

Tort Trends

The newsletter of the Illinois State Bar Association's Section on Tort Law

EDITOR'S NOTE

BY JOHN L. NISIVACO

The first article is written by Lyndsay Markley and she reflects on the seven important lessons she has learned about how to be a professional lawyer. Her article focuses on the importance of being kind to fellow attorneys and the best way to handle an unprofessional attorney.

The second article of this edition was written by John Bailen. This article discusses legislation, effective January 1, 2014, creating specific requirements for both parties after settlements. The piece reviews the new settlement rules, the actions to which the legislation applies, and the fact that liens are provided for in the legislation.

The third article was authored by Brian LaCien and Julie Klein. The article looks at

Illinois precedent and *Haskins v. Midwest Air Traffic Control Service*, a recent case in the Northern District of Illinois, to provide guidance for attorneys that are trying to resolve the issue of whether the statute of limitations will bar a legally disabled plaintiff from filing an otherwise untimely claim under the Wrongful Death Act. First, the article states the ways in which Illinois law generally favors legally disabled persons. Next, the article explains the issue presented for disabled persons under the Wrongful Death Act and how the Illinois court in *Haskins* resolved that issue.

Thank you to all the contributors. The articles are excellent and we hope you find the material helpful. ■

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A PRIMER ON PROFESSIONALISM

BY LYNDsay MARKLEY, THE LAW OFFICES OF LYNDsay A. MARKLEY, LTD., CHICAGO

When I tell people that I am a trial attorney, one of the first questions they ask is about attorney relationships. The general public assumes that all attorneys spend most of their time engaged in a heated battle with opposing counsel. I am always delighted to inform them that some of my best friends are defense attorneys, and even if we do not form a lifetime bond, I have a great collegial relationship with most attorneys on the other side.

Of course, there are the exceptions. During the prosecution of one of my

wrongful death cases earlier this year, I encountered a situation that was so hostile it had me looking to the Attorney Code of Ethics (which was sadly absent of any definitive requirement of professionalism towards our colleagues), as well as my mentors for guidance. The conduct by the lead defense counsel was appalling and totally unjustified; personally attacking me in e-mails and having outbursts during discovery depositions, including calling me a "little girl" several times.

Continued on next page

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Although I hope this type of conduct is the exception and not the rule, it caused me to reflect on several lessons I have learned about professionalism in law (or at the very least, just acting like a normal human being!):

- 1) **Think it, do NOT ever write it.** Assume that every single thing written during the course of litigation will at some point be seen by a judge. The easy, casual nature of e-mail is deceptive—it feels like a conversation among friends—but it is not. Within the past nine years, e-mail has become the main means of communication in our profession. E-mail is great, saving you and your client time and money—but be careful what you say at all times and remember that it might not be the best way to communicate with certain individuals.
- 2) **Do not engage a miserable attorney.** Misery loves company. It is safe to assume that an attorney that is making your life a living hell, likely behaves that way towards everyone else in their path too. The less interaction with this type of person, the better for you and your case. Only respond when necessary and keep responses short, sweet and focused. Taking the ‘high road’ might not be fun—it requires self-control and patience—but do not ever sink to the level of an attorney that is misbehaving. Take solace in the fact that most judges, and all litigators, know who is naughty and who is nice in our community. You will never regret acting with grace and dignity.
- 3) **Assume you will meet again.** It is easy to forget that our community of litigators, despite the deceptively large number, is small and tightly knit. It is highly likely that an attorney you have on a case, meet in a courtroom or work with on a committee, will come up again and again in your professional life. For example, during my early days as a defense attorney, I was instructed to mail out a standard practice form letter. I will never forget the telephone call I received a few days later when the plaintiff’s attorney called my office to chastise me and inform me that I “was no one, knew no one and would never be anyone” and that he was going to “black ball” me from

the legal community. I had no idea what he was so upset about (and now that I know how standard 201(k) letters are, I am even more baffled), and hung up the telephone feeling disheartened. Later that year I was at an event and encountered this attorney yet again. Turns out he was running for a bar association office. Not recalling my name, he warmly shook my hand and asked for my vote. He continues to seek election to this day. Although I do not hold a grudge, I decline to ever vote for him for the same reason I never date men who are mean to restaurant servers....

