ILLINOIS STATE BAR ASSOCIATION

OCTOBER 2017 VOL 55 NO. 2

The Globe

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

Editor's comments

BY LEWIS F. MATUSZEWICH

For this issue of *The Globe*, we thank one current officer of the International and Immigration Law Section Council and two prior Chairs of the Section Council. Immediate past Chair, Patrick M. Kinnally, provided his article, "Chipping away at a Promise" Pretrial Diversion Agreements and Immigration Convictions."

Prior Chair and current member of the Section Council, Professor Mark Wojcik of the The John Marshall Law School, provided an update, "Revisiting the Chicago Declaration on the Rights of Older Persons." Input on this article was provided by another former Chair of the Section Council, William Mock, also a professor at The John Marshall Law School.

In addition, The John Marshall Law School has provided us the information concerning Professor Mark Wojcik's work as a Fulbright Specialist at the Jigme Singye Wangchuck School of Law in Bhutan.

Current Section Council Secretary, David W. Aubrey, of the law firm of Gori Julian & Associates, P.C. in Edwardsville,

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"Chipping away at a promise": Pretrial diversion agreements and immigration convictions

BY PATRICK M. KINNALLY

Pretrial Diversion Agreements (PDA) are used in many states to change or eliminate the effect of a criminal conviction on a non-violent offender. "A Survey of Criminal Justice Diversion Programs and Initiatives, Center for Health and Justice" (TASC) (2013). (See, *Crespo v. Holder* 631 F. 3d 130 (4th Cir. 2011) [Crespo] Usually the prosecution offers such programs to first time offenders. And in many areas, such as Kane County, Illinois, these arrangements have met with success and serve as a disincentive to recidivism (Habelsma, Diversion Programs, "Are We Reaching Desired Effects" *Aurora University, Criminal Justice* (2015).

Under such a contract the government defers prosecution for a period of time in exchange for the defendant "accepting responsibility for his behavior," and

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Editor's comments

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Illinois, describes, "Tools for International Discovery."

International legal issues continually arise in many forms and formats. In the May, 2017 issue of the *Illinois Bar Journal*, a family law column was titled, "Are there special requirements for kids traveling internationally with only one parent?" The column included a sample form of a "Letter of Consent" for travel of a minor child. In the June, 2017 issue of the *Illinois Bar Journal*, "Immigration-related UPL is on the rise, attorneys report," is subtitled, "Chicago area immigration attorneys have reportedly seen an uptick in both demand for their services and immigration scams." Both topics, travelling internationally and immigration scams, could be explored in more detail in a future issue of *The Globe*.

As always, thank you to all of our contributors.

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"Chipping away at a promise"

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completing the diversion program successfully. (*Iqbal v. Bryson,* 604 F. Supp. 2d 822 (E.D. Va. 2009) [*Iqbal*]. If the latter occurs, no conviction results under state law. For an immigrant defendant, however, what constitutes a conviction is based on a different brand. This is because the term "conviction" is a defined under federal immigration law. And, that definition, determines whether the DPA is a conviction in determining removability or inadmissibility, not what the state law statute says it is. (See, *Dung Phan v. Holder* 667 F. 3d 448 (4th Cir. 2012). [Judgment not withheld].

Based on that dialectic for immigrant defendants the consideration of a PDA, mandates special attention. Not only as to the terms of the PDA but, it now seems, more importantly, what is uttered in court at the time the PDA colloquy occurs between the court, the accused, and counsel. (*Boggala v. Sessions* (USC 4th Cir. No. 16-1558 (08/2017)). [*Boggala*]. As we shall see, a "conviction" under federal law enjoys a singular specie under the Immigration and Nationality Act (INA). 8 USC 1101 (a) (48) [INA Conviction]. Hence, if the INA definition of conviction is established in a state law PDA hearing or agreement it may not matter that the result in state court is beneficial. If an INA conviction is part of the PDA or a statement during the PDA hearing that amounts to the requirements for such a conviction your client may become removable or inadmissible. In so doing the remedial object of the PDA for the immigrant defendant would be lost.

