

The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

This issue of *The Globe* is unique. Virtually the entire issue is devoted to the successful efforts by members of the International and Immigration Law Section to convince the Illinois State Legislature and Governor Rauner to approve a new Consular Notification Bill. Governor Rauner signing the Bill culminates an effort over many years, led by Cindy Buys, a former Chair of the International and Immigration Law Section Council and a law professor at Southern Illinois University School of Law. Her article in this issue describes the history of the Bill and its importance as it implements at the State level requirements of the Vienna Convention on Consular Relations.

Chair Tejas Shah's "Message from the Chair" also emphasizes the importance of this effort, the legislation, and the need for

the Section to now develop and implement training programs working with judges, law enforcement personnel and attorneys throughout the State.

Several years back, we initiated a program that we entitled, "Meet the Section Council" that allows the readers of *The Globe* to learn the background and the practice of the people that work on the Section Council and develop CLE programs and other activities, take the lead in contributing material for *The Globe*, and otherwise keep the Section viable and relevant to its members. This month we feature Michael Lied, who has served for the past three years as the ISBA's CLE Committee Liaison with the International and Immigration Law Section.

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Message from the Chair

BY TEJAS SHAH

As the 2015-16 Chair of the ISBA International and Immigration Law Section Council, it is my honor to introduce this special issue of *The Globe* celebrating the passage of a new consular notification bill, HB1337 (Public Act 099-0190). This bill was signed into law by Governor Rauner on July 30, 2015, and will become effective on January 1, 2016. This legislation will provide much-

needed clarity on when and where foreign nationals in criminal proceedings in the state of Illinois should receive notification of their right to contact their Consulate.

Cindy Buys, a long-standing member of the International and Immigration Law Section Council and Law Professor at Southern Illinois University, has penned a wonderful article describing the history

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the vast array of material and organizations available to practicing attorneys who rarely or on a frequent basis come in contact with international matters, clients asking questions on multi-national or international issues and immigration concerns. Such information is found all over.

In a recent issue of *Inside Counsel*, an ALM publication, they describe the sources of identified cyber attacks. Their introduction is, "While many instances of cyber attacks come from current or former employees, there are still thousands of attacks that come from outside agents, many of them launched attacks across borders." (this is on page 41 of the June, 2015 Inside Counsel issue).

According to their statistics, Russia leads the charge with over 2,400,000 attacks in 2013 alone, followed by 900,000 from Taiwan, almost 800,000 from Germany,

560,000 from Ukraine, 370,000 from Hungary, compared to 355,000 from the United States itself. I am not sure of the relevance to anyone in their daily practice, except a continuous concern with the safeguarding of yours and your clients' data, which may be found on your computer system.

If any reader of *The Globe* has an idea for an item for publication, please e-mail your thoughts to me at lfmatuszewich@mkm-law.com.

As always, thank you to all of our contributors.

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of this bill's enactment. This article is truly engaging reading for anybody who is unfamiliar with the Vienna Convention on Consular Relations and litigation that has arisen in Illinois related to U.S. and local law enforcement obligations under this treaty.

The enactment of this law is particularly meaningful to me as the chair of this section council because many members of our section council and the ISBA have played a very significant role in ensuring its passage. The 2010 ISBA International and Immigration Law Section Council drafted the bill and a background briefing paper and worked to educate the ISBA community to build support for the proposal. Cindy Buys played a very significant role in this process and deserves a great deal of credit for her tireless advocacy in ensuring the passage of this bill. Other members of the 2010 Section Council were also champions of the cause of ensuring that the right to consular notification carries some substance. Jim Covington, the ISBA's legislative director, then worked effectively to find sponsors for the bill. Sen Kwame Raoul deserves great credit for his role in sponsoring the bill on two separate occasions. Recent events involving the family of Senator Michael Connelly also played a role in ensuring the

bill's passage in this legislative session.

The section council will now focus on education and outreach to judges, law enforcement, and consular corps organizations so that all stakeholders are aware of the new law's requirements and how to ensure its proper implementation. Our section council is in the process of planning a program that we will open up to all of these stakeholders and to lawyers and law students who provide pro bono and other representation to foreign nationals who will be affected by this legislation. We would also encourage other lawyers, law students, and other stakeholders to use their bully pulpits in ethnic, minority, and local bar associations to educate others about this important bill.

I would close by noting the significance of this bill not only because of its substance, but also because it demonstrates that the ISBA and our section council can have a very meaningful impact on the rule of law and the lives of Illinois residents as advocates standing up for principle.

