10th ANNUAL JOINT CLE CONFERENCE
Friday, April 28, 2017

Thank you to all our sponsors for making this FREE program possible:

SIU School of Law
Jackson County Bar Association
Williamson County Bar Association
ISBA Mutual Insurance Company
Illinois Institute for Continuing Legal Education
Illinois Bar Foundation
Chicago Title Land Trust Co.
Life’s Plan
Court Call

Jackson County Bar Association
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Vice President - Timothy J. Ting
Secretary - David R. Hughes
Treasurer - Andrew M. Weaver

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Vice President - Joe Moore
Secretary - William Bryce Levanti
Treasurer - Paul Jay Schafer

CLE Committee
Co-Chairs – Sarah Taylor and Alicia Ruiz
Members – Jayme Figueroa, Sandra Fogel, Crystal Hasting, Sandra Hicks, Brandy Johnson, Heidi Ramos, Judi Ray, Daniel Silver, Jennifer Thompson and Timothy Ting

Join your local Jackson and Williamson Co. Bar Associations!
ILLINOIS BAR FOUNDATION’S MISSION
Illinois Bar Foundation’s mission is to ensure meaningful access to the justice system, for those with limited means, and to assist lawyers who can no longer support themselves.

ACCESS TO JUSTICE GRANTS
This year, the IBF awarded 28 grants ranging from $2,500 to $17,500 to organizations across the state to provide legal aid, promote pro bono services, or provide legal information for those who can’t afford an attorney.

WARREN LUPEL LAWYERS CARE FUND
The IBF supported many attorneys and their families across Illinois to help them get back on their feet and maintain a modest standard of living. More than $90,000 went to support these attorneys and families in FY16.

POST-GRADUATE LEGAL FELLOWSHIPS
The IBF is excited to announce the 2016-2017 Fellowship participants! Victoria Dempsey is working at Loyola University Chicago’s Community Law Center, Caitlin Duane is working at the DePaul University College of Law’s Poverty Law Clinic, and Patricia Zimmerman is working at Northern Illinois University’s Zeke Giorgi Law Clinic. Fellowships add more attorneys to the legal aid field and help recent law graduates hone the skills they need to practice law.

JUSTICECORPS
This innovative AmeriCorps program enlists student volunteers to serve as guides to make courts across Illinois more welcoming and less intimidating for people without lawyers. Illinois JusticeCorps recruits, trains, and provides the necessary support for college and law students to offer procedural and navigational assistance in 10 courthouses statewide.

SUPPORTED BY
The IBF is supported by attorneys, law firms, and other businesses serving the legal community in Illinois. Thank you for your continued support of our mission.
Membership Application

Susan M. Brazas, Chair, The Fellows
Lisa M. Nyuli, Vice Chair, The Fellows
Sandra Crawford, Secretary, The Fellows

The mission of the Illinois Bar Foundation is to ensure meaningful access to the justice system, and to assist lawyers and their families who have fallen upon hard times. This year, the Foundation will distribute more than $850,000 to programs that enhance our system of justice and as payments to lawyers or their survivors who have fallen on hard times due to age, illness or other tragedy.

Name ____________________________
Address __________________________
City __________________ Zip _________ Phone ________________ Email __________________

☐ I am a current or retired attorney/judge
☐ I am a non-attorney Foundation supporter

I want to join The Fellows at the following level:

☐ Bronze Fellow $1,000 or $100 per year
☐ Silver Fellow $2,000 or $200 per year
☐ Gold Fellow $5,000 or $500 per year
☐ Diamond Fellow $10,000 or $1,000 per year
☐ Platinum Fellow $15,000 or $1,500 per year
☐ Pillar of Foundation $25,000 or $2,500 per year

Pledges may be payable over ten years.

Effective July 1, 2016, Fellows may restrict their pledge for use in a specific appellate district.
☐ Please restrict my pledge for the _________ appellate district.
☐ OR

☐ Please use my pledge statewide wherever the need is greatest.

I want to increase my Fellows membership to: (All previous Fellows pledge payments will be credited to the new level)

☐ Silver Fellow $2,000
☐ Gold Fellow $5,000
☐ Diamond Fellow $10,000
☐ Platinum Fellow $15,000
☐ Pillar of Foundation $25,000

Complete this application and return it to: Illinois Bar Foundation
20 South Clark, Suite 910, Chicago, IL 60603. Have a question? Call (312) 726-6072
10th ANNUAL JOINT CLE CONFERENCE
April 28, 2017

8:00 – 8:50 a.m.  Registration & Breakfast – Sponsored by Chicago Title Land Trust Co.

8:50 – 9:00 a.m.  Welcome

9:00 – 10:00 a.m.  Transitions, Succession Planning & Other Ethical Concerns
                   (1.0 MCLE, incl. 1.0 PMCLE*)
                   Peter L. Rotskoff, ARDC Chief of Litigation & Professional Education

10:00 – 11:00 a.m.  Criminal Law Updates for the Occasional Practitioner (1.0 MCLE)
                    Matt Goetten, Special Prosecutor, IL State’s Atty. Appellate Prosecutor

11:00 – 11:15 a.m.  Break

11:15 – 12:15 p.m.  The New Income Shares Child Support Guidelines (1.0 MCLE)
                    Margaret Bennett, Bennett Law Firm, LLC and Nancy Shafer, Family Law Software

12:15 – 1:00 p.m.  Lunch – Sponsored by ISBA Mutual Ins. & Provided by Panera Bread Co.

1:00 – 1:15 p.m.  Sponsors

1:15 – 2:15 p.m.  Lessons from Recent Illinois Lawyer Discipline Cases (1.0 MCLE, incl. 1.0 PMCLE*)
                   Michael P. Downey, Legal Ethics Lawyer, Downey Law Group LLC

2:15 – 2:30 p.m.  Break

2:30 – 3:30 p.m.  Session 1: Representing Non-U.S. Citizens (1.0 MCLE)
                   Cindy Galway Buys, Professor, SIU School of Law
                   OR
                   Session 2: Special Needs & Pooled Trusts & ABLE Tax Savings Accts. (1.0 MCLE)
                   Scott Nixon, Executive Director, Life’s Plan Inc.
                   Julia Mezher, Assistant Vice-President & Trust Counsel, The Chicago Title Land Trust Co.

3:40 – 4:40 p.m.  Partnering with Your Insurance Carrier to Improve Practice Mgmt. & Avoid Malpractice (1.0 MCLE, incl. 1.0 PMCLE*)
                   Jeffrey B. Strand, President & CEO of ISBA Mutual Ins. Co.

4:45 – 6:00 p.m.  Reception – Sponsored by Illinois Bar Foundation

* Professionalism Credit will be applied for.
Transitions, Succession Planning & Other Ethical Concerns

Peter L. Rotskoff,

ARDC Chief of Litigation & Professional Education
About The Faculty

PETER L. ROTSKOFF earned a B.A. from Vanderbilt University and a J.D. from John Marshall Law School. Mr. Rotskoff is a frequent presenter to government agencies, bar association groups and law firms on issues related to ethics and professionalism. Some of the associations he is a part of are as follows: Sangamon County Bar Association, Appellate Lawyers Association, National Organization of Bar Counsel, Lincoln-Douglas American Inn of Court. He also served on several committees with the Illinois State Bar Association such as Standing Committee on Mentoring from 2004 to 2006 and Standing Committee on Corrections and Sentencing from 1994 to 2015. He is currently still involved in the Standing Committee on Legal Education, Admission & Competence as well as the Alternative Dispute Resolution Section Council.
SIU/Jackson-Williamson Co. Bar Association CLE

Carbondale, Illinois
April 28, 2017
Peter L. Rotskoff
Chief of Litigation
ARDC

TWO NEW RULES

- PMBR – Supreme Court Rule 756(e)
- Commission Rule 56 - Diversion
ILLINOIS BECOMES FIRST STATE TO ADOPT PROACTIVE MANAGEMENT BASED REGULATION

Beginning in 2018, Illinois attorneys in private practice who do not have a practice management system compliant with the Illinois Supreme Court's rules must participate in a proactive, online self-assessment regarding the operations of their law firms. This self-assessment will require lawyers to demonstrate that they have reviewed the operations of their firms based upon both lawyer ethics rules and best business practices. The program will be administered by the Attorney Registration and Disciplinary Commission (ARDC), the Illinois Supreme Court agency that regulates lawyers.

Following a lawyer’s self-assessment, the ARDC will provide the lawyer with a list of measures to improve those practices that are identified during the self-assessment process. All information gathered in a lawyer’s online self-assessment is confidential, although the ARDC may report data in the aggregate.

### Practice Size and Setting for Lawyers with an Active Status License and Currently Practicing Law

<table>
<thead>
<tr>
<th>Practice Size*</th>
<th>Number Responding in Practice Category</th>
<th>Practice Size % of Total Engaged in Active Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solo</td>
<td>13,555</td>
<td>19.8%</td>
</tr>
<tr>
<td>Other</td>
<td>2,854</td>
<td>3.6%</td>
</tr>
<tr>
<td>Not-for-profit</td>
<td>1,340</td>
<td>1.9%</td>
</tr>
<tr>
<td>Academia</td>
<td>941</td>
<td>1.4%</td>
</tr>
</tbody>
</table>

*Preliminary figures taken from the 65,317 responses to the law practitioners’ question for the 2016 registration year from lawyers with an Active status license and who indicated that they are currently practicing law.
### Private Practice, Solo Size: Malpractice Insurance

<table>
<thead>
<tr>
<th># of Attorneys</th>
<th>Malpractice Insurance</th>
</tr>
</thead>
<tbody>
<tr>
<td>5,588</td>
<td>No</td>
</tr>
<tr>
<td>13,555</td>
<td>Total</td>
</tr>
</tbody>
</table>

41% HAVE NO MALPRACTICE INSURANCE

### Private Practice, Solo Size: Succession Plan

<table>
<thead>
<tr>
<th># of Attorneys</th>
<th>Succession Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>10,463</td>
<td>No</td>
</tr>
<tr>
<td>2,167</td>
<td>Yes</td>
</tr>
<tr>
<td>13,555</td>
<td>Total</td>
</tr>
</tbody>
</table>

77% HAVE NO SUCCESSION PLAN
Beginning in 2018, private practitioners who do not have malpractice insurance must complete a 4-hour interactive, online self-assessment regarding the operation of their law firm;

There is no cost to take the CLE accredited course;
**PMBR con’t.**

- Lawyers can take the assessment at various times and in various increments as long as the 4-hour course is completed at the time of 2019 registration;
- Any interested lawyer can take the PMBR course for free and for MCLE credit.

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**Commission Rule 56 - Diversion**

- Allows an attorney an opportunity to address concerns identified in an investigation without public discipline;
- Only available for certain types of cases.
Conditions of Diversion Agreement could include:

- Mentoring
- Law office management
- Audits of financial accounts
- Evaluation and treatment for substance abuse or mental health issues

A Few Recent Cases of Interest
1. Computer and Internet Issues

In re Win,
IN RE
BRIAN
DENNIS
HUNTER
M.R. 28050,
2016PR00028
(ILL. MAY 18,
2016)
In re Papoutsis, M.R. 25780 (Sept. 22, 2016)

2. Law Firm Misconduct
In re David,
M.R. 27951, 2015PR00049 (Ill. March 22, 2016)

In re Brestal, M.R. 28088 (May 20, 2016)
3. UPL

• *In re Joel S. Alpert*, M.R. 28141 (Sept. 22, 2016)

• *In re Michelle A. Cummings*, 2016PR00114

4. Fraud & Dishonesty
In re Phillip C. Gallagher, M.R. 28077 (Sept. 22, 2016)

In re Anthony Patrick Gilbreth, M.R. 28008 (May 18, 2016)
Hypotheticals

Rules of Professional Conduct & Disciplinary Law
ARDC website at: www.iardc.org

Guidance on the Rules & IL Lawyer’s Professional Duties
Call the ARDC Ethics Inquiry Hotline:
312-565-2600 (Chicago); 217-546-3523 (Springfield)

FREE online CLE seminars at ARDC web site:
https://www.iardc.org/CLESeminars.html

Lawyers’ Assistance Program:
1-800-LAP-1233

Talk it out with other lawyers
See RPC 1.6(b)(4)
SIU/Jackson-Williamson County
Bar Association CLE
Carbondale, Illinois
April 28, 2017

Hypotheticals

Peter L. Rotskoff
ARDC Chief of Litigation and Professional Education
1. Supervision of Non-lawyer Employees

You hire a paralegal who, unbeknownst to you, has a criminal record. After a successful first year, you fully trust the paralegal and you allow him to prepare settlement statements in personal injury cases and you give him access to your client trust account. Over the next two years, the paralegal steals the identity of two clients and uses at least $600,000 of your trust funds. After you are alerted to the problem, the paralegal is arrested and convicted. The judge orders you joint and severally for restitution of approximately $700,000. Two clients also sue you for malpractice. Finally, the ARDC has indicated that it may seek formal disciplinary proceedings against you.