Let's take a look at the INA conviction statue. It says:

***

> With respect to an alien the term "conviction" means a formal judgment of guilt of the alien entered by a court. However, if adjudication of guilt has been withheld, an alien is deemed to have been convicted where:
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and.
>
> (ii) the judge has ordered some form of punishment, penalty, or retraint on the alien's liberty to be imposed.

The Globe

Published at least four times per year. Annual subscription rates for ISBA members: $25.

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8 USC 1101(a)(48)(A)

Under this definition a conviction results *only* if both parts of the definition are satisfied. (*Crespo*)

> Practice Pointer: Read the PDA. What facts, if any are stated. Do not admit facts that constitute an admission of guilt, specifically, do not agree to a plea of guilty, a plea of no contest or an admission by your client of facts sufficient to find guilt.

Vijaya Booggala, a physician, and lawful permanent resident alien entered into a PDA in a North Carolina State Court. He was charged with soliciting a child by computer to commit a sex act. He signed a criminal information agreeing to be tried on that information. The PDA also contained the following statement which Boggala signed.

***

> The admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State's prosecution against me for this offence should prosecution become necessary as a result of these terms and conditions of deferred prosecution.

(Sl.op.at 10).

***

Both the majority and dissenting opinions in Boggala agreed this provision of the PDA contained no stipulated facts. Where Boggala erred, according to the majority was at the PDA hearing. At that time the following exchange happened.

***

> Court: "you are admitting responsibility and stipulating to *the facts* to be used against you and admitted into evidence without objection in the State's prosecution against you for this offense should prosecution become necessary. Do you understand?" (Emphasis supplied).
>
> Boggala: "Yes."

***

(SI. op. at 10)

Because the state court judge used the present tense and uttered "the facts." It was referencing the only existing state of facts (as contained in the information). According to the Boggala majority opinion this amounted to a stipulation to the facts due to Boggala's actual confirmation of those specific facts. The federal court found this was adequate to meet the first prong of the INA conviction statute, making him removable.

The dissenting opinion in Boggala found the majority's interpretation, in a word, illusory. Judge Diaz concluded that all Boggala did at the PDA hearing was corroborate the written PDA where he checked box 5. (Boggala, sl. op. at 17). He concluded that nothing in the PDA colloquy was substantially different than the written PDA. It is highly unlikely the state trial judge's use of "the facts" as opposed to "any facts" was purposeful.

Indeed, the *Boggalo* majority departed from *Crespo* and *Iqbal* in finding an INA conviction resulted in State Court. Crespo pled not guilty to a criminal offense under a PDA. The judge found facts justifying a finding of guilt and deferred adjudication. Crespo satisfactorily completed his sentence of a year probation without incident.

The federal government sought Crespo's removal and he was ordered removed. The Fourth Circuit Court of Appeals reversed that order. It held that an INA conviction had not occurred since Crespo had not pled guilty, he had not been found guilty by a judge or jury, he had not pled no contest, or made an admission of guilt. Accordingly, he had not been convicted under the INA. It found that a judge's finding of guilt was of a far different ilk than a judge finding facts sufficient to find guilt. None of the factors for INA conviction were contained in Crespo's PDA.

Iqbal shares *Crespo's* view. The issue in *Iqbal* was whether a PDA executed in a New York state court amounted to an INA conviction which prohibited Javaid Iqbal from naturalizing as a Untied States citizen. The court held that the boiler plate language that was used in every PDA in New York was not case specific. Nor did the PDA recite sufficient facts to warrant a finding of guilt nor any facts regarding Iqbal's alleged involvement in a criminal alien smuggling. Finally, there was no reference or attachment of any statement of facts or any other evidence adduced at the PDA hearing where Iqbal admitted guilt in open court or in any other manner. Although Iqbal had agreed in a written PDA that he accepted responsibility for his behavior, such a statement is not an admission of guilt, the court found. Therefore, no INA conviction resulted.