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Illinois adopts new law to better implement consular notification and access

BY CINDY GALWAY BUYS

On July 30, 2015, Governor Rauner signed into law HB 1337 to improve consular notice and access in Illinois. The new law, now known as Public Act 099-0190, clarifies who is responsible in the Illinois criminal justice system to provide consular notice to foreigners who are arrested or detained in Illinois, when such notice must be given, and what happens if notice is not given.

The duty of consular notification and access derives from article 36 of the Vienna Convention on Consular Relations,¹ to which the United States has long been a party, as well as from various bilateral consular treaties. Specifically, Article 36(b) of Vienna Convention requires that the competent authorities of a receiving State inform a foreign national who is arrested or detained of his or her consular notification rights without delay. Further, if requested by a foreign national, the receiving State's authorities shall, also without delay, notify the consular post of the sending State that they have arrested or detained a national of the sending State.²

Litigation regarding the duty of consular notification under the Vienna Convention on Consular Relations exploded in many state and federal courts beginning in the late 1990s. Foreign defendants arrested in the United States were routinely not being given consular notice and access by local law enforcement authorities. Foreign defendants sought a variety of remedies, including exclusion of evidence, vacating guilty pleas or judgments, and damages. The issue of lack of timely consular notification went to the U.S. Supreme Court on several occasions, most recently in the case of *Medellin v. Texas*.³

The International and Immigration Law Section Council of the ISBA decided to draft a bill to improve consular notification, both to reduce further litigation and to

increase compliance with the consular notification for foreigners at home and Americans abroad. In 2010, the Section Council drafted the initial legislation and a background briefing paper and worked to educate other ISBA section councils and committees to build support for the proposal. After receiving sufficient support from the various committees and section councils, the proposal was presented to the ISBA General Assembly, which voted in favor of the proposed legislation. The ISBA then utilized its legislative staff, most notably Jim Covington, to find sponsors for the bill and to introduce it into the Illinois General Assembly. Sen. Kwame Raoul (D-Chicago) kindly agreed to sponsor the bill. It was then introduced into the Illinois General Assembly in 2011 as SB 1906.⁴ Representatives from the ISBA and the Chicago consular corps testified in favor of the bill at a hearing before the Criminal Justice Committee in the spring of 2011. Unfortunately, the legislative session focused on other priorities and time ran out to get it passed.

Law enforcement, public defenders, and judges continued to struggle with implementation of the duty of consular notification. For example, in 2014, the Seventh Circuit Court of Appeals in *Mordi v. Zeigler* had to decide whether the failure of Illinois State Police Officers to provide consular notification and access to a foreign defendant despite having knowledge that he was Nigerian should result in damages.⁵ The defendant learned of his right to consular notification and access approximately a year after he was incarcerated. He filed an action for damages under 42 U.S.C. § 1983 against several law enforcement officers involved in his arrest and detention.⁶ The officers asserted they were entitled to qualified immunity, which "protects government officials from liability for civil

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷ When the case reached the Seventh Circuit Court of Appeals, the Court had to decide who was required to provide that notice and when.⁸ Because the case law varies regarding what constitutes notification "without delay," the Court held that the law was not clearly established such that the officers should have known they had a duty to provide consular notification and access during the few hours each had contact with Mordi.⁹ The *Mordi* decision made clear there was still a need to clarify who is responsible for providing consular notification and access and when. Accordingly, the ISBA renewed its legislative efforts in this regard.

Once again, Sen. Kwame Raoul agreed to sponsor the bill in the Illinois Senate, but it was first introduced into the Illinois House under the sponsorship of Rep. Scott Drury (D-Highwood). The House passed the bill in March of this year and it went to over the Senate. Interestingly, Sen. Michael Connelly (R-Wheaton) spoke passionately in favor of the bill in the Senate Criminal Law Committee because his brother-in-law, Martin O'Connor, had recently been arrested and detained for eight days in Turkey for allegedly attempting to smuggle an artifact out of that country.¹⁰ In November 2014, Mr. O'Connor had purchased a bombardier's sword at Istanbul's Grand Bazaar as a souvenir while on vacation. He was stopped at the airport and placed under arrest because a museum archeologist mistakenly believed the sword to be protected historical property. Mr. O'Connor was taken to jail and was not given consular notice and access to the U.S. consulate in Turkey. His wife returned to the United States and was able to obtain legal assistance for him. Eventually the

Turkish authorities were convinced of the mistake and dropped the charges. Had that effort not been successful, Mr. O'Connor would have remained in a Turkish jail for up to six months awaiting trial. Mr. Connelly's support and understanding of the importance of consular assistance helped the bill to pass out of the Senate favorably in May. The bill then went to Governor Rauner, who signed it into law on July 30, 2015. The new law, now known as Public Act 099-0190, will take effect on January 1, 2016.