- 4) **Show mercy.** At some point you will receive a frantic phone call from another attorney needing an extension. Even if they were tough on you, rude to you, give them the extension. I have seen a huge transition in the personality of a difficult attorney who has received mercy—why not buy yourself what could be a couple of years of less terrible interactions, for seven extra days on writing a brief? You might need a favor from them in the future and if they do not give it freely, point out that you did it for them.
- 5) **Ask your mentors.** In my recent case where the lead attorney’s conduct was wildly out of control, I turned to my peers for advice. Most of the advice I received was to move for sanctions or a protective order. This did not feel like the correct solution but I had no idea how to handle the level the conduct was rising too. I decided to turn to a judge that I respect, seeking out her wise counsel on the situation. She said to handle the situation with as much grace as possible unless it prevented the forward momentum of the case.
- 6) **Remember we are all human.** In addition to being attorneys, we are all human beings. Our job is inherently adversarial which adds a unique component of stress to what is already a stressful position. You have no idea what is going on in someone’s life—if they are going through a divorce, a sickness, a death. Try not to take interactions personally and also, try to show empathy and patience when someone is not being very likeable. You will never regret

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taking the high road, but an attorney who engages in poor conduct will likely see that come back to haunt them.

7) **Accept an apology.** Twice in my career

I have received apologies from poorly behaving attorneys. After listening to what they had to say, both involving serious health issues and medications, I

readily accepted the apology and moved forward anew. Do not make someone grovel who already knows they were wrong. ■

Recent legislation regarding settlements

BY JOHN R. BAILEN, BRUCE FARRELL DORN & ASSOCIATES, CHICAGO

Once a settlement agreement has been reached in your case both sides should undertake whatever steps necessary to fulfill the terms of the agreement. In legislation signed on August 26, 2013 by Governor Quinn there are now specific requirements for the parties when concluding the case. 735 ILCS 5/2301 provides specific rules for both sides after settlement. It was effective on January 1, 2014. Within 14 days of “written confirmation of the settlement” defendant must tender a release to plaintiff. “Written confirmation includes all communication by written means.” Thereafter, a settling defendant must “pay all sums due to the plaintiff within 30 days of tender by

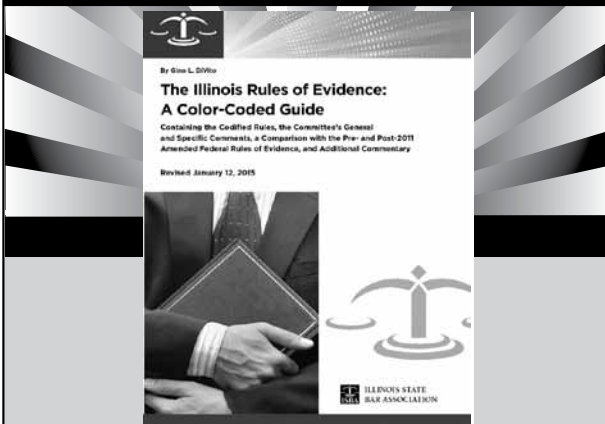
the plaintiff of the executed release.” If a defendant fails to pay the money pursuant to the settlement the plaintiff may obtain a judgement against the defendant in the amount provided for in the release plus costs and interest after a hearing.

The new legislation pertains to any “personal injury, property damage, wrongful death, or tort action involving a claim for money damages. The law does not apply to the State of Illinois, a State agency or board, or commission, any State officer or employee sued in his or her official capacity to any person or entity represented by the Attorney General or any municipality or unit of local government.