A. Are you liable for restitution?

B. Is this malpractice?

C. Have you violated the Rules of Professional Conduct?

Rules 1.15, 5.3
2. **Dealing with Pro Se Litigants**

You represent the defendant in a contract dispute and the plaintiff is *pro se*. On the eve of trial, you make a settlement offer to the plaintiff and she says, “I don’t know, you’re the expert, do you think that’s a fair settlement?”

How do you respond?

The case does not settle and the trial commences. The plaintiff clearly does not know what she is doing and repeatedly asks you and the judge for help and advice.

How do you respond?

**Rule 4.3**
3. **Social Media**

You represent a defendant in a personal injury case. You instruct your paralegal to go onto Facebook and “friend” the plaintiff so that the paralegal can gain access to the plaintiff’s non-public Facebook page. You specifically instruct the paralegal to use her real name and make no misrepresentations.

At trial, you use information obtained by the paralegal on the plaintiff’s non-public pages to impeach the plaintiff.

Have you violated the Rules of Professional Conduct?

**Rules 4.2, 5.3 and 8.4(c)**
4. **False Statement by Client**

Your client is deposed by her husband’s lawyer during a dissolution proceeding. Because you have carefully reviewed her financial records, you know that during the deposition, she has misstated a number of facts concerning her assets and liabilities.

What do you do?

What would you do if this happened at trial rather than in a deposition?

**Rule 3.3**
5. Office Sharing

You share office space with two other lawyers. You all use a common phone number, receptionist and secretary, but you each have a separate computer system and you are not officially affiliated in any manner. The sign on the front of the building simply reads “Law Office”.

A. A client of one of the other lawyers sues all three of you for malpractice; are you liable?

B. One of your office-mates refers you a contingency fee case but she does not get the client’s agreement for the referral as required by Rule 1.5(e). After the case settles, your client tells you that he does not want any part of the attorney’s fees to go to your office-mate. Should you honor the referral agreement?

Rules 1.5, 1.0 (Terminology)
6. **Information From Opposing Counsel**

You represent Husband in a divorce case. Attorney for Wife inadvertently emails you a document containing direct examination questions intended for Wife to review and other strategic advice concerning her testimony.

A. What do you do after receiving the email?

B. Can you use the contents of the email?

C. Now assume Husband accessed Wife’s email without her knowledge and obtained the information described above as well as payroll records and other documents. Husband brings you the documents but does not say how he obtained them. You decided to use the information in settlement negotiations. Is this a problem?

*Rules 4.4(b), 3.4(a) and 8.4(c)*
7. **Withdrawal Due to Problem Client**

You represent the Husband in a highly contested divorce case. Lately Husband has been prone to anger outbursts and is showing up at your office at all times of the day without an appointment. He has also made vague threats about doing harm to his Wife. Finally, he has made inappropriate sexual comments to a female associate who is working on the case and she has asked to be taken off the matter. You have decided you want to withdraw from the case but a major hearing is scheduled in less than two weeks.

A. What is your basis for withdrawal?

B. How do you withdraw without revealing information protected by Rule 1.6 and which, if revealed, could be harmful to your client?

Rules 1.16, 1.6
8. Who is the client?

The daughter of an elderly client has requested that you pursue a guardianship for the client because the daughter believes that her mother is incompetent and may be the victim of neglect or abuse by her sons who reside with her. You meet with the client, and she appears lucid and rational. She strenuously opposes a guardianship proceeding and denies any neglect or abuse by her sons.

A. What do you do?

B. The daughter calls you to discuss your progress. What do you say?

Rule 1.6, 1.14
9. **Social Media**

A client in a custody case indicates to you that she is no longer drinking and is regularly attending AA. You decide to check her Facebook page and you see numerous recent posts making reference to your client drinking, as well as recent pictures of your client drinking with friends at bars and parties.

A. How do you advise your client about the contents of her Facebook page including changing privacy settings and removing or deleting information from her page?

B. May you check and use information from the husband’s Facebook page?

C. All of the information you have gathered leads you to believe your client is severely impaired due to substance abuse. Do you have any obligation to reveal this information to the court or opposing counsel?

D. At the hearing, you do not raise any issues about your client’s drinking because of your review of her Facebook page. On cross examination however, she testifies that she has been completely sober for the last six months and regularly attends AA. What are your obligations with regard to this testimony?

**Rules 3.3(a)(3), 3.4**
Criminal Law Updates for the Occasional Practitioner

Matt Goetten,
Special Prosecutor, IL State’s Atty. Appellate Prosecutor
About The Faculty

MATT GOETTEN earned a B.S. in Psychology from the University of Illinois, a Master’s Degree in Labor Relations from the University of Illinois, and a J.D. at Southern Illinois School of Law. During law school, he clerked for then Jackson County State’s Attorney, Mike Wepsiec. After graduating from law school, Matt Goetten dedicated his career to serving as a prosecutor. He was a State’s Attorney with Greene County for eight years and served a brief appointment as the Pike County State’s Attorney. Today, he is employed with the Illinois State’s Attorneys Appellate Prosecutor’s (ILSAAP) office with the Special Prosecutions Unit. He prosecutes cases throughout the State of Illinois in special circumstances, such as, existing conflicts for the local state’s attorney or upon request for trial assistance by local state’s attorneys. Initially enlisting in the Illinois National Guard to pay for law school, he accepted his commission as a JAG Officer in 2005. He is now an eighteen-year member of the Illinois National Guard, serving as the Staff Judge Advocate for the 126th Air Refueling Wing at Scott AFB in the Air National Guard. He also served in various legal roles throughout the state in the Army National Guard, including a deployment to Afghanistan in 2009. Matt lives with his wife and daughter in rural Greene County, Illinois, at least until August when his daughter plans to leave him to attend the University of Illinois. Matt's son also attends the University of Illinois where he will be a senior this coming school year.
CRIMINAL LAW UPDATES FROM A BIG DUMB PROSECUTOR

Matt Goetten
Special Prosecutor
Illinois State’s Attorneys Appellate Prosecutor
725 South Second Street
Springfield, Illinois 62704
217-782-1628
mjgoetten@ilasaap.org

WHAT IS ILASAAP?

- State Agency Responsible for Most Criminal Appeals (for State)
  - 4 Appellate District Offices with Administrative Office in Springfield
  - Board of Governors: State’s Attorneys elected by peers

- Secondary Mission: Provide Special Prosecutions to SA Offices
  - Most frequently due to conflicts of interest cases
  - Provide trial assistance and/or consultation where requested
  - FY16 provided support for 758 cases in 92 counties

- Also Provide Assistance in Labor and Forfeiture Matters

www.ilasaap.org
WHAT IS THIS?

- What this is...
  - Some criminal law updates by a guy who had 67 cases in 26 counties
  - Some observations for the occasional criminal law practitioner
  - New-ish statutes to be aware of
  - New-ish cases your presenter finds instructive
  - A 30,000 foot view of criminal law topics of interest
  - Some random musings

- What this is NOT...
  - An exhaustive treatise of new developments in criminal law
  - An “expert” opinion about any of the matters discussed
  - “Stump the chump” hour...(I already admitted I’m not smart in the title)
  - The worst hour of CLE you have ever been forced to sit through
  - The best hour of CLE you have ever had the “joy” of sitting through

IN MEMORIUM

Cracks open a Diet Coke...takes one sip, and only one sip...

“Every person charged with a crime is more or less guilty of more or less what they are charged with.”

Man, Myth, Legend, Teacher, Friend, Poker Player
-Professor Bill Schroeder
MOVING ON

- Review of New-ish Statutes
  - ICMJ
  - Decriminalization
  - Juvenile Interrogations
  - Judicial Explanation
  - Bail
  - Expanded Closed Circuit
  - DUI Evidence
  - Special Probations (not just for drug users anymore)

- Case Law Updates
  - Search and Seizure
  - Pretrial Matters
  - “Pre-Flight Checklist”
  - Waiver of Counsel
  - Discovery
  - Sufficiency of Evidence
  - Closing
  - Impeachment

- Practical Concerns to Make Matt’s Life Easier
  - What is your email?
  - To 402 or not to 402
  - Motions in Limine (your friend and mine!)
  - Factual Basis

DISCLAIMER

My thoughts and random observations are my own and do not necessarily reflect the views or positions of ILSAAP or its management. They certainly do not reflect the thoughts of the State of Illinois, if the State were capable of thinking, which it is not, but what if it was?…Wait…is it? I mean not the government but the State. Note to self: idea for new book.

Anyway, you see what I mean. Non-attribution for this presentation!
ILLINOIS CODE OF MILITARY JUSTICE

- Became Law on January 1, 2017 (20 ILCS 1807)
- Gives Illinois National Guard (Air and Army) Authority to Prosecute Under Certain Conditions
- Court of Last Resort
- Fills a Gap in Previous, Outdated, Statute

- Why it matters to you...
  - Identify service member clients (for many reasons)
  - Understand your actions in the civilian criminal court can have other impacts on service and service benefits
  - Declination to prosecute by the SA may be first step
  - Engage with your client’s military attorney

UP IN SMOKE

- Just the High Notes (I know this is not really new but I’ve been busy)

- Changes to Several Statutes (See P.A. 099-0697), Effective July 29, 2016
  - 625 ILCS 5/11-501(a)(7)—Quantifying the amount of THC in DUI
  - 625 ILCS 5/11-501.2(a)(6)—“Tetrahydrocannabinol concentration means either 5 nanograms or more of delta-9-tetrahydrocannabinol per milliliter of whole blood or 10 nanograms or more of delta-9-tetrahydrocannabinol per milliliter of other bodily substance.” ....if you say so
  - 720 ILCS 550/4—Changes Weights for Class Offenses (Decriminalize 10grams and less)
  - 720 ILCS 600/3.5(c)—Run Out of Weed at Your Peril if You Carry a Pipe?

- Why should you care?
  - More Relaxed Clients?
  - Seriously, Make Certain You Check the Amounts Against the New Classes
  - If You Do DUI Work I Think You Have a New Tool in Negotiations
JUVENILE INTERROGATIONS

- P.A. 99-0882, Effective January 1, 2017, Regarding Juvenile Interrogations
  - Generally, requires boys and girls under age 15 who are charged with a serious crime be represented by counsel during interrogations. The law applies to charges that would be considered a felony if committed by an adult. Any statements a youth makes without the benefit of counsel will inadmissible in court.
  - 55 ILCS 5/3-4006—Add s to Duties of the Public Defender
  - 705 ILCS 405/5-170—Entitled to Representation Under 15
  - 705 ILCS 405/5-401.5—When Statements Are Admissible

- Why Should You Care?
  - We Continue to Move Toward Implementing Stated Intent of Juvenile Court Act
  - If You Represent Juveniles This Is a Minor Change
  - If Your Kids Are Like Mine Were...This Might Save You Some Money

YOU’VE GOT SOME SPLAINING TO DO

- P.A. 99-0861, Effective January 1, 2017, Probation/Prison Explanation
  - 730 ILCS 5/5-4-1(b-1)—Generally, requires judges explain choice of prison for a crime that would allow them to release an offender on probation.
  - Applies to Class 3 & 4 Offenders With No Other Felony Convictions or Violent Convictions in History.
  - Creates an Affirmative Obligation for the Sentencing Court

- So What?
  - Sentencing Courts Should Already Favor Probation, Where Appropriate
  - Gives Defense Attorneys Another Sentencing Tool (DOC now more work for the judge)
  - But...Does It Discourage Pleas?!?
  - Stay Tuned for the Appeals Because...I Do Not Really Know
**DO YOU TAKE CASH?**

- P.A. 99-0618, Effective January 1, 2017, Cash Bond
  - Generally, requires law enforcement officials to accept cash to post bail
  - 725 ILCS 5/110-9—On Taking Bail
- Nobody Really Cares
  - You Are Still Not Allowed to Provide Bail for Your Client(s)
  - Many Smaller Counties Have Traditionally Only Taken Cash

**OUT OF COURT STATEMENT?**

  - 725 ILCS 5/106B-5—Added “aggravated battery” and “aggravated domestic battery” to list of offenses for which a child, or person with certain disability, may testify via closed circuit rather than in court
  - If you were not already aware of this option, you are now with this update
- It Matters Because
  - Further Protects Victims
  - Helps Prosecutors
  - What About Defendant’s “Right to Confront”
DUI EVIDENCE

- S.B. 3450—Would allow past DUI convictions to be admitted into evidence in a subsequent DUI trial
- This is a Bill, Yes It’s Only a Bill...But One to Watch

PROBATION BY ANY OTHER NAME

- Attempts to Avoid “Felonizing” Your Client
  - 1<sup>st</sup> Offender Probations—For Drug Charges
  - TASC Probation—For Drug Addicted
  - Offender Initiative Program 730 ILCS 5/5-6-3.3
    - Certain Financial Crimes
    - Requires Preliminary Hearing Waiver
    - Suspends Proceedings for No Less Than 12 Months
    - Terms Include Full Restitution
    - Terminates in Dismissal...If Successful
  - Second Chance Probation 730 ILCS 5/5-6-3.4
    - Minor Felony Drug and Property Crimes
    - Guilty Finding Required
    - Minimum 24 Months
    - Terms Analogous to 1<sup>st</sup> Offender
    - Dismissal Upon Successful Completion
Search and Seizure

People v. Burns, 2016 IL 118973 (March 24, 2016)
Dog-Sniffs—Was a warrantless use of a drug dog in the defendant’s building (the common area outside his door) a Fourth Amendment violation?
The Supreme Court concluded that is was. It determined the warrantless use of a drug dog contravened the US Supreme Court’s directive in Jardines as a trespass to property (the curtilage) and that no good faith exception applied.

