline which means that the staff will not share the communications from the caller with any outside entities or persons such as law enforcement, schools

or parents. Thus, this type of access offers an early safety net for victims of sexual assault. As Ms. Bent frames the struggle, the free therapy Porchlight offers is designed to support survivors who hope to achieve "a measure of normalcy" in their lives.

Another resource for victims of sexual violence is the not-for-profit Chicago Alliance Against Sexual Exploitation (CAASE). Its Executive Director—and lawyer—Kaethe Morris Hoffer advised us of the direct services CAASE provides to its clientele as well as the advocacy work the agency performs in the community to combat sexual inequality and violence against women. As we listened to these phenomenal advocates explain the significant needs of survivors of sexual violence, we understood better the challenges that both the survivors and the service providers face and the financial and community support the agencies deserve but don't always receive.

We are grateful for the time and energy our group of talented speakers committed to participating in our program and applaud their dedication and the progress they are making toward a day when attending college will not be so fraught with anxiety and discomfort about personal safety as it now is for many young women, young men and those in the LGBT community. Much work lies ahead for the professionals and volunteers—that count survivors among them—who are 'toiling' in the trenches, and also for those of us who now know enough about the problem and the need for resources that we are compelled to offer our aid.

ADDITIONAL RESOURCES FOR STUDENTS, SURVIVORS, RESEARCHERS, VOLUNTEERS and OTHER PROFESSIONALS

- Rape Victim Advocates (RVA): 24-hour Chicago Rape Crisis Hotline: 1-888-293-2080; www.rapevictimadvocates.org, 312-443-9603.
- Get involved in preventing sexual violence, even lobbying your alma mater to comply with Title IX: www.endrapeoncampus.org.
- Learn more about Title IX protections and remedies and how to file a complaint at: www.knowyourIX.org.
- Learn about counselling and volunteering through Porchlight Counseling Services at www.porchlightcounseling.org and its Confidential Helpline: 773-750-7077.
- Chicago Alliance Against Sexual Exploitation or CAASE at www.caase.org provides a number of services for survivors of sexual violence and engages in advocacy aimed at changing the culture of violence.
- Besides being able to access the first report of the White House Task Force to Protect Students from Sexual Assault on www.notalone.gov, you will also find on that website a Resource Guide for the college and university communities to assist them in preventing and improving the response to sexual violence in those institutions as well as links to further information and tools useful for advocacy groups.
- At www.bjs.gov/content/pub/pdf/ccsvsftr.pdf you will find the **Campus Climate Survey Validation Study** prepared by the Department of Justice's Bureau of Justice Statistics (BJS) and released on January 20, 2016. The Study was based upon a nine-school pilot test seeking data on sexual victimization.
- For more information about the new Illinois law (P.A. 99-426), contact Karyn Bass Ehler, Civil Right Bureau Chief, at 312-814-5968 or kbassehler@atg.state.il.us.
- Learn more about the *privilege* granted to communications between a survivor and her "confidential advisor" regarding an incident of sexual violence that is set forth in the new Illinois law (entitled 'Preventing Sexual Violence in Higher Education') at *110 ILCS 155/20(d)(4)* and also in the Illinois Code of Civil Procedure at *735 ILCS 5/8-804*.
- At www.pcar.org learn about the Pennsylvania Coalition Against Rape which was founded in 1975 to end sexual violence and advocate for rights and needs of sexual assault victims. PCAR promotes public policies that provide protection and services to victims. PCAR also operates the National Sexual Violence Resource Center (NSVRC), identified below.
- National Sexual Violence Resource Center, at www.nsvrc.org, provides information about multiple types of resources related to sexual violence prevention and intervention, including study data, programs, training on sexual assault-related issues for professionals, library references and other websites covering the expansive topic.
- The Prosecutors' Resource on Violence Against Women at www.aequitasresource.org was originally developed in 2009 and operated by PCAR until 2015 when it became a separate 501(c)(3) entity that is committed to improving the quality of justice in cases involving sexual violence, including intimate partner violence, sex trafficking and stalking, and to developing, evaluating and refining prosecution practices that increase victim safety and offender accountability.
- At www.utexas.app.box.com/blueprintforcampuspolice find **The Blueprint for Campus Police: Responding to Sexual Assault** developed from a collaboration overseen by the University of Texas.
- To find Clery Act data and how to understand the statistics; compliance requirements under Title IX and the Clery Act, including the 2013 VAWA Amendments; how to file a Clery Act complaint; training seminars, and information about individual state resources for reporting, visit the Clery Center For Security on Campus at www.clerycenter.org.

ACKNOWLEDGMENTS

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SYMPOSIUM
College Sexual Assaults

Thursday, November 5, 2015, 6:00 p.m. – 9:00 p.m.
Columbia College, 1104 S. Wabash, Chicago

Friday, November 6, 2015, 8:00 a.m. – 5:30 p.m.
The School of the Art Institute of Chicago
112 S. Michigan Ave., Chicago

Southern Illinois University Carbondale
Guyon Auditorium, Morris Library (via webcast)

University of Illinois at Springfield
Brookens Auditorium, 1 University Plaza (via webcast)

MCLE Credits and CEU Credits Provided

Registration: www.porchlightcounseling.org

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Photos from the Symposium on

On this page (Clockwise, beginning at right): Speaker Catherine Lhamon; Hon. Yolaine Dauphin, Justice Thomas L. Kilbride, Carol Casey; Emily Masalski; Kaethe Morris Hoffer and Sofie Karasek; Mary Petruchius, IL Attorney General Lisa Madigan, Catherine Lhamon, Hon. Yolaine Dauphin.

College Sexual Assaults

On this page (Clockwise, below right): Diane Rosenfeld with Hon. Yolaine Dauphin; Dr. Maria Nanos and Anne Bent look on as Hon. Marilyn Johnson speaks; A group photo of all of the speakers.

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