> Practice Pointer: It is now apparent that the PDA hearing is equally as important as the PDA as to what is said at that time. The immigrant defendant should not stipulate to the facts contained in the PDA agreement or deviate from its contents by saying anything in court. S/he should only acknowledge the PDA was executed. Nothing more, no banter, no exchanges.

Thankfully, in Illinois PDAs are commonplace. (*e.g.* 715 USA Form 186, Offices of United States Attorneys *https://www.justice.gov/usam criminal-resource manual.*

They are useful tools for prosecutors and contain restorative options for offenders. These contracts must be studied with care where an immigrant defendant is a party. Where such a pact does not contain: a finding of guilt by a judge or jury; a plea of guilty; a plea of no contest, or an admission by the alien defendant of facts sufficient to find guilt—than an INA conviction should not result. Finally, at the PDA hearing nothing more should be stated other than what is contained in the PDA.

When that happens the PDA becomes the real and complete deal it was meant to be for the court, the prosecution and the accused. Promises made are only valuable when they are kept, in whole, not just in part. ■

Patrick Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat, immediate past Chair of the International and Immigration Law Section Council, can be reached at Kinnally Flaherty Krentz Loran Hodge & Masur PC by phone at (630) 907-0909 or by email to pkinnally@kfkllaw.com.

Revisiting the Chicago Declaration on the Rights of Older Persons

BY MARK E. WOJCIK

At the end of 2013 and through 2014, dedicated groups of academics, representatives of non-governmental organizations, and other stakeholders drafted "The Chicago Declaration on the Rights of Older Persons." I was the author of the first draft of that document, which was first based on the Convention on the Rights of Persons with Disabilities. The idea behind the need for a new document was that older persons around the world had special needs and faced unique challenges not addressed by other international human rights conventions.

That first draft of a Declaration on the Rights of Older Persons quickly took on a life of its own with input from scholars around the world on ageing from the legal, scientific, and social science fields, as well as comments and suggestions from representatives of many of the most important NGOs on ageing and leaders in the aging policy field. The Chicago Declaration on the Rights of Older Persons was intended to extend commonly-accepted universal human rights to older persons.

The final version of the Chicago Declaration on the Rights of Older Persons was finalized at a conference held July 10-11, 2014 at The John Marshall Law School in Chicago, in cooperation with Roosevelt University Chicago and the East China University of Political Science and Law in the People's Republic of China. The Declaration was then later presented at the United Nations in a side event held during a meeting of the United Nations Open-Ended Working Group on Ageing. I was among the delegation from The John Marshall Law School at that United Nations event, which included Professors William B.T. Mock, Steven Schwinn, Sarah Davila-Ruhaak, and Barry Kozak, and Ms. Teresa Do. (Professor William Mock has since been appointed as the American Bar Association's Liaison to the United Nations Open-Ended Working Group on Ageing.)

Rights found in the Chicago Declaration reflect many existing human rights conventions, but applied to the particular needs of older persons. Human rights treaties and other documents consulted during the drafting stages included the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), the Convention on the Elimination of All Forms of Racial Discrimination ("CERD") the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). Each document was analyzed for applications unique to older persons. Experts from around the world contributed to the final draft of the Declaration in meetings and sessions that lasted many long hours.

The Chicago Declaration was intended to protect the rights of older persons in various areas, including autonomy and independence, participation in decision-making processes, and freedom of choice. International human rights law has recognized the need for special protection of the rights of other groups (including women, children, and persons with disabilities) that have faced similar barriers. There are nine core principles found in the Chicago Declaration on the Rights of Older Persons:

1. Respect for inherent dignity;
2. Respect for individual autonomy, including the freedom to make one's own choices;
3. Respect for the independence and capabilities of older persons;
4. Respect for interdependence and caring relationships;
5. Respect for non-discrimination and equality under law;
6. Respect for family relationships and intergenerational solidarity;
7. Respect for full and effective participation and inclusion in society;
8. Respect for and recognition of older persons as part of human and cultural diversity; and
9. Respect for aging as an integral and continuous part of life.