People v. Timmsen, 2016 IL 118181 (March 24, 2016)
Roadblocks/Reasonable Suspicion—Did the defendant’s act of making a U-turn to avoid a roadblock provide the police with reasonable suspicion to stop the defendant’s vehicle?
The Supreme Court concluded that the police officer had reasonable suspicion to stop the defendant’s vehicle because when the defendant made the U-turn he committed what an objective officer would believe to be a violation of the Vehicle Code, reversing the appellate court.
Pretrial Matters

**People v. Tate, 2016 IL App (1st) 140598**
Objections—State objected to the defense motion for substitution of judge and trial judge sustained the objection. Appellate court reversed and remanded after 28-year sentence on aggravated battery. Probably why the change was sought?

**People v. Staake, 2016 IL App (4th) 140638**
Preliminary Hearing—The trial court need only determine that probable cause exists for single felony offense regardless of number of charger pending and need not make any findings regarding other charges.

**People v. Lilly, 2016 IL App (3d) 140286**
Trial Delay—Delay attributable to both State and defense sufficient to toll statutory speedy trial term. The defendant is responsible for affirmatively acting when becomes aware trial is delayed by objecting and demanding trial.

“Pre-Flight Checklist”

**People v. Williams, 2016 IL App (4th) 140502**
Rejection of Pleas—The trial court’s inquiry should address multiple subjects in which the defendant's constitutional rights may be implicated. The appellate court recommends the following as a minimum:

1) Ensure all parties understand the sentencing range
2) Ask State about plea offers, if any, and expiration dates, if any
3) Confirm offer with defense counsel and that it was conveyed to client
4) Court confirm personally defendant's understanding of plea
5) Ensure defendant understands it is his/her decision to enter a plea
6) Confirm defendant's decision to reject offer
7) Revisit the sentencing range and ensure defendant understands
8) Ensure the defendant understands to plead/go to trial=his/her choice
Waiver of Counsel

**People v. Mitchell, 2016 IL App (2d) 140057**
Stage—Competent waiver by the defendant of counsel continues through all subsequent proceedings unless defendant later requests counsel or circumstances suggest the waiver was limited to particular stage of proceedings. Courts must indulge in every reasonable presumption against waiver.

**People v. Hunt, 2016 IL App (1st) 132979**
Denial—Improper denial of defendant’s request to proceed pro se resulted in reversal of felony.

Discovery

**People v. Carballido, 2015 IL App (2d) 140760**
*Brady* Violation—Failure to disclose “field notes” of investigating officer constituted *Brady* violation.

**People v. Olsen, 2015 IL App (2d) 140267**
Video—It was error for the trial court to bar officer’s testimony at DUI trial regarding field sobriety testing conducted as a sanction against the State for officer’s failure to capture field sobriety tests on video.

**People v. Moises, 2015 IL App (3d) 140577**
Almost Video—Officer conducted field sobriety testing on driver outside the view of the squad care video. Court ruled there was no discovery violation because State neither destroyed nor withheld video for defense.
### Sufficiency of Evidence

**People v. Walker,** 2016 IL App (2d) 140566  
Text Messages—Defendant’s consistent use of specific phone constituted compelling circumstantial evidence that defendant was the person sending the text messages where the drug transactions in question were arranged entirely by text message.

**People v. Owens,** 2016 IL App (4th) 140090  
*Apprendi?*—In prosecution for felony DUI the State was not required to prove, as an element, the basis of the license revocation to sustain the felony DUI based on the revocation. Not an *Apprendi* issue.

### Watch Your Mouth

**People v. Jones,** 2016 IL App (1st) 141008  
Smooth Criminal—The State committed reversible error where referring to the defendant, in its opening statement, several times, as a criminal. Statements included “cold blooded criminal” when referring to what the State believed the evidence would show in face-off with police.

**People v. Staake,** 2016 IL App (4th)  
Pimpin’ Ain’t Easy Nor is Rebuttal—Claim that the State engaged in improper rebuttal in its closing argument rejected by the Appellate Court. Court reiterated that “trying felony cases before a jury ‘ain’t beanbag.’” Also, while “limitations exist...there is no restriction on argument because a party takes offense to the harshness of the opponent’s closing argument.”
**Impeachment**

**People v. McCoy, 2016 IL App (1st) 130988**

Ability to Perfect—State must be prepared to prove up impeachment or the attempt is improper. State must have good-faith basis to ask impeachment questions as well as intent/ability to perfect impeachment. Case reversed where State had inquired of defendant of his intent to kill the victim’s family with no completion of impeachment after defendant’s denial.

**People v. Burgess, 2015 IL App (1st) 130657**

Foundation—Before a witness can be impeached with a prior inconsistent statement, a proper foundation must be established. Proper foundation includes presenting place, circumstances, and substance of earlier statement and allowing witness an opportunity to explain inconsistency.

---

**AND NOW...FOR SOMETHING COMPLETELY DIFFERENT**

HINT: This is the non-attribution part of the program...
Email Is For Everyone

- My email is mjgoetten@ilsaap.org
- What is your email? I do not know because you have been ignoring:
- Illinois Supreme Court Rule 131 REQUIRES Your Email On Filings
- This requirement has been effective since January 1, 2016, but...
- My dad does NOT have a computer but he has email
- Seriously, email is your friend and mine

402 Or Not?

- Speaking of Illinois Supreme Court Rules, Let’s Talk 402—Pleas
- Rule 402(d)(1)—Bringing the Judge Into the Process
  - Defendant Must Be Admonished
    - Judge will learn information she/he would not know otherwise before trial
    - Not entitled to a new judge if agreement is not reached (although I think most would recuse?)
  - Judge Must be Willing to Participate—Some Are Not
- If Your Judge is Amenable...I Recommend Using This Process
  - Helps Parties Get to “Yes” By Getting Judicial Insight
  - Gives Matt an Understanding of Local “Thinking” On Sentencing
  - Less Likely, In My Opinion, to Result in Some Appeal (Some Judges Disagree)
  - Informal v. Formal—is There Really a Difference
Motions In Limine

- Should be called Motions in “Let-A-Me”
- If you are going to do trial work start compiling these
- Trials are full of enough surprises, we should endeavor to limit them

- Common Uses
  - Montgomery issues involving prior convictions
  - Use of evidence in opening statement
  - Ruling on a specific evidentiary issue

- More Unusual Uses
  - Voir Dire Question: “Do you have anything against attorneys with beards?”
  - Requesting stipulations as to evidence
  - Using Power Point

Factual Basis

This is my appeal to all prosecutors in the audience:

- Your factual basis for the plea should be short
  - You must meet the elements of the crime...that is all
  - DO NOT read the entire police report
  - DO NOT include extraneous matters (unless you want a plea reversed)
  - If, on one count, it takes you longer than I can hold my breath, it’s wrong

- Go to your judge’s office TODAY and discuss
  - I know the person in the black robe is in charge but they don’t want to hear you either
  - They want a clean record, and so do you
  - You may be annoying them and you do not even know it
FIN

QUESTIONS?
The New Income Shares Child Support Guidelines

Margaret Bennett,
Bennett Law Firm, LLC

Nancy Shafer,
Family Law Software
About The Faculty

MARGARET BENNETT is co-chair of both the Child Support and Parentage Subcommittees of the ISBA Family Law Section Council and is the chair of the State of Illinois Child Support Advisory Committee. She participated in drafting The Parentage Act of 2015, and the Income Shares Child Support legislation which will become effective on July 1, 2017. She received her undergraduate degree from the University of California, Berkeley with honors and received her J.D. from Loyola University School of Law, Chicago. Ms. Bennett has been recognized as an Illinois Super Lawyer (2012-2017). Ms. Bennett has also been named in the Top 100 Super Lawyers list (2012-2017) and in the Top 50 Women Super Lawyers list (2013-2017). Her office is in Oak Brook, where she concentrates her practice in family law.

NANCY CHAUSOW SHAFER is a principal in the Highland Park IL firm, CHAUSOW SHAFER, PC, concentrating in Matrimonial Law, including Litigation, Mediation and Collaboration. She is a fellow of the American Academy of Matrimonial Lawyers and has all the usual SuperLawyer/Leading Lawyer accolades. A focus of her energies is to increase the education of professionals and the public on options for the divorce process, including Collaborative practice. Nancy is a frequent presenter and organizer at CLE programs. Nancy is also the Illinois and Minnesota sales rep for Family Law Software, www.familylawsoftware.com.
INCOME SHARES: NEW RULES FOR CHILD-SUPPORT GUIDELINES

EFFECTIVE JULY 1, 2017

History of Child Support Guidelines in Illinois

- Prior to 1984, Illinois law provided courts with the discretion to set support at a reasonable and necessary amount.
- In 1984, Public Act 83-1404 amended section 505 of the Illinois Marriage and Dissolution of Marriage Act to require the calculation of support by applying percentage guidelines to the obligor’s net income dependent upon the number of children.
- The net income percentage of income model has been part of Illinois law for over 30 years.
- The current model fails to consider both parents’ income and the standard of living the child would have enjoyed had the parents stayed together.
State Usage Guidelines

What is Income Shares?

Child support amount is based on the combined income of both parents.

Requires information about both parents’ incomes.

Each parent is responsible for their prorated share of child-rearing expenditures.
New Terminology & Definitions

- Business Income
- Guideline for High Income
- Low Income Adjustment (self-sufficiency adjustment)
- Multiple Family Adjustment
- Spousal Maintenance Adjustment
- UnEmployed or UnderEmployed Income Adjustment
- Obligor/Obligee
- Schedule of Basic Child Support Obligation (SBCSO)
- Basic Child Support Obligation (BCSO)
- Shared Physical Care
- Split Physical Care
- Standardized Net Income Conversion Table
- Zero Dollar Child Support Order

Key Differences between Income Shares and Percentage of Obligor Income Models

Income Shares
- Considers both parents’ incomes when determining the award.
- Each parent is responsible for their prorated share.
- Based on the cost to raise the child.

Percentage of Obligor
- Looked at only the obligor’s income.
- A flat percentage is applied to the obligor’s income.
- Does not directly consider the cost to raise the child.
HOW IT WORKS
Child Support amount comes from a “Schedule of Basic Child Support Obligation”
• We will ‘lookup’ the income level and # of children
• Based on expected expenditures of parents for their children at different income levels
• Created by economists based on economic data
• Not yet available - TBD

What is the Schedule of Basic Support Obligation?
Utilizes data from the Consumer Expenditure Survey put out by the Bureau of Labor Statistics;
Identifies how much parents residing together spend on their children;
Based on parents’ combined income and family size.
What Does the Schedule Include?

