ILLINOIS STATE BAR ASSOCIATION

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Rural Practice

The newsletter of the Illinois State Bar Association's Section on Rural Practice

24 Legal Practice Tips

Learned from 24 Years in Legal Practice

BY COLLEEN L. SAHLAS

Regarding Legal Fees:

1) **Always collect payment up front.** Collect a retainer or flat fee up front before you begin services. Have your retainer letter signed by the client(s) at the same time you collect payment. It's much harder to try to collect after the fact, and bringing a fee petition takes time and money. You could be chasing empty pockets.
2) **Don't offer free consultations.** Abraham Lincoln said, "A lawyer's time and advice are his stock in trade." If you are not charging for your time and advice (your stock in trade), you are communicating to clients that your advice is not worth paying for. People value only what costs them something. I used to believe that "free" consultations would persuade those on the fence to move forward with estate planning. What I realized is that those who will not pay you now will not pay you later. The adage in selling houses is "open houses don't sell houses." Open houses invite the "tire kickers" and nosy neighbors. Similarly, free legal consultations invite the curious, the insincere and unmotivated. Those who are truly interested in your services will be willing to pay for your time upfront. If you want to offer a promotion to bring in new clients, consider a

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Statutory Amendments Affecting the Illinois Power of Attorney for Property – Boon or Bane for Estate Planning Attorneys?

BY MIA O. HERNANDEZ AND JENNIFER BUNKER SKERSTON

RECENTLY, LIVELY DISCUSSION ensued among estate planning practitioner members of the Trusts and Estates Section on the ISBA Central Community discussion board regarding Public Act 103-0994, effective January 1, 2025, which amends the Illinois Power of Attorney Act (the "Act") to add and describe unreasonable and reasonable causes for a third party to refuse to honor powers of attorney for property.[1] The impetus for the Act's amendment was to redress the perceived problem that it is not uncommon for third parties to unreasonably reject powers of attorney for property.

The five unreasonable causes to refuse to honor a properly-executed Illinois statutory short form power of attorney for property listed in the amended Act are:

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different strategy. Have them pay for the consultation up front. Advise them that their fee, once paid, will be credited toward a total flat fee, such as for an estate plan.

3) **Discounts usually backfire.** The potential clients who ask for a discount have already deemed your fees are too high, or that they are special and should receive special treatment from you. [This generalization excludes persons whose culture or heritage employs bargaining in most transactions and is commonplace and customary. I am not discussing or including those who have such customs or traditions.] Most clients or potential clients who request a discount lack appreciation for it as they already believe they are entitled to it. You will likely end up providing more services for a reduced fee and feeling short-changed. Friends and family will feel their special relationship with you affords them special privileges, such as contacting you outside of business hours or discussing their case during social occasions or family gatherings. Boundaries will be blurred. In turn, you will expect that they will have greater appreciation for your time and expertise because of the family/friend relationship. You and the client will both be disappointed, each failing to meet the other's expectations.
4) **You determine your worth as an attorney.** Years ago, I attended a seminar on legal marketing. The speaker challenged the audience of attorneys by telling us that we determine our worth as attorneys. Put another way, you teach people how to treat you. Using an analogy of retail, you categorize yourself as one of the following: a dollar store, a department store, or an exclusive boutique. You decide. How you categorize yourself and your fees will determine your target audience for marketing and ultimately your clientele. Naturally, your experience, knowledge, and skills factor into your fees. Remember your fees must comply with the Illinois Supreme Court Rules of Professional Conduct (see Rule 1.5) and not be deemed excessive. For example, in probate matters, an attorney is entitled to reasonable compensation according to certain factors.[1] When I raised my rates after many years of experience, I found my clientele went from problematic, troublesome, and complaining to pleasant, appreciative, and rewarding to work with.

Regarding Potential Clients:

5) **The Pareto principle applies to your caseload.** 20% of your clients will be demanding and unreasonable and take up 80% of your time (while paying the least). Those who complain in the beginning will continue to complain throughout the attorney-client relationship.
6) **Don't fear firing potential clients or clients.** The client you decline to represent can be a more significant decision than the client you take on. If you have not declined a potential client within 30 days, consider refining your vetting process. Read, "Toxic Client: Knowing and Avoiding Problem Customers," by Garrett Sutton (2016). **My criteria for a preferred client**: complies with requests, our firm's protocol and policies; referred by a trusted referral source; no pending emergencies or bizarre complications; willing to pay the consultation fee; needs legal services for areas of law in which we practice; pleasant and calm; not overly dramatic, demanding, rude, difficult, or holding us "verbally hostage" on the telephone; does not doubt our advice and is not argumentative; and is trying to get information for DIY legal services; does not treat our firm like a free legal hotline.
7) **Don't try to sell yourself to a potential client.** Rather, accept that many people