Liens are also provided for in the

legislation. The plaintiff is allowed to protect a third-party’s right of recovery or subrogation interest by tendering to the defendant certain specific written communications. Such communications may include a signed release of a lien held by an attorney or healthcare provider, a letter from the plaintiff’s attorney agreeing to hold the full amount of the settlement in a client trust account pending final resolution of the lien, an offer that the defendant hold the full amount of the claimed right to recovery pending resolution of the amount or any other method of resolution which may be agreed upon the parties. ■

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Wrongful death actions: The statute of limitations for a legally disabled plaintiff

BY JULIE KLEIN AND BRIAN LACIEN, POWER ROGERS & SMITH, P.C., CHICAGO

Illinois courts have addressed the statute of limitations for a plaintiff who is legally disabled in a variety of circumstances. This issue has not been directly addressed by any Illinois court in the context of the Wrongful Death Act. Looking to Illinois precedent and a recent case in the Northern District of Illinois, this article discusses whether the statute of limitations will bar a legally disabled plaintiff from filing an otherwise untimely claim under the Wrongful Death Act.

“Illinois law has long recognized that incompetents are favored persons in the eyes of the law and courts have a special duty to protect their rights.”¹ As part of this protection, Illinois courts have allowed legally disabled persons to file otherwise time-barred claims in a variety of circumstances.² In one circumstance, the “discovery rule” may save an otherwise time-barred complaint, as courts have held that “the period of limitations for filing the suit does not begin to run until the disability is removed.”³ In other circumstances, statutory tolling provisions may apply to extend the filing deadline for a person who suffers from a legal disability.⁴ The Illinois legislature enacted a separate tolling statute, 735 ILCS 5/13-211, which allows a disabled person to maintain an action until the disability is removed. By its terms, this tolling statute applies to causes of action specified in Sections 5/13-201 through 5/13-210.⁵ Several causes of action that are not codified in the tolling statute contain an equivalent provision in the applicable section, such as claims for medical malpractice under Section 5/13-212, and products liability under Section 5/13-214.⁶

Actions brought under the Wrongful Death Act present unique circumstances in this context. The Wrongful Death Act is not included in the list of applicable statutes to toll under 5/13-211. To complicate the

situation further, the Wrongful Death Act contains a provision tolling the statute of limitations for minors, but not for legally disabled persons.⁷ This begs the question: What happens when a legally disabled plaintiff, as an heir of the decedent, files an otherwise untimely claim under the Wrongful Death Act? According to a recent case in the Northern District of Illinois, *Haskins v. Midwest Air Traffic Control Service*, Illinois courts would apply the discovery rule to save an otherwise untimely complaint brought under the Wrongful Death Act, where the plaintiff’s mental disability prevents her from timely filing a claim.⁸

The suit in *Haskins* arose out of a plane crash in Afghanistan on May 17, 2010, killing Wayne Stancil and 27 others.⁹ On March 19, 2014—nearly four years after the crash and after the expiration of the two-year statute of limitations—a wrongful death action was filed on behalf of Meghan Stancil, the daughter of decedent Wayne Stancil.¹⁰ Meghan has been declared mentally disabled since 2008.¹¹ The defendants filed a motion to dismiss the case on the grounds that the statute of limitations had expired.¹²

The court considered two theories that could potentially save Meghan’s claim: first, whether Illinois courts would apply the discovery rule in cases of legal disability, and second, whether Illinois courts would apply any tolling doctrine to extend the filing deadline.¹³ The court held that Illinois would “apply the discovery rule to save an otherwise untimely complaint, where the plaintiff’s mental disability prevents her from timely filing suit.”¹⁴ The discovery rule “postpone[s] the start of the period of limitations until the injured party knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused.”¹⁵ The court set forth three primary reasons

that the discovery rule applied here. First, Illinois courts have applied the discovery rule to wrongful death actions.¹⁶ Second, Illinois courts have applied the discovery rule to injuries that are caused by sudden and traumatic events, like a plane crash.¹⁷ To this point, the court distinguished a line of cases exemplified by *Golla v. General Motors Corporation*, which held that the limitations period begins to run on the date the injury occurs in cases where the plaintiff’s injury is caused by a sudden traumatic event, like a plane or car crash.¹⁸ The court emphasized that *Golla* stood for the proposition that “an action for injuries arising from a sudden traumatic event accrues when the plaintiff first know of his right to sue” and that, under *Golla*, the statute of limitations begins to run once a plaintiff has notice of an injury arising out of a sudden, traumatic event.¹⁹ Thus, the court held that the sudden and traumatic event rule did bar the application of the discovery rule to cases of mental incapacity.²⁰