<table>
<thead>
<tr>
<th>Includes</th>
<th>Excludes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Housing:</td>
<td>Child care expenses</td>
</tr>
<tr>
<td>Apparel</td>
<td>Health insurance</td>
</tr>
<tr>
<td>Food</td>
<td>Uninsured and extraordinary medical expenses</td>
</tr>
<tr>
<td>Transportation:</td>
<td>Extracurricular activities and school expenses*</td>
</tr>
<tr>
<td>Entertainment:</td>
<td>[enhanced]</td>
</tr>
<tr>
<td>Miscellaneous:</td>
<td></td>
</tr>
</tbody>
</table>
## How Schedule Is Built

### Exhibit 6: Composition of Average Spending by Families (adopted from Betson 2010)

<table>
<thead>
<tr>
<th>Expenditure Category</th>
<th>Childless Couple</th>
<th>One Child</th>
<th>Two Children</th>
<th>Three or More Children</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Annual Outlays</td>
<td>$51,428</td>
<td>$55,968</td>
<td>$59,096</td>
<td>$49,491</td>
</tr>
<tr>
<td><strong>Budget Share</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Food</td>
<td>15.7%</td>
<td>16.0%</td>
<td>16.8%</td>
<td>18.3%</td>
</tr>
<tr>
<td>Housing</td>
<td>37.9%</td>
<td>41.2%</td>
<td>41.4%</td>
<td>40.9%</td>
</tr>
<tr>
<td>Apparel</td>
<td>2.6%</td>
<td>3.1%</td>
<td>3.2%</td>
<td>3.6%</td>
</tr>
<tr>
<td>Transportation</td>
<td>20.3%</td>
<td>19.9%</td>
<td>19.0%</td>
<td>18.4%</td>
</tr>
<tr>
<td>Entertainment</td>
<td>7.2%</td>
<td>6.4%</td>
<td>6.8%</td>
<td>6.3%</td>
</tr>
<tr>
<td>Healthcare</td>
<td>6.1%</td>
<td>5.3%</td>
<td>5.3%</td>
<td>4.6%</td>
</tr>
<tr>
<td>Personnel Care</td>
<td>.7%</td>
<td>.6%</td>
<td>.6%</td>
<td>.5%</td>
</tr>
<tr>
<td>Education and Reading</td>
<td>1.9%</td>
<td>1.8%</td>
<td>1.7%</td>
<td>1.7%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>7.6%</td>
<td>5.7%</td>
<td>5.2%</td>
<td>5.7%</td>
</tr>
</tbody>
</table>

### Income: All income from All sources
Non-included Income

- Public assistance programs are not included as income.
  - Temporary Assistance to Needy Families (TANF), SSI, Food Stamps.
- Benefits and income received for other children in the household are not included as income.
  - Social Security disability and retirement benefits paid for the benefit of the subject child must be included in the parent’s gross income for purposes of calculating support but the parent is entitled to a support credit for the amount of the benefits paid for the child.

Guidelines: Floor and Ceiling

- The Schedule of Basic Support Obligation will include a low income adjustment for obligors earning 75% or less than the Federal Poverty Guideline.
  - The Schedule of Basic Support Obligation will include combined monthly net incomes up to $30,000 (approximates gross income of $500,000).
When Income Exceeds the Schedule of Basic Child Support Obligation

A court has discretion when the combined adjusted net income of the parties exceeds the highest level of the schedule of basic child support obligation, except that the Basic Child Support Obligation shall not be less than the stated amount for the highest level of combined net income.

The highest level in the Basic Child Support Obligation Schedule is a combined net income of $30,000 per month.

Courts can still deviate, and the upper end of the table is not a cap on child support.

Minimum Child Support Orders

For parents with income levels at or below 75% of the Federal Poverty Guideline, child support is $40.00 per month per child. Total support for all children is capped at $120 per month with all children sharing equal portions of that support.

- This minimum support amount is rebuttable and does not apply to incarcerated or incapacitated parents, where no support generally should be ordered.

(Zero dollar child support order)
Adjustments to Income for Support Obligation

1. Business Income
2. Maintenance
3. Non shared children

Business income
Gross receipts minus ordinary business expenses
- Excluded from ordinary expenses and Court can reject
  - amounts allowable by the IRS for
  - accelerated depreciation,
  - excessive or inappropriate business deductions and/or
  - personal expenses paid through the business
Adjustments to Gross Income

In-kind benefits from employer (including self-employed)
- In-kind payments shall be considered income IF
- they are significant and
- they reduce personal living expenses.

Unemployed or Underemployed
- If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income of that party.
- Potential and Probable Earning level based on:
  - work history
  - Occupational qualifications
  - Prevailing job opportunities
  - The ownership of a substantial non-income producing asset
  - Earning levels in the community
  - Rebuttable presumption of 75% of Federal Poverty Guidelines
Other Adjustment to Gross Income

Maintenance
- Maintenance paid or payable in the current relationship is a deduction from gross
- (soon to include prior maintenance obligations too)
- Maintenance received is included in gross income

Multiple Family Obligations Adjustment

(non-shared children)
Method of Calculation

- As part of the Quadrennial Review, the Illinois Child Support Advisory Committee looked at new ways to calculate child support for parents with other family obligations.

- Illinois currently is a “first in time” State.
  - First child with an established financial need is considered first, before the financial needs of subsequent born children.
Adjustment to Net Income: Support for Non-Shared Children

If paying either court ordered child support, or actually paying financial support for Child not of the relationship:

Court ordered support is completely deducted

Financial support paid not by court order permitted deduction is amount actually paid or 75% of guidelines, whichever is LESS

Deduction is from net income

TIP: get support orders for prior children

Calculating Net Income
Illinois Approach: Net Income

The income shares legislation defines net income as gross income minus either the standardized tax amount or the individualized tax amount.

- The standardized tax amount will be the default rule.

Standardized Net Income

Assumptions for calculation of Federal and State taxes:

- Standard tax deduction for single payor;
- One personal exemption;
- Applicable number of dependency exemptions for the minor children that the parties have together go to the parent with majority parenting time unless otherwise agreed;
- Social Security and Medicare tax calculated at the then current FICA rate (or mandatory pension) and SIT.
Standardized Net Income

An HFS annual tax chart would be used to:

- Determine net income by subtracting the standard tax calculations from gross income.
- Updated to reflect any changes to the Federal, State, or FICA taxes as they occur.
- Provide the judiciary and all litigants—especially the IV-D program, pro se litigants—with an easy to use gross to net conversion to calculate support.

Standard doesn’t always fit

- If party is remarried and files Joint: Don’t use standardized
- If party is Head of Household: Don’t use standardized
- If party itemizes deductions: Don’t use standardized
- If party has capital gains income: Don’t use standardized
- If parties live in different states: Don’t use standardized
Individualized Net Income

Individualized Net Income will apply when the following occurs:

◦ Agreement/stipulation by the parties;
◦ Court order based on documentation; or
◦ Either party elects to use the individualized net income after full and complete disclosure.

Individualized Net Income by Party Agreement

The parties agree to an individualized net income agreement that is different from the proposed basic standardized tax calculation guideline.

This method may be used by the court unless the court rejects the proposed method for good cause.
Individualized Net Income

All of the relevant tax attributes shall be as the parties agree or as properly calculated.

- filing status
- allocation of dependency exemptions
- itemized deductions for federal and state income tax purposes
- deduction for FICA and Medicare
- other relevant credit or deductions
- Business or capital gains income (losses)

Either or both parties can agree to opt-in and utilize the Individualized Net Income approach.

Temporary Child Support

- Temporary Child Support may be determined in a summary hearing.

- Eligible party can opt in to the individualized method, the tax deductions and credits shall be determined by the court on the basis of information contained in one or both parties’ financial statements, Financial Affidavits, and relevant supporting documents pursuant to SCR or local rules.
The actual income shares guideline child support calculation

**DISCLAIMER:** NOT BASED ON REAL NUMBERS SINCE WE DON’T YET HAVE THE SCHEDULE OF BASIC SUPPORT OBLIGATION OR THE GROSS TO NET CONVERSION TABLE

---

**Step 1:** Determine the adjusted net monthly income for each parent based on net monthly income plus or minus maintenance paid.

**Step 2:** Calculate each parent’s percentage of the total combined net income.

**Example:** If Parent #1’s (Mom) adjusted net monthly income = $2,500, and Parent #2’s (Dad) = $7,500, then

Parent #1’s (Mom) percentage share of the combined adjusted net monthly income = 25% and Parent #2’s (Dad) percentage = 75%.
Child Support Calculation

Step 3

Based on the combined adjusted net monthly income, use the Schedule of Basic Support Obligation (BCSO) to determine the amount of the basic child support obligation.

Schedule of Basic Child Support Obligation

<table>
<thead>
<tr>
<th>Monthly Income</th>
<th>1 Child</th>
<th>2 Children</th>
<th>3 Children</th>
<th>4 Children</th>
<th>5 Children</th>
</tr>
</thead>
<tbody>
<tr>
<td>$9,875.00 - $9,924.99</td>
<td>$1,429</td>
<td>$2,149</td>
<td>$2,561</td>
<td>$2,861</td>
<td>$3,147</td>
</tr>
<tr>
<td>$9,925.00 - $9,974.99</td>
<td>$1,433</td>
<td>$2,157</td>
<td>$2,571</td>
<td>$2,872</td>
<td>$3,159</td>
</tr>
<tr>
<td>$9,975.00 - $10,024.99</td>
<td>$1,438</td>
<td>$2,164</td>
<td>$2,581</td>
<td>$2,882</td>
<td>$3,171</td>
</tr>
<tr>
<td>$10,025.00 - $10,074.99</td>
<td>$1,442</td>
<td>$2,171</td>
<td>$2,590</td>
<td>$2,893</td>
<td>$3,182</td>
</tr>
<tr>
<td>$10,075.00 - $10,124.99</td>
<td>$1,447</td>
<td>$2,179</td>
<td>$2,600</td>
<td>$2,904</td>
<td>$3,194</td>
</tr>
<tr>
<td>$10,125.00 - $10,174.99</td>
<td>$1,451</td>
<td>$2,186</td>
<td>$2,609</td>
<td>$2,915</td>
<td>$3,206</td>
</tr>
</tbody>
</table>
Child Support Calculation
Step 4 – Allocate the BCSO

“Easy Math” Example

If “Combined Adjusted Net Monthly Income = $10,000 →

Monthly basic support obligation for one child = $1,438.00

Thus, P2’s (Dad) monthly basic support obligation to P1 = $1,438.00 \times 75\% = $1,078.50

Note: Parent #1’s (Mom) obligation of $359.50 is assumed to be utilized in the course of everyday payments for the child.

Shared Physical Care Formula
Shared Physical Care Definition

Shared physical care means that each parent has allocated parenting time of the children for at least 146 overnights per year.

Presumption: Both parents contribute to the expenses of the children in addition to the basic child support obligation.

Cross-Multiply and Set-off

Calculates support for each parent adjusted for the parenting time schedule of overnights.

50% multiplier is applied to the basic obligation to account for the duplicated child-rearing costs between the parent’s households.

The 50% increase approximates the share of child-rearing expenses that are duplicated (housing, transportation, etc.).

Each parent’s share of the basic obligation is cross-multiplied with the percentage of time the other parent has overnights of the child.
**Review Step 3:** Based on the total adjusted net monthly income, use the Schedule of Basic Child Support Obligation to determine the basic combined support obligation.

**Example:** If the total adjusted net monthly income = $10,000, the monthly basic support obligation for one child is $1,438.

**Step 5:** Calculate the combined monthly shared physical care support obligation by multiplying the basic combined obligation determined in Step 3 by 1.5.

**Example:** $1,438 x 1.5 = $2,157

**Step 6:** Determine each parent’s portion of the monthly physical care support obligation by multiplying the figure determined in Step 5 by each parent’s percent share of income as determined in Step 2.

**Example:**
Parent #1's = $2,157 x 25% = $539.25
Parent #2's = $2,157 x 75% = $1,617.75

**Step 7:** Assuming the obligor exercises 146 overnights or more per year with the child, determine the percentage of time the child spends with each parent.

**Example:**
Parent #1 has the child for 219 overnights or 60% of the time.
Parent #2 has the child for 146 overnights, or 40% of the time.
Step 8: Cross Multiply Determine, for each parent, the support obligation owed the other parent for time spent with the child by multiplying the parent’s portion of the monthly shared physical support obligation as determined in Step 6 by the percentage of time spent with the other parent as determined in Step 7.

Example:

Parent #1’s monthly support obligation owed to Parent #2 = $539.25 x 40% or $215.70

Parent #2’s monthly support obligation owed to Parent #1 = $1,617.75 x 60% or $970.65

Step 9: Offset Subtract the lesser support obligation from the greater support obligation.

Example: 

Parent #2’s monthly support obligation is $970.65 - $215.70 = $754.95
Split Physical Care

Illinois now provides for a child support formula for split physical care:

**More than one child** and

Each parent has physical care (majority parenting time) of at least one of the children.