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do not respect or appreciate lawyers or legal services. Look for them and weed them out (they almost always ruin your day and productivity). Many view lawyers as a commodity or a source of free information for DIY legal services. They often resent having to hire lawyers and have biases about lawyers. They will not see the need for the legal services they require. Early in my career, I used to think I had 30 seconds of air time on the telephone to sell myself and my services. I found these conversations were a waste of time and were fruitless. Even if you convince a resistant potential client to hire you, most likely they will not value your service, will quibble over fees, resist your advice, and blame you for negative outcomes.

8) **Don't give free legal advice over the phone. You are not a legal hotline.** Be intentional about offering pro bono services when appropriate. And, offer general guidance and direction to those who may not be a good fit for your firm while you refer them elsewhere. But for potential clients, you should provide general legal principles and tell them why they need your services. Don't give a legal opinion or legal advice. Don't tell them how to practice law, what steps to take, or how to solve their problem. They need a lawyer, not "do-it-yourself" legal instructions. There's potential liability involved if they rely on your advice to their detriment, even if you believe there is no attorney-client relationship yet. If they press you for answers, advise them that you only give advice to paying clients and to schedule an appointment for a consultation. You cannot give proper legal advice without a full assessment of all the facts and supporting documents.

9) **Watch out for the "Columbo" potential client.** Peter Falk played Lieutenant Columbo in a popular, television show in the 1970s and '80s called "Columbo." He appeared to be a simpleton, coming across as naive, disheveled, and unsophisticated. His demeanor and appearance masked his shrewd, observant nature and intelligence. His tactic was to pretend the interview was over, taking them off guard with "one last question." Watch out for the Columbo potential client with "one last question." I found too many times there are potential clients with "just a quick question" who have kept me answering questions for 30 minutes. Frustratingly, they rarely hire me after that long call. Don't fall for the trap that it's just a "quick question," or "just one more question." Those phrases are code for fishing for free information. They'll promise to hire you but rarely do. Often, they're looking for free advice and have no intention of retaining your services and paying you.

10) **The clients who balk at your fees and pay the least will be the most problematic.** Don't fall for a potential client challenging your fee by comparing it to a less expensive attorney. There will always be someone who charges less than you. Invite the potential client to hire that attorney. Look for the red flags of the complaining potential client early in the initial conversation, and pass them on to another attorney. Remember the Pareto principal at #5. Consider the opportunity cost you sacrifice with the problematic client. Get rid of the problematic potential client to free up your schedule for the good client who will eventually come along.

11) **Be wary of the client who just wants to "keep things simple."** It sounds innocuous and even understandable when a client says they "just want to keep things simple" in a legal matter. It's uncanny, however, that the clients who want to keep things simple are the clients with the most complex legal issues. I tell clients that there's no simple solution for complex legal problems. I recently talked with a potential client who had a net worth of $12 million. He wanted me to "terminate his trusts" he and his wife established 20 years earlier. He said he didn't care about Illinois estate tax because it would not be levied until after the death of he and his wife. I advised that he should hire another attorney if this was his intent. I apprised him of the many other purposes and benefits of trusts besides estate tax avoidance. And I advised him that I would not want his son asking me after their deaths why he had to pay more than 1 million dollars in Illinois estate tax when this could have been prevented. When a client says they want to keep things simple, they are really saying they don't want to take the time or money to do things right.

Regarding Running Your Practice:

12) **Loss leading legal services generally don't bring in more legal work.** For years, we hoped charging lower fees for residential real estate deals would be a loss leader for other areas of legal practice, such as business, estate planning, and probate. There is a very low turnover rate, and it generally is not productive. More importantly, loss leaders sacrifice opportunity cost. When I applied my time toward more rewarding and higher-paying legal services, I worked fewer hours, had fewer complaints and deadlines, and generated more clients and more revenue. Loss leaders are just a loss.

13) **Proofread everything.** No exceptions. Prior to becoming an attorney, I was a licensed social worker. My first job was working for a child services organization. After a fundraising event, we drafted a thank you letter to our sponsors. One prominent sponsor supplied hot dogs with buns. A draft letter said, "Thank you for providing the hot gods with buns." Thankfully that letter was revised before mailing!