The full text of the new law is printed below. However, the two key provisions of the legislation require that:

(1) The law enforcement official in charge of a custodial facility must ensure that any known or suspected foreign national is advised within 48 hours of booking or detention that he or she has a right to communicate with an official from the consulate of his or her country, and that such notice is given either when requested by the foreign national or when required by law; and

(2) At the initial appearance of a defendant in any criminal proceeding, the court must advise the defendant in open court that any foreign national who is arrested or detained has the right to have notice of the arrest or detention given to his or her country's consular representatives and the right to communicate with those consular representatives if such notice has not already been provided. If notice was not previously given, the court shall grant any reasonable request for a continuance of the proceedings to allow for contact with the foreign national's consulate.

This new law will ensure that notice is given in a timely manner and at a stage where consular assistance could make a difference by defining the requirement to provide consular notice "without delay" to mean "within 48 hours of booking or

detention." It also will reduce litigation regarding whether the notice was given "without delay." Further, the law clarifies which law enforcement officer is responsible for giving the notice to eliminate confusion in this regard. Finally, having judges check to ensure that notice is given will not only increase compliance, but will preserve a record of compliance for appellate or post-conviction proceedings.

The failure to give consular notification harms foreign defendants in the preparation of their defense because they do not receive the assistance of their consulate in matters such as understanding a foreign language and legal system, securing counsel, and obtaining evidence and witnesses located abroad. It also hinders the ability of the U.S. legal system to secure final judgments by creating additional appealable issues. The United States' failure to abide by its international obligations harms the reputation of the United States as a country governed by the rule of law and respect for individual rights. Finally, lack of compliance also impedes the ability of the United States to insist on such notice when U.S. citizens are arrested or detained abroad.

The ISBA Section Council on International and Immigration Law is thankful for the support it received from the ISBA more generally, as well as the Illinois legislators who worked with us to secure passage of this law. The Section Council will now embark on an educational campaign to increase knowledge and understanding of the new law on consular notification. Questions in this regard may be directed to Professor Cindy G. Buys at cbuys@siu.edu.

Public Act 099-0190

HB1337 Enrolled LRB099 07209 RLC 27304 b

AN ACT concerning criminal law.

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

Section 5. The Code of Criminal Procedure of 1963 is amended by changing Sections

103-1 and 109-1 as follows:

(725 ILCS 5/103-1) (from Ch. 38, par. 103-1)

Sec. 103-1. Rights on arrest.

- (a) After an arrest on a warrant the person making the arrest shall inform the person arrested that a warrant has been issued for his arrest and the nature of the offense specified in the warrant.
- (b) After an arrest without a warrant the person making the arrest shall inform the person arrested of the nature of the offense on which the arrest is based.
- (b-5) This subsection is intended to implement and be interpreted consistently with the Vienna Convention on Consular Relations, to which the United States is a party. Article 36 of that Convention guarantees that when foreign nationals are arrested or detained, they must be advised of their right to have their consular officials notified, and if an individual chooses to exercise that right, a law enforcement official is required to notify the consulate. It does not create any new substantive State right or remedy.

- (1) In accordance with federal law and the provisions of this Section, the law enforcement official in charge of a custodial facility shall ensure that any individual booked and detained at the facility, within 48 hours of booking or detention, shall be advised that if that individual is a foreign national, he or she has a right to communicate with an official from the consulate of his or her country. This subsection (b-5) does not create

- any affirmative duty to investigate whether an arrestee or detainee is a foreign national.
- (2) If the foreign national requests consular notification or the notification is mandatory by law, the law enforcement official in charge of the custodial facility shall ensure the notice is given to the appropriate officer at the consulate of the foreign national in accordance with the U.S. Department of State Instructions for Consular Notification and Access.
- (3) The law enforcement official in charge of the custodial facility where a foreign national is located shall ensure that the foreign national is allowed to communicate with, correspond with, and be visited by, a consular officer of his or her country.
- (c) No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance.
- (d) "Strip search" means having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of such person.
- (e) All strip searches conducted under this Section shall be performed by persons of the same sex as the arrested person and on premises where the search cannot be observed by persons not physically conducting the search.
- (f) Every peace officer or employee of a police department conducting a strip search shall:
- (1) Obtain the written permission of the police commander or an agent thereof designated for the purposes of authorizing a strip search in accordance with this Section.
 - (2) Prepare a report of the strip search. The report shall include the written authorization required by paragraph (1) of this subsection (f), the name of the person subjected to the search, the names of the persons conducting the search, and the time, date and place of the search. A copy of the report shall be provided to the person subject to the search.
- (g) No search of any body cavity other than the mouth shall be conducted without a duly executed search warrant; any warrant authorizing a body cavity search shall specify that the search must be performed under sanitary conditions and conducted either by or under the supervision of a physician licensed to practice medicine in all of its branches in this State.
- (h) Any peace officer or employee who knowingly or intentionally fails to comply with any provision of this Section, except subsection (b-5) of this Section, is guilty of official misconduct as provided in Section 103-8; provided however, that nothing contained in this Section shall preclude prosecution of a peace officer or employee under another section of this Code.
- (i) Nothing in this Section shall be construed as limiting any statutory or common law rights of any person for purposes of any civil action or injunctive relief.
- (j) The provisions of subsections (c) through (h) of this Section shall not apply when the person is taken into custody by or remanded to the sheriff or correctional institution pursuant to a court order.