Calculate support by using two child support worksheets to determine the support each parent owes the other, as if the child in his or her care were the only child of the parties.

**Set off:** Then subtract the lesser support obligation from the greater.

Add-ons to Basic or Shared Physical Care Child Support Obligation

**HEALTH INSURANCE, MEDICAL EXPENSES, CHILD CARE AND EXTRACURRICULAR ACTIVITIES**
Health Insurance

The total insurance premium *attributable to the child* who is the subject of the order shall be added to the basic child support obligation.

Allocated pro-rata based on their respective net incomes (Step 2)

- Either or both parents will initiate medical coverage for the children by:
  - Currently effective medical insurance policies held by the parents
  - Purchase medical insurance for the children
  - Provide the children with current and future medical needs through some other manner
- Adding dental and optical insurance will be at judicial discretion.
What if Neither Parent has Access to Health Insurance?

- One or both parents must be ordered to provide private health insurance when it becomes available.
- The parent with majority time may be ordered to provide public health insurance for the children.
- Either or both parents must be ordered to pay cash medical support that is reasonable in cost.

Medical Expenses

Unreimbursed health care expenses

Court may, in its discretion, order parents to share contribution to these obligations

Not automatically pro-rata but may often be in same percentages as net income
Child Care Expenses

Child Care expenses will be prorated and added to the basic child support obligation.
Reasonably necessary to be employed, to attend educational or vocational training to improve employment opportunities, or for job search
Includes before/after school care and camps

Extra Curricular Activities

School and Extracurricular activity expenses
Discretionary with court
Applies to either or both parties
Reasonable
In addition to basic child support obligation
Enhance the child’s development
- Educational
- Athletic
- Social
- cultural
SUMMARY OF SENATE BILL 69-THE TECHNICAL CORRECTIONS TO THE INCOME SHARE CHILD SUPPORT LEGISLATION

1. To provide consistent congruence with the Illinois Marriage and Dissolution of Marriage Act and other Illinois statutes, numerous terms were replaced. Terms replaced were as follows:

   Child support “award” became child support “obligation” or "child support”. The term “award” was considered outdated when used in the child support context meaning an amount of child support determined rather than “awarded” by the court;

   "Chart" became "Standardized Net Income Conversion Table". This is a table to be promulgated by the Illinois Department of Healthcare and Family Services to be used when applying the Standardized Tax Formula to arrive at a parent’s net income.

   "Children" became "Child" where appropriate as the decision was made to use the singular, rather than the plural, when referring to children in the context of the statute;

   "Custodian" and “custodial parent” became "party with the majority of parenting time" as the term "custodian" was removed from the Illinois Marriage and Dissolution of Marriage Act in 2016, except as it relates to legal relationships involving non-parents, i.e. grandparents;

   "Custody" became the parent having “physical possession of the child" as the term "custody" was removed from the Illinois Marriage and Dissolution of Marriage Act in 2016, except as it relates to legal relationships involving non-parents; i.e. grandparents;

   Department of Healthcare and Family Services became the "Illinois Department of Healthcare and Family Services";

   Expenditure "Table" became "Schedule of Basic Child Support Obligation". The schedule reflects the cost of raising a child/children based on the parents’ combined net income and data from the Bureau of Labor Statistics.

   "Financial Disclosure Statement” and “Financial Affidavit” became "Supreme Court Approved Financial Affidavit (Family & Divorce Cases)” to conform with the new Supreme Court Rule which provides for a statewide family law financial affidavit;

   "Maintenance" became "spousal maintenance" to be consistent with terminology used in other sections of the Illinois Marriage and Dissolution of Marriage Act;

   "Order for Withholding" became Withholding Order/Notice for Support to comply with Title IV-D of the Social Security Act;

   "Respondent" became "obligor";
“Parent” became “party” where appropriate;

“Payor” and “payee” were replaced with “obligor” and “obligee” respectively to provide statutory consistency with the Public Aid Code and other statutory provisions which define and use the terms “obligor and “obligee”.

2. Section Headings were created or reworded. Eight (8) subject headings were created or reworded to add clarity and organization to the statute.

3. Section 1.5 (A-D) was added to provide an overall basic understanding of the new child support formula.

4. The multifamily adjustment formula in Section 3(F)(I)(i) and(ii) were reworded. The original language in this section was confusing and possibly would have resulted in erroneous computations. This section was corrected and rewritten. The Illinois Department of Healthcare and Family Services spent many hours with the drafting committee to create specific formulaic language for use in calculating the multifamily adjustment as originally intended. Clarifications were made in Section 3(F) relative to “net” and “gross” income in accordance with the intentionality of the Section.

5. The spousal maintenance adjustment provisions in Section 3(F)(II) were modified to provide for an adjustment for prior orders for spousal support in addition to orders for spousal maintenance in an existing child support case.

6. The child care expense provisions in Sections 3.7(A) and (B) were partially rewritten to provide clarity. A substantive change was made to provide that the parties must take into consideration the federal income tax credit for child care when allocating the cost of child care between the parents. Other states have statutorily included the federal tax credit in determining the allocation of childcare cost. The Illinois Department of Healthcare and Family Services participated in this decision. It was considered to be more equitable to allow the parties to include the tax credit in the computation when allocating child care costs. The new language can be found in Section 3.7 (B).

7. The provisions in section 3.8 were modified to add clarity and duplicative language was eliminated. In addition, a provision was reworded to provide that the Illinois Department of Healthcare and Family Services is only responsible to promulgate a worksheet to calculate child support in cases where the parties are utilizing the Standardize Tax Amount formula not in cases using the Individualized Tax Amount Formula.

In addition numerous minor edits were made to eliminate unnecessary language and to provide gender neutral terms when possible. The technical changes also included punctuation and grammar edits.
INCOME SHARES
NEW RULES FOR CHILD SUPPORT GUIDELINES

By: Margaret Bennett, Nancy Chausow Shafer and Hon. Pamela Loza

Summary: A major change in how child support is computed, how the new guidelines will work, and why they are going to help make our lives as divorce practitioners easier.

With the enactment of P.A. 99-764, Illinois now joins 39 other states and the District of Columbia in adopting the income shares model for the calculation of child support. Illinois has utilized the percentage guideline formula to determine child support since 1984, and unofficially for many years prior. This method of calculating child support is based on a percentage of the obligor's net income with the percentage increasing for each child of the parties. The enactment of the percentage guideline statute in 1984 was prompted by the State's participation in the federal interstate child support program created by Title IV-D of the Social Security Act of 1975, which provides for federal incentive payments to states. The percentage guideline formula is now considered an outdated model for computing child support as it does not reflect actual child rearing costs or allocation of those costs between the parents. Only seven states continue to utilize the percentage guidelines method as it is perceived as a one parent payor system which fails to consider child rearing costs. This method often causes discord between the parents and distrust of the child support system.

The income shares child support approach is an equitable and accurate method for computing child support because child support is based on data that reflects measurements of child rearing costs which are then allocated between the parents based on both parent's respective net income. The income shares model attempts to emulate the actual family child rearing expenditures incurred by the family and the sharing of those expenses by the parents prior to their divorce or separation. This approach reduces negativity between the parents thus benefiting the child. The implementation of the new child support legislation should significantly enhance child support services including the collection of child support and coordination of interstate child support.

Comparisons of the two methods show when using the income shares model child support amounts can be higher, lower, or comparable to the existing percentage guideline support depending upon the respective financial circumstances of each
parent. There is a rebuttable presumption in any judicial or administrative proceeding that the amount of child support which would result from the application of the income shares guidelines is the correct amount of child support to be awarded. The statute also provides that the Act itself does not constitute a substantial change of circumstances warranting a modification. This provision was included to prevent petitions for modification being filed after the effective date of July 1, 2017 based solely on the new legislation.

The income shares model of calculating child support utilizes economic data of child rearing costs based in part on the income level of the parents. Most income shares states obtain child rearing financial data from the Bureau of Labor Statistics. Calculating child support based on actual child rearing costs provides financial protection for the child by maintaining the standard of living the child would have enjoyed if the parents had not divorced or separated. The Schedule of Basic Support Obligation will be promulgated by the Illinois Department of Healthcare and Family Services (HFS) and updated periodically. The actual Schedule of Basic Child Support obligation will not be part of the child support statute but will be maintained by HFS and available on their website. The Schedule for child rearing costs will be based on data from the Bureau of Labor Statistics adjusted for Illinois and will be updated periodically. Illinois is utilizing, as do other income shares states, an economic research institute to prepare the new Schedule of Basic Child Support Obligation. The process will be initiated and administered by HFS, the agency responsible for insuring compliance with Illinois' federal mandate under which Illinois received over $200,000,000 dollars per year in grants for participation and compliance with the Title IV-D program.

In anticipation of the new legislation, HFS prepared a sample expenditure table in 2012 which is available on their website. Once the updated expenditure tables are available, HFS will prepare web-based electronic worksheets. The electronic worksheets and the expenditure tables will be available to the public on their website.

**Net Income**

Although some states utilize gross income to calculate child support payments, Illinois made the decision to continue to utilize net income to calculate a parties' respective share of support responsibility. The definition of income for purposes of calculating child support continues to be all income from all sources as under previous law thus retaining decades of case law defining income. However, the
new statute exempts certain governmental benefits from inclusions as income including TANF, SNAP and SSI.

Business income is defined in the new statute. The court now has authority to reject depreciation, excessive or inappropriate business deductions and/or personal expenses paid through a business when determining a parent’s income.

The new statute allows the parties to elect one of two formulas for computing tax deductions to determining net income:

a. The standardized (or simplified) tax amount; or
b. The individualized tax amount.

The standardized tax formula is based on both parents having single taxpayer status, utilizing the standard deduction with one personal exemption. The standardized tax formula will be based on the support recipient receiving the dependency exemption for the child unless otherwise agreed or determined. In addition to federal and state taxes, the computation of net income will allow the deduction for Social Security and Medicare taxes calculated at the Federal Insurance Contribution Act tax rate.

While the use of the standardized tax amount may be appealing in its relative simplicity, it is unlikely to reflect the actual net income of a party who has numerous itemized deductions. For those cases, practitioners will wish to utilize the individualized tax amount formula to determine net income. Using the individualized tax amount to determine net income requires the use of properly calculated state and federal taxes.

Failure to use the individualized tax amount may result in an inaccurate calculation of child support when a party has financially beneficial itemized deductions and/or credits which reduce taxes and increase net income. It is recommended that family law practitioners utilize one of the available software programs especially in cases where spousal support is awarded.

The Interaction between Income Shares and Spousal Maintenance

When determining the percentage of income shares between the parties in cases where spousal support is paid by one parent to the other, maintenance is subtracted from the payor parent's income and must be included in the recipient parent's income. The percentage of income shares increases the recipient parent's
percentage share and conversely reduces the payor spouse's percentage share. An analysis of the interaction between the 750 ILCS 5/504 and the new 750 ILCS 5/505 have consistently shown a more equitable financial result. In fact, all states utilizing spousal maintenance guideline formulas are states which also have income shares statutes to calculate child support.

The spousal maintenance adjustment should be made from the gross income before determining the tax amounts, since maintenance is tax deductible and includable in the recipient’s income. It should be noted that spousal maintenance paid to a prior spouse will also be subtracted from the obligor's income, and spousal support received from a previous spouse must also be included as income by the recipient. Commercial software programs will calculate the tax consequences of spousal support on net income when determining the percentage of income shares and the resulting child support obligation.

**The Multiple Family Adjustment**

If a parent is paying either court ordered support or actually paying financial support not ordered by the court, that support is a permitted adjustment from gross income. Court ordered support is completely deducted. Financial support paid not by court order is permitted at the amount actually paid or 75% of the amount that would be ordered under the income shares guidelines, whichever is less. This provision is a good reason to obtain a child support order for non-shared children. The multiple family adjustment should be made after, not before, the tax computation, since child support is not tax deductible.

**The Shared Parenting Adjustment**

The new child support statute has a two-step formula for shared parenting when both parents has 146 (40%) nights or more parenting overnights per year. The first calculation is to multiply the basic support obligation as determined by the expenditure table by 1.5. Many other states have this type of enhancement of the basic child support obligation to reflect shared parenting expenses. The purpose of the increase from the basic support obligation is to account for the increase in costs for housing, food and other basic costs required to maintain two households in order to accommodate a shared parenting plan. For example, if the expenditure table reflects
$3,000 per month of child rearing expenditures, the shared parenting multiplier amount would be $4,500 per month. The percentage of the parents' income shares are then determined. Those allocated amounts are then cross multiplied by the percentage allocation of parenting time to the other parent, and are set-off by subtracting the lesser support obligation from the greater as shown in the example.