Finally, the court reasoned that Illinois courts would apply the discovery rule in cases of legal disability.²¹ The court noted that Illinois has applied various doctrines in excusing legally disabled persons from strict filing deadlines.²² It stated: “If Meghan Stancil was incapable of discovering her cause of action, barring her suit on timeliness grounds would not service the purpose of the discovery rule.”²³

As to the second theory—whether Illinois courts would apply any tolling doctrine to extend the filing deadline—the court suggested that “common-law tolling may apply to claims under the Wrongful Death Act,” but declined to decide that issue.²⁴ Shedding some light on the issue, the court pointed out that the Illinois Supreme Court rejected the notion that statutes of limitation are ‘conditions precedent’ to filing suit in *Belleville Toyota*,

*Inc. v. Toyota Motor Sales, U.S.A., Inc.*²⁵ Prior to *Belleville*, it was held that statutes of limitations, which are codified in statutory causes of actions, were conditions precedent, and could not be tolled.²⁶

Belleville held that statutes of limitations are conditions precedent only in the area of administrative review.²⁷ Thus, *Belleville* suggests that the statute of limitations codified in the Wrongful Death Act is not a condition precedent, and may be tolled.²⁸

It is only a matter of time before this issue is directly raised in an Illinois court.²⁹ Until then, the reasoning and logic relied upon in *Haskins* may lend guidance to attorneys who run across this issue. ■

1. *Bruso by Bruso v. Alexian Bros. Hosp.*, 178 Ill. 2d 445, 454 (1997).

2. See *In re Goldberg's Estate*, 288 Ill. App. 203, 213 (Ill. App. Ct. 1937) (holding that plaintiff's claim seeking to find her divorce decree null and void was not affected by the statute of limitations where the plaintiff-ex-wife was mentally disabled and she could not be accountable for any delay in seeking redress); *Haas v. Westlake Cmty. Hosp.*, 82 Ill.App.3d 347, 349 (2d Dist. 1980) (holding that plaintiff was not accountable for any apparent delay, negligence or laches in filing a claim and the claim was not barred by statute of limitations where plaintiff was under the disability at the time the cause of action arose); *Mazikoske v. Firestone Tire & Rubber Co.*, 149 Ill. App. 3d 166, 178 (3d Dist. 1986) (finding that plaintiff was incompetent to manage his estate or person and, accordingly, his claim was not barred by the two-year statute of limitations). See also Richard A. Michael, Incapacity of the plaintiff, 3 Ill. Prac., Civ. Proc. Before Trial § 17:3 (2d ed. 2014).

Under Illinois law, a person is 'legally disabled' if "he or she is entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his [or her] estate or financial affair." *In re Doe*, 301 Ill. App. 3d 123, 126-27 (1st Dist. 1998) (internal citations omitted).

3. *Hass*, 82 Ill. App. 3d 349.

4. 735 ILCS 5/13-211.

5. 735 ILCS 5/13-211. Sections 5/13-201 through 5/13-210 refer to: defamation, personal injury, childhood sexual abuse, loss of consortium, loss of means of support or parental relationships, contribution and indemnity, written and oral contracts, and counterclaims.

6. 735 ILCS 5/13-212(c) ("If the person entitled to bring an action described in this Section is, at the time the cause of action accrued, under a legal disability other than being under the age of 18 years, then the period of limitations does not begin to run until the disability is removed."); 735 ILCS 5/13-213(d) ("[I]f the person entitled to bring the action was, at the time the personal injury, death or property damage occurred, under

the age of 18 years, or under a legal disability, then the period of limitations does not begin to run until the person attains the age of 18 years, or the disability is removed.").

7. 740 ILCS 180/2(c) ("[I]f a person entitled to recover benefits under this Act, is, at the time the cause of action accrued, within the age of 18 years, he or she may cause such action to be brought within 2 years after attainment of the age of 18.").

8. *Haskins v. Midwest Air Traffic Control Service, Inc.*, No. 14-cv-02727, 2014 WL 6980574 (N.D. Ill. Dec. 10, 2014).