(Source: P.A. 81-1509.)

(725 ILCS 5/109-1) (from Ch. 38, par. 109-1)

Sec. 109-1. Person arrested.

(a) A person arrested with or without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, except when such county is a participant in a regional jail authority, in which event such person may be taken to the nearest and most accessible judge, irrespective of the county where such judge presides, and a charge shall be filed. Whenever a person arrested either with or without a warrant is required to be taken before a judge, a charge may be filed against such person by way of a two-way closed circuit television system, except that a hearing to deny bail to the defendant may not be conducted by way of closed circuit television.

(b) The judge shall:

- (1) Inform the defendant of the charge against him and shall provide him with a copy of the charge;
- (2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of

- this State to represent him in accordance with the provisions of Section 113-3 of this Code;
- (3) Schedule a preliminary hearing in appropriate cases;
- (4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code; and
- (5) Order the confiscation of the person's passport or impose travel restrictions on a defendant arrested for first degree murder or other violent crime as defined in Section 3 of the Rights of Crime Victims and Witnesses Act, if the judge determines, based on the factors in Section 110-5 of this Code, that this will reasonably ensure assure the appearance of the defendant and compliance by the defendant with all conditions of release.
- (c) The court may issue an order of protection in accordance with the provisions of Article 112A of this Code.
- (d) At the initial appearance of a defendant in any criminal proceeding, the court must advise the defendant in open court that any foreign national who is arrested or detained has the right to have notice of the arrest or detention given to his or her country's consular representatives and the right to communicate with those consular representatives if the notice has not already been provided. The court must make a written record of so advising the defendant.
- (e) If consular notification is not provided to a defendant before his or her first appearance in court, the court shall grant any reasonable request for a continuance of the proceedings to allow contact with the defendant's consulate. Any delay caused by

the granting of the request by a defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of Section 103-5 of this Code and on the day of the expiration of delay the period shall continue at the point at which it was suspended.

(Source: P.A. 97-813, eff. 7-13-12; 98-143, eff. 1-1-14; revised 12-10-14.) ■

Cindy Galway Buys is a Professor of Law and Director of International Law Programs at Southern Illinois University School of Law. She is a member of both the ISBA International and Immigration Law Section Council and the Women and the Law Committee.

1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified by the United States on Nov. 24, 1969) [hereinafter Vienna Convention].

2. While the Vienna Convention requires consular notice only if requested by the foreign national, many of the bilateral treaties require consular notice of all arrests or detentions regardless of the wishes of the foreign defendant.

3. 552 U.S. 491 (2008).

4. The text of SB1906 as introduced in 2011 may be found here: <<http://www.ilga.gov/legislation/fulltext.asp?DocName=09700SB1906sam001&GA=97&SessionId=84&DocTypeId=S&B&LegID=58032&DocNum=1906&GAID=11&Session=>>

5. *Mordi v. Zeigler*, 770 F.3d 1161 (7th Cir. 2014), <http://caselaw.findlaw.com/us-7th-circuit/1682240.html>