**Additional Child Related Expenses**

Because the choice and cost of child care is unique to every family, the drafters of the new statute chose not to include child care expenses in the Schedule of Basic Support Obligation. Child care expenses will be determined separately from child support prorated in proportion to each parent's percentage share of combined parental net income, and included in the child support order. In addition to the allocation of child care costs, the court may order either or both parents to contribute to the reasonable school and extracurricular activity expenses incurred which are intended to enhance the educational, athletic, social or cultural development of the child. The statute does not require school and extracurricular activities expenses to be allocated in proportion to each parent's percentage share of combined parental net income.

The court, in its discretion, in addition to the basic child support obligation shall also provide for the child's current and future medical needs by ordering either or both parents to initiate health insurance coverage for the child which can include dental and/or vision insurance for the child. The parent with primary physical responsibility for the child may be ordered to apply for public health insurance coverage if neither party has access to private health insurance coverage for the child. In addition, the court may also order the parents to contribute to the reasonable health care needs of the child not covered by insurance including but not limited to, unreimbursed medical, dental, orthodontic, or visual expenses and any prescription medication for the child. Health insurance premiums for the child shall be added to the basic child support obligation and divided between the parents in proportion to their respective net income which can resulting in a credit or off-set to a parent paying the entire cost of the child's health insurance coverage.

The allocation of responsibility for the support of the child will now expressly become a shared obligation of both parents. Under the current percentage guideline model, the majority parent's share of the support obligation was always part of the equation, but not expressly described or quantified. National child support expert and author, Laura Morgan, when commenting on Illinois' new child support statute
stated "Adopting the Income Shares Model has proven an effective way of increasing the perception of fairness in support obligations, and thus increasing compliance with those orders. I am sure that after the initial period of adjustment practitioners will find that the perception of fairness will go a long way to settling cases." It is hoped that both parents and practitioners will find the new child support process to be transparent, fair and equitable thus increasing the parents' ability to interact in a manner that serves the best interests of the children.

**Business Income.** Business Income is defined as gross receipts minus ordinary and necessary expenses required to carry on the trade or business. A “business” includes, but is not limited to, sole proprietorship, closely held corporation, partnership, other flow-through business entities, and self-employment.

**Guidelines at High Incomes.** A court may use its discretion to determine child support if the combined adjusted net income of the parties exceeds the highest level of the schedule of basic child support obligation, except that the basic child support obligation shall not be less than the stated amount for highest level of combined net income. The highest level in the basic child support obligation schedule is a combined net income of $30,000 per month.

**Individualized Tax Amount.** Means the aggregate of the following taxes:

(i) Federal income tax (properly calculated withholding or estimated payments);

(ii) State income tax (properly calculated withholding or estimated payments); and

(iii) Social Security or self-employment tax, if applicable (or, if none, mandatory retirement contributions required by law or as a condition of employment and Medicare tax calculated at the Federal Insurance Contributions Act rate).

**Low Income Adjustment or Self Sufficiency Adjustment.** Illinois was one of five states which did not have a low income adjustment. A low income adjustment occurs when the impoverished obligor cannot afford what it actually costs to raise a child, so the Schedule of Basic Child Support Obligation produces an amount that the obligor can realistically pay which is a minimum order amount. The criterion for determining whether an obligor qualifies for the low income adjustment is annual income at 75% or less of the Federal Poverty Guideline.

**Multiple Family Adjustment.** Applies to parents in which one or both parents have had children with two or more partners. The amount of a pre-existing child support order is completely deducted from the net income of a parent to the extent payment is actually made under the order unless the court makes a finding that it would cause economic hardship to the child. The adjustment also applies to a parent who is paying financial support for a presumed, acknowledged or adjudicated child living in or outside that parent’s household. The Court shall deduct from the parent’s net income the amount of financial support actually paid by the parent for the child or 75% of the support the parent should pay (using that parent’s income alone) under the child support guidelines unless the court makes a finding that it would cause economic hardship.
“Obligee” means the individual to whom a duty of support is owed or the individual’s legal representative.

“Obligor” means the individual who owes a duty of support to make payments under an order of support.

**Schedule of Basic Child Support Obligation.** The schedule or table is a look-up table of how much families spend on their children by combined parental net income and numbers of children. This is a schedule based on economic data from the Bureau of Labor Statistics on child rearing expenses based on the parents’ combined net income.

**Shared Physical Care Formula.** Illinois was one of two states that did not address shared physical care, statutorily. Most state guidelines impose a time sharing threshold to apply a time sharing formula. Illinois now provides for a timesharing formula when each party has at least 146 overnights per year of parenting time.

**Split Physical Care Formula.** Split physical care occurs when there is more than one child and each parent has physical care of at least one of the children. Illinois now provides for a child support formula for split physical care.

**Spousal Maintenance Adjustment.** When determining the net income between the parties in cases where spousal support is paid by one parent to the other, spousal maintenance is subtracted from the payor’s parent’s income and must be included in the recipient parent’s income.

**Standardized Net Income Conversion Table.** Is a table converting gross to net income using the Standardized Tax Amount. The conversion table is promulgated by the Illinois Department of Healthcare and Family Service and lists a parent’s gross income and converts it to net income based upon the standardized tax amount and the number of children. The table assumes the dependency exemption for the child is awarded to the majority parent.

**Standardized Tax Amount.** Means the total of federal and state income taxes for a single person claiming the standard tax deduction, one personal exemption, and the applicable number of dependency exemptions for the minor child or children of the parties, and Social Security and Medicare tax calculated at the Federal Insurance Contributions Rate.

**Unemployed or Underemployment.** If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earning levels based on the obligor’s work history, occupational qualification, prevailing job opportunities, the ownership by a parent of a substantial non-income producing asset and earning levels in the community.
**Zero Dollar Child Support Orders.** For parents who receive only means-tested assistance or who cannot work due to a medically proven disability, incarceration or institutionalization, there is a rebuttable presumption that the monthly minimum support order is inapplicable and a zero dollar order should be entered.

By: Margaret A. Bennett

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COMPUTATION OF BASIC CHILD SUPPORT OBLIGATION

1. Determine each parent’s combined net monthly income.

2. Add the parents’ monthly net income together to determine the combined monthly net income of the parents.

3. Select the corresponding appropriate amount from the Schedule of Basic Child Support Obligation based on the parties’ combined monthly net income and number of children of the parties.

4. Calculate each parent’s percentage share of the basic child support obligation.

5. Although a monetary obligation is computed for each parent as child support, the receiving parent’s share is not payable to the other parent and is presumed to be spent directly on the child.
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, DOMESTIC RELATIONS DIVISION

IN RE THE MARRIAGE OF:  
MOTHER,  
Petitioner,  
and  
No. Worksheet A  
FATHER,  
Respondent.

CHILD SUPPORT OBLIGATION WORKSHEET

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<tr>
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<th></th>
<th>Mother</th>
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<tr>
<td>1. Monthly Net Income</td>
<td>$</td>
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<td></td>
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<tr>
<td>a. Minus child support payments for other children</td>
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<td>-</td>
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<tr>
<td>2. Monthly Adjusted Net Income</td>
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<td>$</td>
<td>$</td>
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<tr>
<td>3. Percentage Share of Income (each parent’s income from line 3 divided by combined income)</td>
<td>%</td>
<td>%</td>
<td>100%</td>
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<tr>
<td>4. Basic Combined Obligation apply line 3 combined column to Schedule of Basic Child Support Obligation</td>
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<td></td>
<td>$</td>
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<tr>
<td>5. Each parent’s share of basic support obligation (Each parent’s percentage from line 3 times combined obligation in 4)</td>
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<td>$</td>
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*The majority parent’s obligation is assumed to be utilized in the course of everyday expenses for the child and is retained by the majority parent.

**Items not included in Basic Child Support Obligation Schedule which must be allocated between the parties:**

1. Cost of child’s health insurance;
2. Unreimbursed health care costs;
3. Extracurricular activity expenses;
4. Child care costs; and
5. School expenses.
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Lessons from Recent Illinois Lawyer Discipline Cases

Michael P. Downey,

Legal Ethics Lawyer, Downey Law Group LLC
About The Faculty

MICHAEL P. DOWNEY is a legal ethics lawyer and founder of Downey Law Group LLC, a law firm devoted to legal ethics, lawyer discipline defense, and the law of lawyering. Mr. Downey regularly advises lawyers at law firms and corporate legal departments regarding legal ethics and risk management issues. Mr. Downey also assists lawyers responding to disciplinary complaints, and he has defended lawyers in civil litigation and disciplinary cases in Missouri and Illinois.

A past chair of the ABA Law Practice Division (2013-14) and the Illinois State Bar Association’s Standing Committee on Professional Conduct (2008-09), Mr. Downey was also a vice chair for the ABA TECHSHOW 2017. He has taught legal ethics as an adjunct professor at Washington University and St. Louis University and presented on professional ethics more than 450 times in the United States, Canada, and the United Kingdom. He authored the book, Introduction to Law Firm Practice (ABA 2010), and more than 120 articles on legal ethics and law firm practice. Michael writes regular ethics columns for the Law Practice, the National Law Journal, and the St. Louis Lawyer, and the “Ethox and Paradox” column for the ABA Litigation Section’s magazine Litigation.

In 2013, Mr. Downey received a Burton Award for his article on legal ethics restrictions on lawyers’ comments to the media regarding pending matters. In 2014, Missouri Lawyers Weekly named Mr. Downey a “Most Influential Lawyer” as the “go-to legal ethics lawyer in Missouri.” In 2015, Mr. Downey was inducted as a Fellow in the College of Law Practice Management, and in 2015 and 2016 he was named a “Top 50 Lawyer in St. Louis” by Super Lawyers.

Learn more about Michael Downey and his practice at www.DowneyLawGroup.com, or contact him at (314) 961-6644 or mdowney@DowneyLawGroup.com.
Lessons from Recent Illinois Lawyer Discipline Cases

Michael Downey
Downey Law Group LLC

94,128 registered lawyers, a 1.5% increase from 2014.

64,749 (69%) lawyers located in Illinois.

45,487 (70%) lawyers in Illinois located in Cook County.

29,378 (31%) lawyers located outside Illinois.

49,250 (52%) lawyers had malpractice insurance.

47,614 (81%) lawyers in private practice with a trust account maintained an IOLTA trust account.

31,362 lawyers performed 2,055,987 hours of pro bono legal services.

17,565 lawyers made $14,802,544 in monetary contributions to pro bono legal services organizations.

2015 ARDC Annual Report
ARDC 2015 – By the Numbers

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<td>UPL Investigations</td>
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<td>82</td>
<td>Against unlicensed persons</td>
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**DISCIPLINARY COMPLAINTS**

- 81 disciplinary complaints filed before the Hearing Board, a 27-year low.
- 77% alleged fraudulent or deceptive activity.
- 39% of disciplinary complaints were the result of an attorney report (aka “Himmel” report), the highest percentage reported.
- 130 cases concluded by the Hearing Board, a significant reduction over the prior year.
- 63% of cases were concluded without the need for the Hearing Board to issue a report and recommendation.
- 39% of cases were concluded at the Hearing Board by discipline on consent.
- 18% of cases were concluded by default.

**SANCTIONS**

- 129 sanctions were entered against 128 lawyers.
- 85% of disciplined lawyers were male.
- 62% of disciplined lawyers were between the ages of 50 and 74.
- 61% of disciplined lawyers were sole practitioners.
- 45% of disciplined lawyers were disbarred or suspended until further order of the court.
- 37% of disciplined lawyers were 30 or more years in practice.
- 27% of disciplined lawyers had one or more identified substance abuse or mental impairment issue.
- 2 disciplined lawyers were out-of-state lawyers sanctioned for engaging in the unauthorized practice of law in Illinois.
Proactive Management Based Regulations – IL Rule 756(e)(2)

Every other year, beginning with registration for 2018, each lawyer who discloses pursuant to paragraph (e)(1) that he or she does not have malpractice insurance and who is engaged in the private practice of law shall complete a self-assessment of the operation of his or her law practice or shall obtain malpractice insurance and report that fact, as a requirement of registering in the year following. The lawyer shall conduct the self-assessment in an interactive online educational program provided by the Administrator regarding professional responsibility requirements for the operation of a law firm. The self-assessment shall require that the lawyer demonstrate an engagement in learning about those requirements and that the lawyer assess his or her law firm operations based upon those requirements. The self-assessment shall be designed to allow the lawyer to earn four hours of MCLE professional responsibility credit and to provide the lawyer with results of the self-assessment and resources for the lawyer to use to address any issues raised by the self-assessment. All information related to the self-assessment shall be confidential, except for the fact of completion of the self-assessment, whether the information is in the possession of the Administrator or the lawyer. Neither the Administrator nor the lawyer may offer this information into evidence in a disciplinary proceeding. The Administrator may report self-assessment data publicly in the aggregate.