14) **Successful people delegate.** Don't try to do it all. Delegate to your support staff. Vigilantly protect your schedule and time so you may dedicate it to performing work that can only be done by an attorney.

15) **Always use an engagement letter.** Set the expectation. Review the letter with the client. When things go awry, you can point out that you already advised them previously and they agreed when they signed the letter.

16) **Get organized.** Disorganization allows important things to fall through the cracks. Disorganized attorneys are ineffective and a target for malpractice. Create handouts for your clients. If you find yourself saying the same thing over and over and over, say it once in a handout for your client to take home. Create checklists. These are to-do lists which list each step in the process of a matter. It avoids you having to reinvent the wheel. It is also an instant status report every time you check the file—you will know what needs to be done next. It also prevents forgetting or overlooking routine steps.

17) **Never tolerate abuse from clients.** Set boundaries, give warnings, and be ready to terminate the attorney-client relationship as needed. Toxic clients wreak havoc into your life and that of your staff—both professionally and personally. Work with clients you inherently like, and where there is mutual appreciation.

18) **Use three main steps with every client:** A) Give your client sufficient information regarding the matter and legal concepts they need to know and understand. B) Then, tell them their options, and the potential legal consequences of their choices. C) Make a recommendation and let them make a decision. If they go against your advice, document it and have them sign acknowledging they went against your advice. If it violates the professional rules of conduct, then withdraw and terminate the attorney-client representation.

19) **If you are not competent, don't dabble in an area of law because you assume it's simple.** No area of law is simple. You do a disservice to the client and your colleagues when you provide legal services without having the necessary knowledge and skill set to practice in that area of law. You also potentially violate the Illinois Supreme Court Rules of Professional Conduct regarding competency (see Rule 1.1). Be a consummate professional who is ethically above board, not merely conforming to a Code of Professional Responsibility.

20) **Don't feel pressured to give answers you don't have.** Instead, tell the client you need to look into that and get back to them. Take 5 minutes to review the file or spend time researching before giving a quick, inaccurate answer you may regret.

Regarding Your Career:

21) **Mentor someone.** You'll learn while you teach, and find it is very rewarding. You'll also build into the professional life and career of a new attorney.

22) **Never stop learning.** I love learning and growing my skills. I enjoy challenging myself to learn beyond that which I believe I'm capable of learning. Ironically, the more I learn, the more I realize how much there is to learn.

23) **Value your fellow attorneys.** Not only can your fellow attorneys help you learn more about the law and the practice of law, but they can also be a wonderful source of client referrals.

24) **Word of mouth referrals and genuine networking relationships are the best referral sources.** Build your networking relationships, treat your clients well, give exceptional legal services, and you'll get the referrals. ■

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1. See *In re Estate of Halas*, 159 Ill. App. 3d 818, 512 N.E.2d 1276, 1284-85 (1st Dist. 1987).