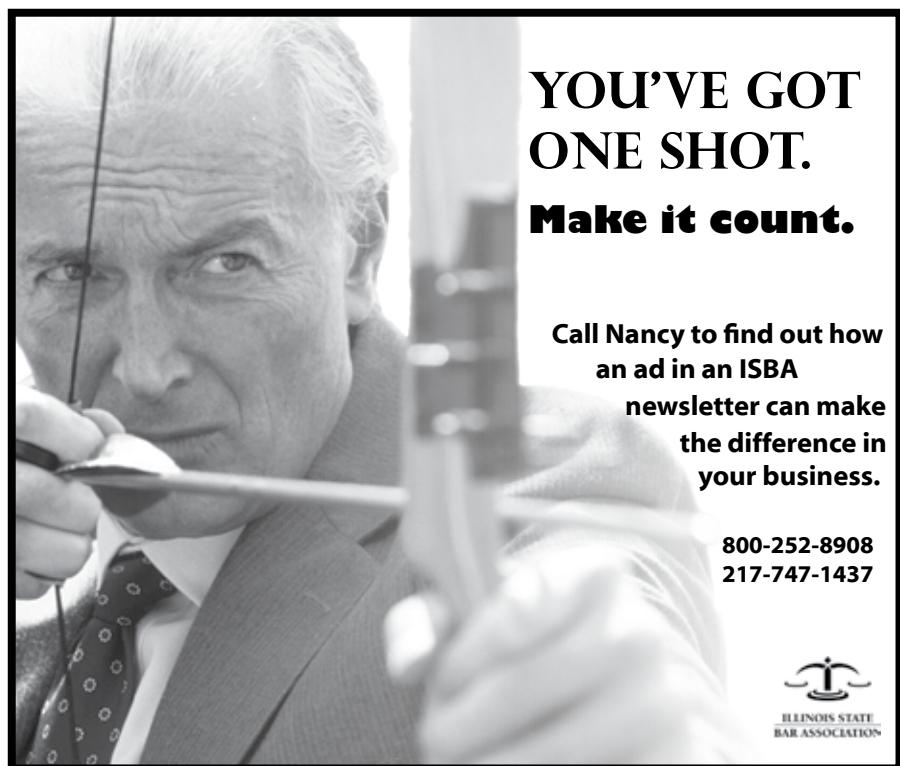
6. Id. All of the defendants except Zeigler, Chance and Healey were dismissed from the action.

7. Id., quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

8. Id. at 1165.

9. Id. The Court suggested in dicta that had Mordi sued the booking officers, the answer might have been different.

10. Jason Meisner, *Chicago couple's cautionary tale: Turkey vacation ends in putrid prison cell*, Chicago Tribune (Mar. 7, 2015), <http://my.chicagotribune.com/#section/-1/article/p2p-82993100/>.



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Meet the section council

The International and Immigration Law Section Council brings to the ISBA a wide range of experiences and interests. Below is an introduction to Section Council CLE Liaison, Michael R. Lied.

MICHAEL R. LIED

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Mr. Lied focuses his practice in the areas of labor and employment law and related litigation and immigration law, representing employers. He attended the University of Illinois at Urbana - Champaign where he received a B.S. in Psychology in 1975 and an M.A. from the University's Institute of Labor and Industrial Relations in 1977. In

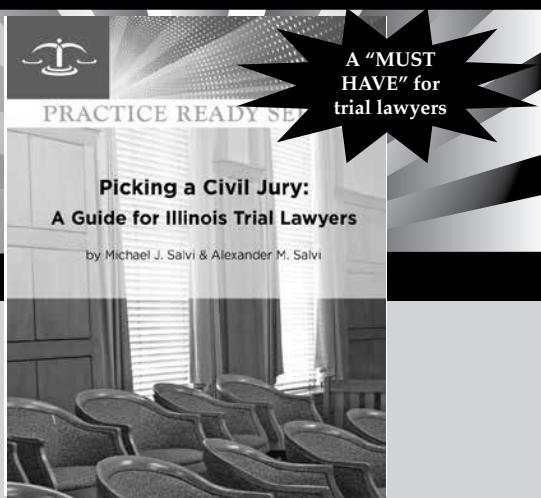
1983 Mr. Lied received his J.D. from the University of Michigan Law School.

He is admitted to practice in both Michigan and Illinois and to the U.S. Supreme Court, U.S. Court of Claims, the Sixth and Seventh Circuit Courts of Appeals, the U.S. District Courts for the Northern, Central and Southern Districts of Illinois, Northern and Southern Districts of Indiana and the Eastern District of Michigan. Mr. Lied has written more than 200 articles for various publications, as well as several chapters in publications of the Illinois Institute of Continuing Legal Education. He is a regular lecturer on various legal topics.

Mr. Lied is a member of the State Bar of Michigan, the American Immigration

Lawyers Association, the Federal Bar Association, and the American Bar Association, and its sections of Litigation and Labor and Employment Law. He is a former president of the Peoria County Bar Association. He is also a member of the Illinois State Bar Association and its section on Labor and Employment Law, where he was formerly chairman and is its newsletter editor. Mr. Lied is also the chairman of the Illinois State Bar Association Federal Civil Practice Section Council and a member of the Standing Committee on Continuing Legal Education. Mr. Lied is a member of the Leading Lawyers network and has been selected as an Illinois Super Lawyer for the period 2007-2015. ■

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