9. *Id.* at *1.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at *2, *5.

14. *Id.* at *3.

15. *Id.* at *2 (citing *Khan v. Deutsche Bank AG*, 365 Ill. Dec. 517, 525-26 (2012)).

16. *Id.* (citing *Wyness v. Armstrong World Indus.*, 131 Ill. 2d 403, 413-14 (1989); *Arndt v. Resurrection Hosp.*, 163 Ill. App. 3d 209, 213 (1st Dist. 1987); *Coleman v. Hinsdale Emergency Med. Corp.*, 108 Ill. App. 3d 525, 529-31 (2d Dist. 1982); *Fure v. Sherman Hosp.*, 64 Ill. App. 3d 259, 272 (2d Dist. 1978); *Praznik v. Sport Aero, Inc.*, 42 Ill. App. 3d 330, 337 (1st Dist. 1976); *Young v. McKiegieue*, 303 Ill. App. 3d 380, 388 (1st Dist. 1999)).

17. *Id.* at *2-*3.

18. *Id.* at *2. See *Golla v. Gen. Motors Corp.*, 167 Ill.2d 353, 362 (1995).

19. *Id.* (citing *Golla*, supra note 18, at 370-71).

20. *Id.*

21. *Id.* at *4.

22. *Id.* at *4 n.5 ("See, e.g., *Girman v. County of Cook*, 103 Ill. App. 3d 897, 898 (1st Dist. 1981) ("[S]tatutes of limitations are generally tolled during a plaintiff's infancy, mental incompetency, or imprisonment."); *Haas*, supra note 2, at 349 (rejecting laches defense where plaintiff is insane or mentally ill); *Goldberg*, supra note 2, at 212-13 ("An insane person cannot be held accountable for any apparent negligence of laches or delay in seeking redress, through the courts or otherwise, for any wrong that may have been done her in respect to her property, and she is not affected by the statute of limitations, which but for her insanity would bar her rights."); *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 26 (1893) (same); *Dodge v. Cole*, 97 Ill. 338, 349-50 (1881) (same).").

23. *Id.* The court noted that "whether the discovery rule saves an otherwise untimely complaint where, as here, a mentally disabled plaintiff had an appointed guardian since before the injury occurred is a separate question." *Id.* The court did not need to decide this issue because the defendant did not raise it. *Id.* Nonetheless, the court suggested that Illinois law rejects the argument that the plaintiff's disability is removed when a guardian is appointed. *Id.* (citing *Mazikoske*, supra note 2, at 177-78; *Van Buskirk*, supra note 22, at 26)). The Seventh Circuit has suggested otherwise. *Id.*

24. *Id.* at *5.

25. *Id.* (citing *Belleville Toyota, Inc. v. Toyota*

Motor Sales, U.S.A., Inc., 199 Ill. 2d 325, 338-40 (2002)).

26. *Demchuk v. Duplanich*, 92 Ill. 2d 1 (1982) (holding that the limitations period in the Dramshop Act was a 'condition precedent' and would not be tolled for a person with disabilities).

27. *Belleville Toyota*, 199 Ill. 2d 335.

28. See *id.*; *Litwiller v. Skar Enterprises, Inc.*, 2011 IL App (4th) 100870 (holding that the one year statute of limitations in the Dramshop Act is not a condition precedent to recovery, and the limitations period was subject to tolling pursuant to the relation-back doctrine).

29. Unpublished federal decisions are not binding or precedential in Illinois courts, however, nothing prevents them from relying on the same logical reasoning relied upon in an unpublished federal opinion, if the court finds it persuasive. *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, ¶ 39 n.10.

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October

Thursday, 10/1/15- Teleseminar—Estate & Trust Planning for Non-traditional Families.

Friday, 10/02/15- Rockford, NIU Rockford—Solo and Small Firm Practice Institute Series—A Closer Look: Securing and Growing Your Practice – Fall 2015. Presented by the ISBA. 8:15-5:15 pm.

Tuesday, 10/6/15- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4.