From these nine overall principles, a series of specific rights for older persons were organized into the following areas:

1. Equality, non-discrimination, and equal opportunity;
2. Quality of life;
3. Liberty;
4. Equality before the law;
5. Health and long-term care;
6. Adequate standard of living;
7. Housing;
8. Living independently and being included in the community;
9. Education;
10. Work and employment;
11. Land and other property;
12. Freedom from torture or cruel, inhuman, or degrading treatment or punishment;
13. Freedom from exploitation, concealment, violence, abuse, and neglect;
14. Freedom of expression and access to information;
15. Freedom of association;
16. Respect for privacy;
17. Social protection;
18. Participation in social, political, and cultural life; and
19. Right to assistance.

The Chicago Declaration also includes specific obligations of states to promote and protect the rights and freedoms of older persons, including the adoption of

appropriate measures to implement the rights in the declaration and measures to curtail any current discriminatory legislation. Special concerns can also be found for LGBTI persons who may face special challenges in facilities and from family members that may not accept their sexual orientation or gender identity.

The full 15-page text of the Chicago Declaration on the Rights of Older Persons can be found at <http://www.jmls.edu/braun/pdf/chicago-declaration-v11.pdf>.

The Chicago Declaration on the Rights of Older Persons was drafted by a great number of people who wanted to protect the rights of older persons. The document, now three years old, can still serve as a plan to achieve legal protections for older persons around the world. ■

Mark E. Wojcik is a Professor at The John Marshall Law School in Chicago and a member of the Section Council of the ISBA Section on International and Immigration Law.

John Marshall Law School Professor Mark Wojcik helps open first law school in Bhutan

Professor Mark Wojcik of The John Marshall Law School in Chicago has been working as a Fulbright Specialist at the Jigme Singye Wangchuck School of Law in Thimphu, Bhutan since July.

The Jigme Singye Wangchuck School of Law is the first law school in the history of the Kingdom of Bhutan, a country of 750,000 people located between China and India.

"It's an incredible honor to help launch the first law school in Bhutan, a country that went from being an absolute monarchy to a constitutional monarchy less than ten years ago," Wojcik said. "The Bhutanese Constitution entered into effect in 2008 and this new law school is going to train the lawyers that the country will need to implement that Constitution."

Upon his arrival, Wojcik helped teach a month-long orientation program before classes formally began. The law school's first class has a total of 25 students—13 women and 12 men—from all parts of Bhutan. Students were chosen from a national pool of 499 applicants. Successful applicants then took a special version of the LSAT. The top 50 candidates were then interviewed, and 25 were admitted based on their scores, grades and a personal interview.

"The students here are great," Wojcik said. "They were selected from a national search that produced the best of the best students for this first class."

Although Wojcik's Fulbright Specialist Grant recently finished, he volunteered to remain for seven additional weeks to work with the students, faculty and administrators as they adjust to their new roles. Wojcik will also use this time to research Bhutanese law and legal developments, and to teach classes using comparative law materials from the South Asia region.

Fluent in several languages, Wojcik has taught and lectured in 11 foreign countries, including the University of Lucerne in Switzerland, the Free Law Faculty of Monterrey in Mexico, Vytautas Magnus University School of Law in Lithuania, and the University of Cagliari in Sardinia, Italy. He also founded the Global Legal Skills Conference, an international legal skills conference that has been held in the United States, Costa Rica, Mexico and Italy.

A faculty member since 1992, Wojcik teaches International Law, International Business Transactions, Lawyering Skills, Torts and Sexual Orientation Law. He is the President-Elect of Scribes—The American Society of Legal Writers and is a Board Member of the Legal Writing Institute. He is the Diversity Officer for the American Bar Association Section of International Law and a member of the ABA Standing Committee on the Law Library of Congress. He has served as chair ten times for different sections of the Association of American Law Schools.