Statutory Amendments

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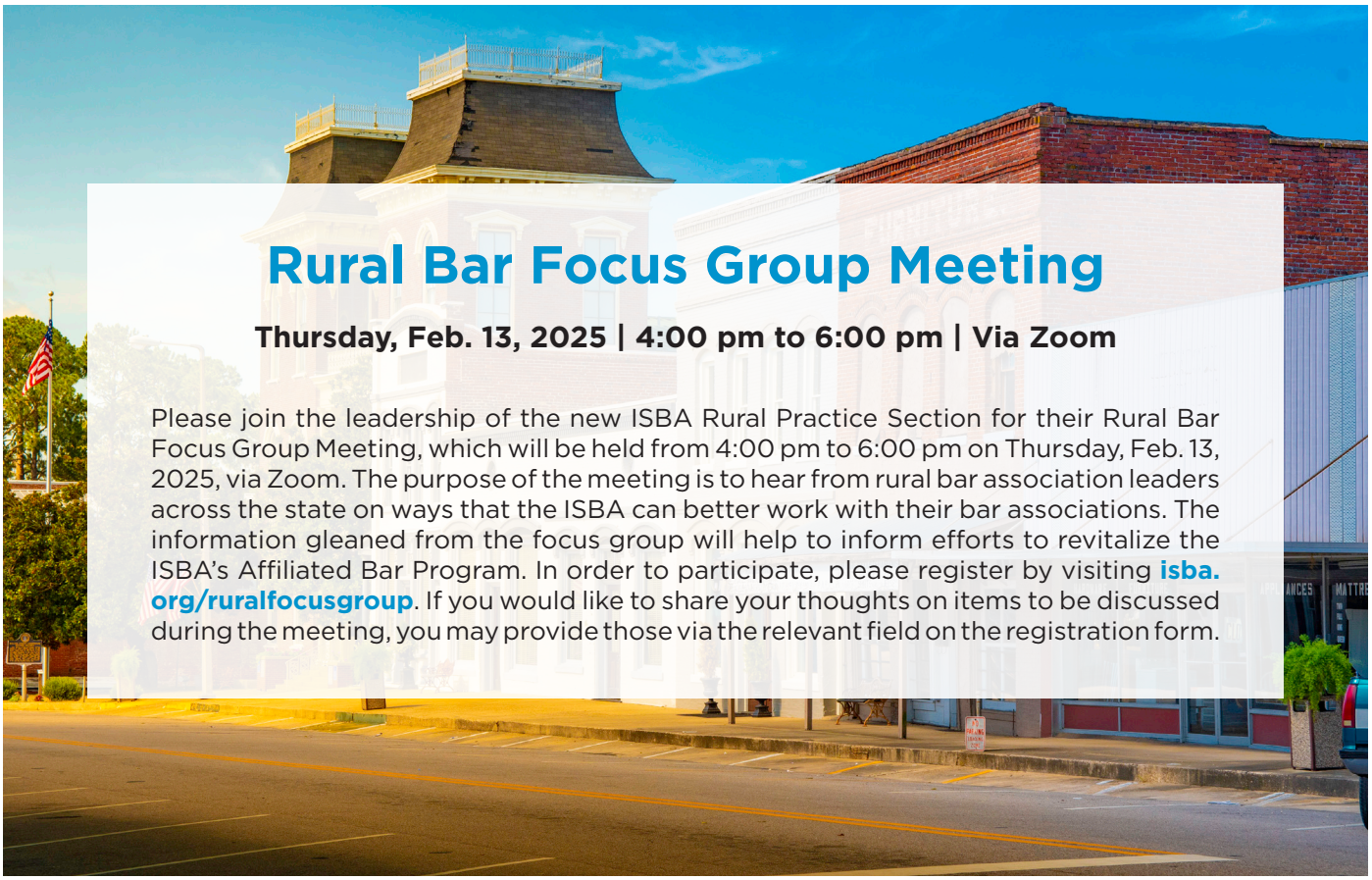
1) the power of attorney form is not one proscribed by the third party receiving it; 2) time has elapsed since execution of the power of attorney; 3) time has elapsed between the execution of the power of attorney by the principal and when the agent has signed the acceptance; 4) the document provided does not bear an original signature, original witness, or original notarization but is accompanied by a properly-executed Agent's Certification and Acceptance of Authority; and 5) the document appoints an entity as the agent.[2]

Many practitioners worry that the "reasonable" causes to refuse to honor powers of attorney for property allowed by the amended Act will trump the "unreasonable" causes to do so, resulting in even more rejections of Illinois powers of attorney for property. Specifically, some practitioners are concerned that third parties, particularly bigger financial institutions, will routinely refuse to honor Illinois powers of attorney for property that are not accompanied by both a Certification and Acceptance of Authority of the acting agent and a certification of validity from an attorney. The relevant added statutory language causing such concern is as follows:

> "(f) Reasonable cause to refuse to honor. Reasons for which it shall be deemed reasonable cause for a third party to refuse to honor a power of attorney for property include, but are not limited to, the following:
>
> (1) the refusal by the agent to provide an affidavit or properly executed Agent's Certification and Acceptance of Authority, Successor Agent's Certification and Acceptance of Authority, or Co-Agent's Certification and Acceptance of Authority;
>
> (2) the refusal by the agent to provide a copy of the original document that is certified to be valid by an attorney, a court order, or governmental entity;
>
> ***
>
> (11) the refusal of the principal's attorney to provide a certificate that the power of attorney is valid;…."[3]

Unlike the agent's certification,[4] the form for the attorney's certification of validity is not provided in the amended Act. Consequently, practitioners are tasked with creating their own attorney's certifications. Attorney Timothy S. Midura



of Huck Bouma, P.C. has kindly shared some of his thoughts on how to proactively address the changes to the Act. Mr. Midura has suggested what he is calling a "Triad Approach," which consists of including the following documents with every newly-executed power of attorney for property:

(1) "Affidavit of Execution"—This self-proving affidavit, signed by the principal and two witnesses with notarization, recites that the principal had the capacity to execute the power of attorney and was under no undue influence, interference, or constraint at the time of signing.
(2) "Attorney's Certificate of Validity"—This affidavit signed by the principal's attorney at the time of execution of the power of attorney for property states that the attached power of attorney for property is valid under Illinois law.
(3) "Agent's Certification and Acceptance of Authority" (form provided in the statute prior to its amendment)—This certificate requires the acting Agent to confirm the power of attorney for property has not been amended or revoked and also certifies the current validity of the power of attorney for property.