Tuesday, 10/6/15- Teleseminar—Insurance and Indemnity in Real Estate.

Wednesday, 10/7/15- Teleseminar—Choice of Law and Choice of Forum in Contracts.

Thursday, 10/08/15- Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4.

Thursday, 10/8/15- Teleseminar—Health Care Issues in Estate Planning.

Thursday, 10/8-Friday, 10/9/15- Grafton, Pere Marquette State Park and Lodge—A Family Law Financial Trial. Presented by the ISBA Family Law Section. 8:30-5:30 both days.

Friday, 10/09/15- Springfield, Lincoln Land Community College Logan Hall Room 1138—Computer Basics 2015: Is This Thing On? Presented by the ISBA Senior Lawyers Section, Co-sponsored by the ISBA Young Lawyers Division. 8:30-12:15 am.

Monday, 10/12/15- CRO and Fairview Heights, Four Points Sheraton—Advanced Workers Compensation. Presented by the ISBA Workers Compensation Section. 9:00

am – 4:00 pm.

Monday, 10/12/15- Teleseminar- LIVE REPLAY—Ethics, Disqualifications & Sanctions.

Tuesday, 10/13/15- WEBINAR—Health Care Workshop: “At Risk” – Advising Health Systems that Own a Health Insurer. Presented by ISBA Health Care Section Council. 12-1:30 (central time, speaker on Eastern).

Tuesday, 10/13/15- Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4.

Tuesday, 10/13/15- Teleseminar—Advanced Choice of Entity, Part 1.

Wednesday, 10/14/15- Teleseminar—Advanced Choice of Entity, Part 2.

Friday, 10/16/15- CRO—Guardianship Bootcamp 2015. Presented by the ISBA Trusts and Estates. ALL DAY.

Friday, 10/16/15- Elgin Community College—Traffic Law Updates- Fall 2015. Presented by the ISBA Traffic Law and Courts Section Council. 8:55- 4 pm.

Monday, 10/19/15- Teleseminar—2015 Americans With Disabilities Act Update.

Tuesday, 10/20/15- Teleseminar—2015 Americans With Disabilities Act Update.

Wednesday, 10/21/15- Bloomington-Normal Marriott Hotel—Real Estate Law Update- 2015. Presented by the ISBA Real Estate Law Section Council. 8:30 am – 4:30 pm.

Wednesday, 10/21/15- Teleseminar- LIVE REPLAY—Business Planning with S Corps, Part 1. Thursday, 10/22/15- CRO STUDIO WEBCAST. Navigating a Section

31 Enforcement Case. Presented by the Environmental Law Section Council. 9:30-10:45 am.

Thursday, 10/22/15- CRO—Practice Management, The Cloud, and Your Firm. Presented by the ISBA. 1:00 pm- 4:30 pm.

Thursday, 10/22/15- Teleseminar- LIVE REPLAY—Business Planning with S Corps, Part 2.

Friday, 10/23/15—CRO—From Opening to Close—A Construction Trial and the Technology to Win Your Case. Presented by the Construction Law Section Council; Co-Sponsored by the Real Estate Law Section Council. 8:30-4:45.

Tuesday, 10/27/15- Teleseminar—Offers-in-Compromise: Settling Tax Liability for Individuals and Business Owners.

Wednesday, 10-28- Friday, 10-30—CRO—Advanced Mediation/Arbitration Training Master Series. Presented by the ISBA. 8:00-5:00 each day.

Friday, 10/30/15- Danville Public Library—Pro Bono Practice and Professionalism: the Basics of Estate Planning, the Guardianship Process, and Family Law. Presented by the ISBA Standing Committee on the Delivery of Legal Services. 9:30 am- 4:30 pm.

November

Tuesday, 11/03/15- Teleseminar—Indemnification & Hold Harmless Agreements in Business & Real Estate.

Wednesday, 11/04/15- Teleseminar—Estate & Income Tax Planning Issues in Divorce.

Thursday, 11/05/15- ISBA Regional Office—Hot Topics in Criminal Law in Illinois- 2015. Presented by the ISBA Criminal Justice Section Council. 9:00 am- 5:00 pm. ■

TORT LAW

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