Note

• This presentation cites many Complaints (marked with blue title slides)

• The contents of all Complaints are merely allegations – no findings of fact yet

• Not all cases are presented in their entirety
In re Julie Lynn Ajster
(Complaint 1/2016)

Ajster advised (non-client witness) King “not to return a written statement to the Peru Police Department”
• Stated there “would be no reason to sue King if he did not return the statement”
• King had an interest in cooperating with authorities
Rule 3.4

A lawyer shall not: . . . (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

Rule 4.3

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
In re Michael James Bercos
(Complaint 6/2016)

Allegations

[Bercos engaged in] conduct involving dishonesty, fraud, deceit, or misrepresentation

• “fabricat[ed] the 2010 will of John Waters
• “caus[ed] that purported 2010 will to be signed with the purported signature of Waters”
• “caus[ed] Gloeckler and Rakalla to attest that they witnessed Waters sign the purported 2010 will
Rule 8.4(c)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

(d) engage in conduct that is prejudicial to the administration of justice.

(More) Allegations

- Represented to the court that the purported 2010 will of John Waters was genuine when he knew it was a forgery
- Presenting the purported 2010 will of John Waters to the court as genuine and provided testimony that the purported 2010 will was genuine, when he knew it was a forgery
- Fabricated the purported 2010 will of John Waters, causing that purported 2010 will to be signed with the purported signature of Waters
Rule 3.3(a)

(a) A lawyer shall not knowingly:

1. make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

2. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

3. offer evidence that the lawyer knows to be false.

If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. . . .

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(More) Allegations

Bercos counseled or assisted a client in conduct that the lawyer knows is criminal or fraudulent

- “assist[ed] Iverson in causing a tenant to sign a lease and collecting rent from a tenant at that property, despite the court’s October 11, 2012 order and Iverson's lack of authority”
Rule 1.2(d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

1. discuss the legal consequences of any proposed course of conduct with a client
2. counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and
3. counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.

(More) Allegations

[Bercos] knowingly failed to respond to a lawful demand for information from a disciplinary authority

• “fail[ed] to respond to the Administrator's July 14, 2015 document subpoena”
Rule 8.1
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
(a) knowingly make a false statement of material fact; or
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by these Rules or by law.

Consequence
• Placed on permanent retirement status in January 2017
In re Willard Francis Brestal
(Complaint 2/2016)

Allegation

[W]ithout notice to or approval from the firm's other partners, Brestal used the firm's credit card and general and payroll bank accounts to pay hundreds of thousands of dollars of his own personal obligations, including payments relating to Respondent's Florida condominium and country club fees.
Payments Included

• $279,137 to himself
• $227 for FL utility bill
• $250 for condo repair
• $2105 to pay (8) condo bills

In re Richard Peter Caro
(Complaint 7/2016)
Allegations

• Caro was admitted in NY in 1974, retired in 2010, re-activated in 2011
• While retired, Caro agreed to represent his landlord in 8 matters arising from Vini’s Pizza

Rule 5.5(a)

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
(More) Allegations

Caro handled legal matters in connection with an eviction claim and a sales tax matter in Illinois when he was not authorized to practice law in this State

– Correspondence with counsel
– Reviewing and analyzing information
– Performing legal research
– Drafting documents
– Advising Martinek as to how to proceed”

In re John Paul Carroll
In re Michelle Gonzalez
(Complaints 12/2015)
Allegation

- Carroll and Gonzalez agreed to represent Lazar on attempted murder *et al.* for $17,500
- Carroll and Gonzalez received $31,500 as a bond refund
- Carroll and Gonzalez decided to keep and split the extra $14,000

(More) Allegations

- Gonzalez failed to provide competent representation to Ellen Adkins and Rita Spain in relation to their efforts to transfer property located at 8350 S. LeClaire
  - Failed to properly transfer Spain's beneficial interest in the land trust to Atkins
  - Failed to advise her clients to use a trustee's deed necessary to transfer the property
- Made an agreement for and collected an unreasonable fee ($4,000) from Ellen Adkins for the real estate transaction relating to 8390 S. LeClaire
Rule 1.1

A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.5(a)

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer
(3) the fee customarily charged in the locality for similar legal services
(4) the amount involved and the results obtained
(5) the time limitations imposed by the client or by the circumstances
(6) the nature and length of the professional relationship with the client
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services
(8) whether the fee is fixed or contingent.
Respondent Gonzalez's advice to Atkins and Spain and her actions taken on their behalf was not competent, because if Respondent had contacted Chicago Title or done some research in the matter, she would have learned that the least expensive and most efficient way to accomplish her clients' objectives would have been to prepare and bill of sale in which Spain transferred her beneficial interest in the land trust to Atkins or to request that Chicago Title issue a trustee's deed.

... On November 2, 2013, Spain died. Upon Spain's death, Adkins was unable to sell the LeClaire property to pay Spain's outstanding bills, because Respondent Gonzalez had not obtained a trustee's deed for the LeClaire property or transferred Spain's beneficial interest in the land trust to Adkins.

(More) Allegations

• On December 29, 2014, Assistant Public Defendant David McMahon spoke to Respondent Carroll and told him that McMahon was McDonald's attorney and that Respondent Carroll and Gonzalez were not permitted to speak to McDonald
• On December 31, 2015, Respondent Carroll returned to the Department of Corrections and met with McDonald to discuss the charges that he and Murray were facing and to discuss a plea deal that had been offered to McDonald by the Office of the Cook County States Attorney
• At no time did Respondent Carroll obtain McMahon's consent to communicate with McDonald regarding the charges pending against McDonald and Murray
Rule 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
In re Dmitry Feofanov
(Complaints 2/2017)

Allegations

• Feofanov represented Krystek in a dispute with a Nissan dealer over a car purchase
• Krystek died
• Feofanov did not disclose the death to the Nissan dealer; instead, Feofanov filed suit and tried negotiating a settlement
Charges

- Misrepresentations to court in violation of Rule 3.3 that he was filing suit on behalf of Krystek and appearing for Krystek
- Misrepresentations in violation of Rule 4.1 by trying to negotiate settlement
- Fraud and misrepresentations in violation of Rule 8.4(c) including for above plus making unauthorized settlement demands

*In re Robert Alan Habib*
(Hearing Board 3/2016)
Findings – Mistake Not Incompetence

Habib’s failure to attend the prehearing conference was an error that led to default judgment being entered against McCauley and A Taste of Heaven. This was an inadvertent mistake that does not rise to the level of misconduct

- Habib also attempted to rectify his mistake by filing a motion to vacate the default and later appealing the Commission orders

No Liability

- We find the Administrator proved a violation of Rules 1.4(a) and 1.4(a)(3) with respect to [Habib]’s failure to give McCauley specific and timely information about the default judgment and the subsequent orders pertaining to damages and attorney fees.
  - Prior to September or October 2011, Habib gave McCauley general information, such as the case “was not going well” and “was found against us” but did not provide sufficiently specific information so that McCauley fully understood the status
  - Rules 1.4(a) and 1.4(a)(3) obligated Habib to give McCauley copies of the default judgment order and the orders setting forth damages and attorney fees at the time the orders were entered or, at the very least, to advise him of the substance of the orders including the amounts of damages and fees for which McCauley was potentially liable.
  - Although Habib claims he gave McCauley information verbally and occasionally provided him with documents, his testimony was vague and lacked any corroboration
  - Accordingly, we find [Habib] failed to keep McCauley reasonably informed about the status of his matter.
Rule 1.4

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules
(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished
(3) keep the client reasonably informed about the status of the matter
(4) promptly comply with reasonable requests for information; and consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

Consequence

The Hearing Board recommended Habib be censured
In re Scott Thomas Kamin
(Complaint 8/2016)

Allegations

- Sublet office space to other lawyers
- Collected rent from subtenants but did not pay landlord
- Accepted service of eviction suit and appeared in court for subtenants without their permission
Rule 8.4(c)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

(d) engage in conduct that is prejudicial to the administration of justice.

In re Bernhard Olson II
(Complaint 1/2017)
Allegations

• Olson represented Courtney in divorce
• Olson increased his rate (due to location of proceeding) without telling client
  – Also charged more than an agreed cap
• Olson employed Courtney to clean his house, and did not advise her to disclose this work in discovery responses

Rule 1.8(a)

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

2. the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and

3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.
In re Mark W. Rigazio
(Hearing Board 8/2016)

Misconduct

• Rigazio instructed book-keeper to falsify pay records to suggest that wages were non-taxable expense reimbursements

• Example: Paid employee $51K but reported $14K as expense reimbursement
Evading Tax Obligations

• Under-reporting wages
• Evading obligations to withhold and remit Social Security, Medicare, and income taxes and payment of employer’s share of taxes
• Enabling employees to underreport income
• Misrepresenting wage and non-wage expenses in his tax returns

Consequences

• Engaged in conduct involving fraud, deceit, or misrepresentation
• Received stayed 60-day suspension and one year probation
• Supreme Court increased the penalty to 1 year suspension (7 months stayed) and 18 months probation
In re Allen A. Lefkovitz
(Review Board 8/2016)

Facts

• Lefkowitz had high-volume tax appeal practice (1000+ active cases)
• Immediately paying clients after depositing checks
• No reconciliations – eight overdrafts
Misconduct and Consequences

- Rule 1.15(a) violation – admitted

- Rule 8.4(c) violation – contested and not proven

- Received one-year suspension, with seven months stayed for 18 months probation

Rule 1.15(a)

A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer’s office is situated, or elsewhere with the informed consent of the client or third person.

- For the purposes of this Rule, a client trust account means an IOLTA account . . . or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in paragraph (f).

- Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.
Rule 8.4(d)

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another
(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects
(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
(d) engage in conduct that is prejudicial to the administration of justice.

In re John Patrick Messina
(Review Board 9/2016)
Underlying Lawsuit

• Messina helped pursue 1989 federal lawsuit claiming competitors sold adulterated orange juice
  – Claim Messina had disclosed information improperly to media
  – Messina was removed from case and it settled

• During fight over sealing of record, Messina was accused of filing false charges
  – Intervened in case
  – Held in contempt for disclosing information to media

• Held in contempt, ordered to pay $150K
• Challenged order on appeal twice and filed bankruptcy, appealing denial of discharge of $150K sanction

• [Image]
Illinois Rule 3.1

“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”

Conclusions & Consequences

• Unreasonable to re-challenge order imposing sanction in civil litigation
• Entry of sanction order – not conclusive, but evidence
  – Hearing Board may take judicial notice
• No requirement to call accusers, or to have expert testify about what is reasonable

• Sanction – 60-day suspension, increased to six months by Supreme Court
**In re Stanley Anthony Walton**
(Complaint 12/23/2015)

**Allegations**

- Walton allowed his law license to go inactive, failed to complete CLE, and was removed from rolls
- Walton filed pleadings on behalf of himself and his brothers “all pro se” contesting actions their step-sister had taken in probating their parents’ wills
  - Told judge he was an attorney
  - Brothers never appeared in court or addressed judge
  - Certified he was attorney of record on proofs of service

- (Also filed other proceedings while not licensed)
Rule 5.5(a)

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

In re Courtney Olivia Wylie
(Complaint 2/2016)
Allegations

- Wylie was an associate at Wilson Elser
- Wylie missed a 2 PM telephonic status conference
- Wylie filed a declaration (falsely) saying an emergency hearing was set at 1 PM, and did not end until 2:45 PM
- Wylie fabricated documents to support (non-existent) emergency hearing, when a partner requested them
- Wylie denied allegations and fabricating documents to ARDC
- Reported by her own firm

Illinois Rule 8.3

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by the attorney-client privilege or by law or information gained by a lawyer or judge while participating in an approved lawyers' assistance program or an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred.

(d) A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before any body other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission.
Rule 8.4(c)

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another
(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects
(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
(d) engage in conduct that is prejudicial to the administration of justice.

Consequences

• Suspended six months on consent, effective February 2017
In re Rostyslav Saciuk
(Review Board 1/2016)

Misconduct

- Saciuk misappropriated $23K in personal injury settlements from two clients
Rule 1.15(c)

A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer.