Mr. Midura has shared drafts of the new forms he created for his Triad Approach, which are available for ISBA Elder Law Section members to download from the ISBA Central Community Library."[5]

Estate planning practitioners will have to wait and see whether rejections of existing Illinois powers of attorney for property do, indeed, increase now that the Act has taken effect. If third parties insist on receiving certifications from agent and attorney for previously-executed powers of attorney for property in order to accept them, estate planning practitioners may be faced with fielding numerous requests from clients and potential clients to update their powers of attorney for property. If a power of attorney for property cannot be updated because the principal no longer has capacity, the estate planning practitioner will be faced with determining whether they are comfortable certifying the validity of powers of attorney executed days, months, or years ago.

Furthermore, it will likely become standard practice for attorneys—both estate planning practitioners and attorneys for financial institutions alike—to advise clients that an Illinois power of attorney for property must include an agent's and attorney's certification. Requiring the certifications allows the recipient and its attorneys to rely on the representations of the agent and certifying attorney, and disclaim any responsibility for determining the power of attorney's validity. Since it is "reasonable" (as specifically provided by the amended Act) to require those certifications, it is also prudent for attorneys (*i.e.,* to reduce or avoid malpractice claims) to recommend their clients refuse to honor powers of attorney for property unless accompanied by both an agent's and an attorney's certification. Consequently, estate planning attorneys in general practice law firms should also consider cautioning their colleagues representing businesses or financial institutions to advise against accepting powers of attorney without certifications. Mr. Midura has shared his sample firm advisory notice, which is available to review on the ISBA Central Community discussion board.[6]

In light of the changes that became effective on January 1, 2025, estate planning practitioners should consider how to: 1) change their forms and approach to preparing new Illinois powers of attorney for property; 2) communicate with current and past clients regarding their existing powers of attorney for property; and 3) respond to requests for certification documents for clients' or potential new clients' prior powers of attorney for property.

Once the initial flurry of activity to decide best practices and to make revisions to powers of attorney for property has passed, estate planning practitioners may ultimately conclude that newly-executed powers of attorney for property adhering to the new requirements are more effective for their clients. Like prior substantive changes to the law, only time will tell as to the practical effect of the Act's amendment. ■

A special thanks is given to attorney Timothy S. Midura of Huck Bouma, P.C., who first raised these issues for discussion amongst members of the Trusts & Estates Section, provided feedback to the authors in preparing this article, and shared drafts of the new forms he created for his Triad Approach and his suggested firm advisory notice.

Mia O. Hernandez and Jennifer Bunker Skerston are Co-Editors of the Trusts and Estates Section Newsletter. Ms. Hernadez is a Shareholder at Webber & Thies, P.C. in Champaign, Illinois, and Ms. Skerston is a Partner at Law Offices of Reilly & Skerston, LLC, in Ottawa, Illinois.

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1. *See* 755 ILCS 45/2-8(e) & (f).
2. 755 ILCS 45/2-8(e).
3. 755 ILCS 45/2-8(f).
4. 755 ILCS 45/2-8(b).
5. Timothy S. Midura's draft forms can be downloaded here: https://central.isba.org/view-document/impending-doom-of-powers-of-attorne-1?CommunityKey=b34a5a29-f80e-4c4b-82fe-3a08cff610d0&tab=librarydocuments.
6. *See* Tim Midura's Triad Approach to the Illinois POA for Property | Elder Law Section.

A *High* Burden: A Discussion of *People v. Krzeczkowski* and the Standard for Securing DUI Drug Convictions

BY MATTHEW MOUSTIS

Introduction

Doris Connelly was traveling down Interstate 57 with her three children and nephew when her vehicle was struck from behind, causing it to spin-out into a ditch and roll-over multiple times. The driver who struck Doris and her family appeared lethargic, showed signs of impairment on field sobriety tests, and had morphine, fentanyl, diphenhydramine, and flualprazolam in his system at the time of the crash. A jury found the driver guilty of driving under the influence of drugs, but the Third District Appellate Court reversed his conviction, holding that the evidence was insufficient to prove his guilt because there was no "competent evidence explaining the nature and effect of the drugs" in his system and "the effect [those] substances had on his ability to drive safely." *People v. Krzeczkowski*, 2024 IL App (3d) 230117-U, ¶ 21. This Article discusses the legal standard for securing DUI drug convictions, the Third District's unpublished Rule 23 Order in *Krzeczkowski*, and considerations for law enforcement agencies enforcing DUI drug laws.