About The John Marshall Law School

The John Marshall Law School, founded in 1899, is an independent law school located in the heart of Chicago's legal, financial and commercial districts. The 2018 *U.S. News & World Report's America's Best Graduate Schools* ranks John Marshall's Lawyering Skills Program 5th, its Trial Advocacy Program 13th, and its Intellectual Property Law Program 19th in the nation. Since its inception, John Marshall has been a pioneer in legal education and has been guided by a tradition of diversity, innovation, access, and opportunity. ■

Tools for international discovery

BY DAVID W. AUBREY, GORI JULIAN & ASSOCIATES, P.C.

As business and commerce increasingly become global, litigators must learn to use international tools to help clients resolve disputes, whether in pursuing contractural, injury, or defective product claims. An essential litigation tool for attorneys is the multilateral treaty titled, "The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereafter, Hague Convention)." This treaty was ratified by the United States Senate in 1972 and codified by federal statute. *Hague Convention*, 28 U.S.C. § 1781 (2017). Moreover, the Supreme Court has reviewed and interpreted this treaty more than thirty years ago, creating a body of law on same. See *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987). This article will briefly summarize the mechanisms provided to attorneys by this treaty.

The Hague Convention was written with the purpose of creating agreed-upon mechanisms for attorneys to gather evidence abroad. A treaty was needed to bridge the real differences in conducting discovery between countries which use Continental Civil law systems with those which use the British Common law. The treaty was negotiated in the Netherlands in March 1970. For practical purposes, this article will focus on two mechanisms for international discovery: letters of request via the Hague Convention and letters rogatory.

Letters of Request

The Hague permits a judicial authority to submit a letter of request to similar authority in a foreign state in order to conduct discovery. In effect, this procedure allows U.S.-style written discovery to proceed even in countries that typically do not allow such practices.

Each member state is required to designate a "Central Authority" to communicate letters of request to the relevant judicial body in the foreign state. For example, the United States Department of State is the central authority for the United States. Helpful information is available for free on the U.S. Department of State's Web site. See <https://travel.state.gov/content/travel/en/legal-considerations/judicial/obtaining-evidence.html>. The receiving judicial bodies possess discretion to deny requests if the request violates some aspect of Hague Convention. Furthermore, if the foreign witness refuses to comply with the propounded request, the local court is authorized to use coercive measures to obtain the evidence. See 28 U.S.C. § 1781, art. 10.

Letters of request must set-forth with sufficient particularity the information being sought, such as, a description of the documents or physical evidence, or information requested, the parties to the proceedings and their representatives, and the nature of the proceedings for which the evidence is sought. *Id.* at Art. 3(a)-(i). Further, the language must in either English or French, with a copy of the document translated into the local language of the country where the evidence is being sought. Each judicial body may use its own local rules and procedures within a letter of request, which allows common law jurisdictions to interact with civil code jurisdictions and vice versa.

Letters Rogatory

Outside of the Hague Convention, a letter rogatory is a formal request from a court asking a foreign court for assistance in performing a judicial function. Because a letter rogatory is not part of the treaty, compliance by the foreign state is even more discretionary than a letter of request. For Illinois attorneys, letters rogatory are less likely to be effective when issued to continental European countries, which often find U.S. discovery to be too intrusive. If evidence is sought from a country outside the Hague Convention, this is the best method for obtaining discovery.

In conclusion, two common options practitioners seeking international discovery are a letter rogatory or a letter of request pursuant to The Hague Convention. The letter of request has many advantages over the former, however, not every nation is party to the underlying treaty. Practitioners would be wise to plan this discovery early in their cases and to expect delays in obtaining international evidence, especially when operating outside any treaty framework. ■

David primarily represents clients diagnosed with mesothelioma and their families. In addition, David represents those injured in commercial trucking accidents, whistle blowers in qui-tam actions, and prisoners in civil rights cases. His contact information follows.

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November

Wednesday, 11-01-17 – ISBA Chicago Regional Office—Anatomy of a Medical Negligence Trial. Presented by Tort Law. All Day.