Driving Under the Influence of Drugs in Illinois

The Illinois Vehicle Code contains five variations of driving under the influence offenses involving impairment from either drugs, intoxicating compounds, or marijuana. *See* 625 ILCS 5/11-501(a)(3) – (a)(6). According to statistics obtained from the Illinois State Police, between January 1, 2022, and October 26, 2024, there were at least 1,299 arrests for these offenses in Illinois, as depicted in the chart below:

The vast majority of impaired drivers in Illinois are cited under section 5/11-501(a)(4) of the Illinois Vehicle Code. Under that provision, a person commits the offense of driving under the influence of drugs when they drive or are in actual physical control of a vehicle while under the influence of any drug or combination of drugs to a degree that renders them incapable of safely driving. 625 ILCS 5/11-501(a)(4); Illinois Pattern Jury Instructions, Criminal, No. 23.16 (approved April 26, 2024). To sustain a conviction for this offense, Illinois courts generally require (1) proof that the driver was impaired due to consuming drug(s); (2) proof that the driver was incapable of safely driving; and (3) testimony describing the nature of the drug that caused the impairment, the physiological effects of the drug, and how the drug affects one's ability to safely drive. *See, e.g.*, *People v. Workman*, 312 Ill. App. 3d 305, 311-313 (2nd Dist. 2000); *Krzeczkowski*, 2024 IL App (3d) 230117-U, ¶¶ 21-24; *Vill. of Lombard v. Cassell*, 2024 IL App (3d) 230220-U, ¶ 29; *see also* Donald J. Ramsell, Ill. DUI Law and Practice Guide, § 2:5, 2:7, 2:17 (Thompson West, 2024).

In most cases, the prosecution will need the testimony of an expert witness to establish the nature and effects of the drug causing the impairment and how the drug affects one's ability to drive safely. *See, e.g.*, *Workman*, 312 Ill. App. 3d. at 311; *Krzeczkowski*, 2024 IL App (3d) 230117-U, ¶ 21; *Cassell*, 2024 IL App (3d) 230220-U, ¶ 29; *People v. Walker*, 2024 IL App (1st) 220985-U, ¶¶ 22-23. Such testimony can be provided by a drug recognition expert officer who evaluated the driver. So long as the defendant's charging instrument does not identify a specific drug, a

Illinois Vehicle Code provision: 625 ILCS 5/11-501	**A person shall not drive or be in actual physical control of any vehicle in Illinois while:**	**Number of arrests between January 1, 2022, and October 26, 2024:**
(a)(3)	Under the influence of any intoxicating compound or combination of intoxicating compounds to a degree that renders them incapable of driving safely	34
(a)(4)	Under the influence of any other drug or combination of drugs to a degree that renders them incapable of safely driving	816
(a)(5)	Under the combined influence of alcohol, other drug(s) or intoxicating compound(s) to a degree that renders them incapable of safely driving	289
(a)(6)	There is any amount of a drug, substance, or compound in their breath, blood, other bodily substance, or urine resulting from the unlawful use or consumption of a controlled substance, intoxicating compound, or methamphetamine	139
(a)(7)	THC concentration of 5 nanograms or more per milliliter of whole blood or 10 nanograms or more per milliliter of other bodily substance within 2 hours of driving or being in actual physical control of a vehicle	21

DRE witness need not identify the specific drug causing the driver's impairment; identifying the category or combination of categories of drugs will suffice. *See People v. Lenz*, 2019 IL App (2d) 180124, ¶ 103. Alternatively, when the driver submits to a blood or urine test, testimony of the forensic toxicologist who evaluated the driver's test results is required. In either scenario, the witness should describe the nature of the drug causing the driver's impairment and/or the applicable drug category; the physiological effects the drug has on a person, the quantity required to produce significant effects, and how long those effects last; how long the drugs remain in one's system; and whether the drugs remain detectible after possible impairment dissipates. *Krzeczkowski*, 2024 IL App (3d) 230117-U, ¶ 24.

In the absence of expert testimony, a conviction for DUI drugs may still be secured if the driver provides detailed admissions to consuming drugs and being under the influence, so long as other evidence corroborates their admissions and demonstrates their inability to safely drive. *See, e.g.*, *People v. Bitterman*, 142 Ill. App. 3d 1062, 1065-66 (1st Dist. 1986); *Vill. of Lincolnshire v. Olvera*, 2024 IL App (2d) 230255, ¶¶ 84-87; *Krzeczkowski*, 2024 IL App (3d) 230117-U, ¶ 24; *Walker*, 2024 IL App (1st) 220985-U, ¶¶ 23-24.

It should be noted, however, that the Illinois Supreme Court has stated that "[e]xpert testimony is not required in every case for an officer to testify to his opinion that a motorist was under the influence of drugs based on his inference from the totality of the circumstances." *People v. Gocmen*, 2018 IL 122388, ¶ 62. According to *Gocmen*, an officer can opine that a driver was under the influence of drugs so long as their opinion is not based on the results of field sobriety tests or other "scientific, technical, or specialized knowledge that require[s] specialized training or experience." *Id.* ¶ 37; *see* Ill. R. Evid. 702. Thus, the officer's non-expert opinion was sufficient to establish probable cause for a DUI drug arrest in the context of a summary suspension hearing. *Gocmen*, 2018 IL 122388, ¶ 62. To date, the Illinois Supreme Court has not applied the reasoning from *Gocmen* in the context of a criminal DUI trial, where the prosecution bears a much higher burden. *See* Ramsell, *supra* § 2:9.

Facts and Procedural History of *People v. Krzeczkowski*

Zbigniew Krzeczkowski ("defendant") was arrested and charged with driving under the influence of drugs following a crash on May 18, 2020. The matter proceeded to a jury trial on October 17, 2022. The State's first witness, Doris Connelly, testified that she was driving 70 miles per hour on Interstate 57 with her three children and nephew. The weather was clear, and it was around 2:30 in the afternoon. According to Doris, the defendant rear-ended her, causing her vehicle to spin and land in a ditch and flip over multiple times. *Krzeczkowski*, 2024 IL App (3d) 230117-U, ¶¶ 4-5.

The next witness was the Illinois State Police trooper who responded to the crash. He testified that he observed heavy front-end damage to the defendant's vehicle. When speaking with the defendant, the trooper testified, the defendant appeared lethargic. And the defendant showed clues of impairment on the vertical gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test, although the trooper could not recall the specific details about the defendant's performance on those tests. The defendant voluntarily submitted to blood and urine tests; he fell asleep while en route to the hospital and again on the way back to the station. *Id.* ¶¶ 6-8.

The defendant was evaluated by a drug recognition expert, but that officer did not testify at trial. *Id.* ¶ 8.

The last witness was a forensic toxicologist with the Illinois State Police, who testified that the defendant's blood sample tested negative for alcohol, but his urine sample tested positive for morphine, fentanyl, norfentanyl, diphenhydramine, and flualprazolam. She described morphine and fentanyl as opioids, diphenhydramine as an antihistamine, and flualprazolam as a novel psychoactive substance similar to (and more potent than) Xanax and not typically used pharmaceutically in the United States. *Id.* ¶ 9.

The jury found the defendant guilty of driving under the influence of drugs. On appeal, the defendant argued that the evidence presented was insufficient to sustain his conviction. *Id.* ¶¶ 11, 13.

The Third District's Order in *People v. Krzeczkowski*

The Third District reversed the defendant's conviction, holding that the evidence was insufficient to sustain the defendant's conviction for DUI drugs. *Id.* ¶ 25. Although the court recognized the evidence of the defendant's impairment, the court focused on the lack of competent evidence connecting those signs of impairment to the drugs found in the defendant's system. The ISP trooper who testified was inexperienced in conducting DUI drug investigations, and he did not describe how the drugs in the defendant's system would result in impairment, presumably because he was not qualified to do so because he was not a certified drug recognition expert. The DRE who evaluated the defendant did not testify at trial. And ISP's forensic toxicologist did not describe the physiological effects of the drugs found in the defendant's system or how they might affect his ability to drive safely. *Id.* ¶ 21. "Without competent evidence explaining the nature and effect of the drugs in defendant's system," the court explained, "the fact finder was left to speculate about the effect these substances had on his ability to drive safely—an essential element of the crime for which defendant was convicted." *Id.* ¶ 21.