Thursday, 11-02-17 - Webinar— Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 11-03-17 – NIU Naperville— Real Estate Law Update – Fall 2017. Presented by Real Estate.

Thursday, 11-09-17 - Webinar— Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 11-10-17 – Chicago, ISBA Regional Office—Profession Under Pressure; Stress in the Legal Profession and Ways to Cope. Presented by Civil Practice and Procedure. 8:15 am-4:45 pm.

Tuesday, 11-14-17 – Webinar—Speech Recognition. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 11-15-17 – Chicago, ISBA Regional Office—Microsoft Word in the Law Office: ISBA's Tech Competency Series. Master Series with Barron Henley. All Day.

Thursday, 11-16, 2017 – Chicago, ISBA Regional Office—Microsoft Excel In the Law Office: ISBA's Technology Competency Series. Master Series with Barron Henley. Half Day.

Thursday, 11-16, 2017 – Chicago, ISBA Regional Office—Adobe Acrobat and PDF Files in the Law Office: ISBA's Technology Competency Series. Master Series with Barron Henley. Half Day.

Thursday, 11-16-17 - Webinar— Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 11-17-17 – Webcast—Obtaining and Using Social Media Evidence at Trial. Presented by Young Lawyers Division. 12:00-1:30 pm.

Tuesday, 11-28-17 - Webcast—Ethics Questions: Multi-Party Representation – Conflicts of Interest, Joint Representation and Privilege. Presented by Labor and Employment. 2:00-4:00 pm.

Tuesday, 11-28-17 – Webinar— Understanding Process Mapping. Practice Toolbox Series. 12:00 -1:00 p.m.

December

Wednesday, 12-06-17 - Webcast— Defense Strategies for Health Care Fraud Cases. Presented by Health Care. 12:00-1:30 pm.

Tuesday, 12-12-17 – Webinar—Driving Profitability in your Firm. Practice Toolbox Series. 12:00 -1:00 p.m.

Thursday, 12-14-17 – Chicago, ISBA Regional Office—Vulnerable Students: A Review of Student Rights. Presented by Education Law. 9:00 am – 12:30 pm.

Friday, 12-15-17 – Chicago, ISBA Regional Office—Guardianship Boot Camp. Presented by Trusts and Estates. 8:30 – 4:30.

Friday, 12-15-17 – LIVE Webcast— Guardianship Boot Camp. Presented by Trusts and Estates. 8:30 – 4:30.

January

Thursday, 01-11-18 – ISBA Chicago Regional Office—Six Months to GDPR – Ready or Not? Presented by Intellectual Property. 8:45 AM – 12:30 PM.

Thursday, 01-18-18 – ISBA Chicago Regional Office—Closely Held Business Owner Separations, Marital and Non-Marital. Presented by Business and Securities. 9AM - 12:30 PM.

Wednesday, 01-24-18 – ISBA Chicago Regional Office—Mentoring Luncheon.

Thursday, 01-25-18 – ISBA Chicago Regional Office—Starting Your Law Practice. Presented by General Practice. 8:50 AM – 4:45 PM.

February

Monday, 02-05 to Friday, 02-09— ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

Feb 6 - Fred Lane's ISBA Trial Technique Institute.

March

Thursday, 03-08-18 – ISBA Chicago Regional Office—The Complete UCC. Master Series, Presented by the ISBA. 8:30-5:00.

Monday, 03-12 to Friday, 03-16— Pere Marquette Lodge, Grafton IL—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

Friday, 03-16-18 – Holiday Inn & Suites, Bloomington—Solo and Small Firm Practice Institute. All day.

Friday, 03-23-18 – ISBA Chicago Regional Office—Applied Evidence: Evidence in Employment Trials. Presented by Labor and Employment. 9:00 am – 5:00 pm. ■

The Globe
Illinois Bar Center
Springfield, Illinois 62701-1779
October 2017
Vol. 55 No. 2

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- The resources available to attorneys willing to volunteer.