In reaching its conclusion, the court rejected the State's *Gocmen* argument that expert testimony was unnecessary in this case to prove that the defendant was under the influence of drugs. *Id.* ¶ 22. The court distinguished this case from *Gocmen* based on the nature of the proceedings: *Gocmen* took place in the context of a hearing on a petition to rescind a statutory summary suspension, where the standard of proof is probable cause, whereas this case involved a conviction following a criminal trial, where the standard of proof is beyond a reasonable doubt. The court agreed with the general statement that "expert testimony is not required in every case to establish a motorist was under the influence of drugs," but, citing *Workman*,

explained that "there must be sufficient other evidence to support a finding of guilt." *Id.* ¶ 23 (*citing Workman*, 312 Ill. App. 3d at 311). In *Workman*, the Second District similarly reversed a DUI drugs conviction where there was no evidence of the drug's physiological effects and how the drugs affect one's ability to drive. The *Workman* court noted that "this lack of competent testimony may create a reasonable doubt of the defendant's guilt, *absent other sufficiently incriminating evidence*." *Workman*, 312 Ill. App. 3d at 311 (emphasis added). The *Krzeczkowski* court appears to have interpreted the "other sufficiently incriminating evidence" language from *Workman* to mean detailed admissions from the defendant describing his drug use and how it affected him, and/or evidence of drugs in the vehicle, neither of which was present here. *Krzeczkowski*, 2024 IL App (3d) 230117-U, ¶ 24.

Those reading *Krzeczkowski* can imagine how the case may have ended differently. Had the drug recognition expert who evaluated the defendant testified at trial, the result may have been different. Similarly, had the forensic toxicologist described how morphine, fentanyl, diphenhydramine, and flualprazolam affect a person and their ability to drive safely, the result may have been different. Finally, it is unclear why the defendant was not charged under section 5/11-501(a)(6), which prohibits driving a vehicle with any amount of an unlawfully-ingested controlled substance in a person's breath, blood, or urine. 625 ILCS 5/11-501(a)(6); *see generally People v. Martin*, 2011 IL 109102; *People v. Rodriguez*, 398 Ill. App. 3d 436 (1st Dist. 2009); *People v. Kathan*, 2014 IL App (2d) 121335.

Considerations for Law Enforcement Agencies

As mentioned above, according to statistics obtained from the Illinois State Police, between January 1, 2022, and October 26, 2024, there were at least 1,299 arrests for offenses involving driving under the influence of drugs, intoxicating compounds, or marijuana in the State of Illinois. E-mail from Sarah Wheeler, Freedom of Information Officer, Illinois State Police, to Matthew Moustis, (Nov. 6, 2024, 10:21 CST) (on file with author). Contrast this with the number of drug recognition expert officers in Illinois: 163. Telephone call with Mike Pappas, Sergeant, Illinois State Police (Nov. 2024). This disparity between the number of DUI arrests and the number of drug recognition experts means that, at any given DUI investigation, the odds of a DRE being available to evaluate the driver are slim at best. And because judges rarely issue search warrants for a driver's blood, law enforcement agencies face significant challenges in obtaining the evidence necessary to secure a conviction.

That said, the primary objective for law enforcement in these situations is to make arrests based on probable cause and take unsafe drivers off the roads; officers should not let the difficulty of obtaining a conviction discourage them from making DUI drug arrests. In doing so, officers should attempt to obtain as much evidence of impairment and unsafe driving as possible. Further, officers should attempt to elicit as many details about the driver's drug use as possible, including what specific drugs were consumed, when the drugs were consumed, how those drugs were consumed, how much the driver consumed, how the drug affects them, whether they are currently feeling those effects, and how the drug affects their ability to safely drive. Finally, officers should report immediately to their supervisor and request to embark on the journey of becoming a certified drug recognition expert. ■

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Champions

Dear Future Champions,

At least twice a year at ISBA Annual and Mid-Year Meetings, we are pitched by colleagues and the Illinois Bar Foundation to become a "Champion." But what is a Champion really, and what's in it for us?

A **champion**, by definition, is a person who fights or argues for a cause or on behalf of someone else. As lawyers, we have the unique opportunity to make a positive impact on society by upholding justice and advocating for those in need. We have the power to shape laws, defend the innocent, and ensure fair resolution of disputes. By definition, we are champions, for our clients, our legal system and for our communities, but through the statewide reach of the Illinois Bar Foundation, we have the opportunity to increase our impact even more.

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Sincerely,

Jessica Durkin
Champions Chair
Illinois Bar Foundation