An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term “advance payment retainer” to describe the retainer, and states the following:

1. the special purpose for the advance payment retainer and an explanation why it is advantageous to the client
2. that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer’s general account
3. the manner in which the retainer will be applied for services rendered and expenses incurred;
4. that any portion of the retainer that is not earned or required for expenses will be refunded to the client
5. that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer’s reasons for that condition.

Conclusions

• Saciuk violated Rules 1.15(c) and 8.4(c)

• Saciuk was suspended for one year
  – Hearing Board recommended 6 months
  – ARDC sought 18 months
  – Respondent sought probation or 30-day suspension
Conclusions

- Silberman transferred $460K held in escrow from real estate transactions to a company he owned
- Only $280K returned ($180K not returned)
- Did not appear at Hearing
- Disbarred
Rule 1.15(a)

A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer’s office is situated, or elsewhere with the informed consent of the client or third person.

• For the purposes of this Rule, a client trust account means an IOLTA account . . . or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in paragraph (f).

• Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

In re Mark Douglas Johnson
(Review Board 1/2016)
Summary of Facts

- Johnson represented Hanson in a criminal case (relating to sexual misconduct with a minor)
- Johnson helped Hanson enter a business owned by Wilson to remove scrap metal owned by Wilson
- Johnson told a deputy sheriff he had a court order allowing access to clean up the property

Rule 1.2(d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

1. discuss the legal consequences of any proposed course of conduct with a client
2. counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and
3. counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.
Conclusions

Johnson had violated Rules 1.2 and 8.4(c)

Johnson should receive a one-year suspension

(Johnson had a previous suspension for paying a court official to provide names of individuals charged with DUI)

In re Barbara Joean Revak
(Review Board 4/2016)
Facts

• Revak represented Davis on 40% contingency fee in lawsuit against fellow shareholders of corporation
• Davis won litigation, and defendants appealed
• During appeal, corporation sold real estate
  – Revak took 40% of profits from sale proceeds
• Case settled, and Revak received 40% of settlement

Review Board

• Found it appropriate for Revak to recover 40% of both sale proceeds and settlement
  – Key: Davis had been deprived of ownership of property

• Revak’s disbarred partner had negotiated fee deal, and received payment of sales proceeds
Rule 8.4(c)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

(d) engage in conduct that is prejudicial to the administration of justice.

In re Monica E. Ribbeck
(Review Board 4/2016)
Facts

• Ribbeck represented estate of passenger on Malaysia Air Flight 370
• Ribbeck filed a Rule 224 petition to learn identities of potential defendants
  – Named Boeing and Malaysia Air as defendants
• ARDC filed complaint for filing frivolous Rule 224 petition – knew of 2 defendants, and really wanted publicity from filings
  – Violation of Rules 3.1 and 8.4(d)

Rule 3.1

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law.

A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
Rule 8.4(d)

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another
(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects
(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
(d) engage in conduct that is prejudicial to the administration of justice.

Resolution of Charges

• Rule 224 petition not unethical, because appellate courts split whether Rule 224 petition is proper when one defendant is known
  – That trial court had dismissed two previous Rule 224 petitions did not prove filing was frivolous
  – Because Ribbeck had objectively reasonable basis for filing petition, her subjective motive is irrelevant
Allegations

• Lewis continued to obtain insurance as a “domestic partner” through 2014 despite end of relationship with Masterson in 2006
• Disciplinary charges arise from insurance fraud and submitting false insurance claims
Rule 8.4(d)

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

(d) engage in conduct that is prejudicial to the administration of justice.

In re Stanley E. Niew
In re Anthony Allegra
(Complaint 7/8/2016)
Allegations

• Niew’s wife (and law partner) was disbarred for mishandling $2.3M in client funds
• Niew’s wife met with clients and deposited funds for legal fees into firm’s accounts
• Allegra (new lawyer, compared with Niew’s c.40 years of practice) participated in client meetings with Niew’s wife and assisted clients in light of those meetings

Rule 5.2

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.
Illinois Rule 764(d)

Upon entry of the final order of discipline, the disciplined attorney shall not maintain a presence or occupy an office where the practice of law is conducted.

The disciplined attorney shall take such action necessary to cause the removal of any indicia of the disciplined attorney as lawyer, counsellor at law, legal assistant, legal clerk, or similar title.

In re Barbara Ann Susman
(Hearing Board 9/2016)
**Misconduct**

- Susman failed to timely file appeal in immigration matter
- Failed to inform client of late filing of appeal and of dismissal of matter
- Misrepresented misconduct during ARDC investigation

**Facts in Dispute**

- Client struggled to pay Susman and for filing fees
- Susman FedEx-ed notice of appeal and thought it was received timely
- Susman advised client to leave country, obtain temporary visa, and re-enter country
  - Susman thought client would lose appeal, and that it contained false statements
- Appeal was later dismissed as untimely
Rule from *Matter of Lozada* (BIA 1988)

8 CFR 208.4: Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

Consequences

- Client did not appear for deposition and was barred from testifying
- Case was dismissed on failure to prove misconduct
Thank You

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Representing Non-U.S. Citizens

Cindy Galway Buys,

Professor, SIU School of Law
About The Faculty

PROFESSOR CINDY GALWAY BUYS has taught a variety of International Law-related courses as well as Immigration Law and Constitutional Law for the past 15 years. In 2008, she was a Fulbright Senior Specialist in Vilnius, Lithuania and she was a Visiting Professor at Bangor University in Wales in 2015.

Professor Buys has held leadership positions in the Illinois State Bar Association, the American Association of Law Schools, the American Bar Association, and the American Society of International Law. She is a member of the Illinois Human Trafficking Task Force and the Illinois Advisory Commission to the U.S. Commission on Civil Rights. She also serves as a panelist for Chapter 19 disputes under NAFTA.

Prior to joining the SIU School of Law faculty in 2001, Professor Buys spent ten years in public and private practice in Washington, D.C. Professor Buys has published a wide range of book chapters and articles on immigration and refugee law, U.S. foreign relations law, U.S. constitutional law, treaty law, international arbitration, economic sanctions, and related topics.

Professor Buys earned an LLM with distinction from Georgetown University Law Center. She obtained both a J.D. and a Master’s in International Relations from Syracuse University and has a Bachelor’s in Political Science from the State University of New York at Albany.
Consular Notification

The United States is a party to the Vienna Convention on Consular Relations (VCCR). Article 36 of the VCCR requires the arresting or detaining authority to provide consular notification and access to foreign defendants as follows:

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

New Illinois Public Act 099-0190 seeks to better implement this duty in Illinois by specifying who is responsible for giving the notice and how quickly it must be given when a foreign defendant is arrested and detained.

How quickly must notice be given?

Previously, international and domestic courts and the U.S. State Department have come to different conclusions as to the meaning of the phrase “without delay”.

The International Court of Justice held in *Avena v. United States* (2004) that notice to the consulate within five calendar days (three business days) of the arrest was sufficient under the facts of that case, but that the United States breached its duty to notify the foreign defendant of his consular notification rights sooner than that.

Similarly, in *Bell v. Virginia*, 563 S.E.2d 695, 706 (Va. 2002), the court held that notification to the Jamaican consulate within three days was sufficient.

In *United States v. Santos*, 235 F.3d 1105 (8th Cir. 2000), the Eighth Circuit Court of Appeals held that a four-day delay in providing notice violated the VCCR.

In *Miranda v. United States*, 65 F. Supp. 1002, 1005 (D. Minn. 1999), a Minnesota Court held that notification within two days was not sufficient.

The United States State Department recommends that notice be given when the foreign national is booked for detention and, in any event, within 24 to 72 hours of arrest or detention.

The new Illinois law settles the notice issue for Illinois by providing that notice must be given within 48 hours of booking or detention of the foreign defendant. The officer in charge of the detention facility is tasked with this responsibility.
Why should a foreign national be in contact with his or her consulate? What kind of assistance can a consulate provide?

Article 5 of the VCCR defines the basic duties of the consulate to include:

- protecting and facilitating the interests of a state and its nationals in the territory of another state, including:
- Safeguarding the interests of its nationals, and
- representing or arranging appropriate representation for nationals before the tribunals and other authorities

Detained noncitizens usually:

- Are not native English speakers
- Are unfamiliar with U.S. legal system
- Are far from family and friends
- Are suddenly without means of support
- And may be hindered by other cultural barriers

Types of consular assistance provided in past cases:

- communicating with family and friends
- obtaining official records in a foreign country such as birth, marriage, or death certificates
- obtaining other evidence relevant to the case such as medical records, evidence of residence, etc.
- arranging for legal representation
- obtaining interpreters or translators
- explaining the U.S. legal process in a way that may be more understandable to a person from another legal system
What remedies may be available if the right of consular notification and access is violated?

The International Court of Justice held in *Avena v. United States* (2004) that Article 36 of the VCCR requires that “full effect” be given to consular notification rights and ordered the United States to review and reconsider the convictions and sentences of the foreign nationals who had not been given consular notification.

The U.S. Supreme Court held that suppression of evidence in not an appropriate remedy for a violation of consular notification rights in *Sanchez-Llamas v. Oregon* 548 U.S. 331 (2006), but suggested that lack of consular notification might be relevant to voluntariness of a plea or effectiveness of counsel.

In *Jogi v. Voges*, 480 F.3d 822, 835 (7th Cir. 2007), the Seventh Circuit held that a national of India who was never informed of his consular notification rights could bring an action under 42 U.S.C. § 1983 for damages against the responsible law enforcement authorities.

In *Osagiede v. United States*, 543 F.3d 399, 413 (7th Cir. 2008), the Seventh Circuit remanded the case of a Nigerian national who was not given consular notification on the basis of ineffectiveness of counsel to see if defendant could make credible assertion that consular notification would have made a difference.

Likewise, in *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703 (2002), the court found that the failure of counsel to inform the defendant of his consular notification and access rights constituted a violation of the defendant’s Sixth Amendment right to effective assistance of counsel.

In *United States v. De La Pava*, 268 F.3d 157 (2d Cir. 2001), the Second Circuit held that dismissal of an indictment in not an appropriate remedy.

The new Illinois law states that if the court ascertains that a foreign defendant has not received consular notification and access at the time of the defendant’s first appearance in court, the court shall grant any reasonable request for continuance to allow contact with the consulate.
Immigration Consequences of a Guilty Plea


725 ILCS 5/113-8
Illinois adopts new law to better implement consular notification and access

BY CINDY GALWAY BUYS

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

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

The International and Immigration Law Section Council of the ISBA decided to draft a bill to improve consular notification, both to reduce further litigation and to increase compliance with the consular notification for foreigners at home and Americans abroad. In 2010, the Section Council drafted the initial legislation and a background briefing paper and worked to educate other ISBA section councils and committees to build support for the proposal. After receiving sufficient support from the various committees and section councils, the proposal was presented to the ISBA General Assembly, which voted in favor of the proposed legislation. The ISBA then utilized its legislative staff, most notably Jim Covington, to find sponsors for the bill and to introduce it into the Illinois General Assembly. Sen. Kwame Raoul (D-Chicago) kindly agreed to sponsor the bill. It was then introduced into the Illinois General Assembly in 2011 as SB 1906. Representatives from the ISBA and the Chicago consular corps testified in favor of the bill at a hearing before the Criminal Justice Committee in the spring of 2011. Unfortunately, the legislative session focused on other priorities and time ran out to get it passed.

Law enforcement, public defenders, and judges continued to struggle with implementation of the duty of consular notification. For example, in 2014, the Seventh Circuit Court of Appeals in *Mordi v. Zeigler* had to decide whether the failure of Illinois State Police Officers to provide consular notification and access to a foreign defendant despite having knowledge that he was Nigerian should result in damages. The defendant learned of his right to consular notification and access approximately a year after he was incarcerated. He filed an action for damages under 42 U.S.C. § 1983 against several law enforcement officers involved in his arrest and detention. The officers asserted they were entitled to qualified immunity, which “protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable
person would have known. When the case reached the Seventh Circuit Court of Appeals, the Court had to decide who was required to provide that notice and when.

Because the case law varies regarding what constitutes notification “without delay,” the Court held that the law was not clearly established such that the officers should have known they had a duty to provide consular notification and access during the few hours each had contact with Mordi. The Mordi decision made clear there was still a need to clarify who is responsible for providing consular notification and access and when. Accordingly, the ISBA renewed its legislative efforts in this regard.

Once again, Sen. Kwame Raoul agreed to sponsor the bill in the Illinois Senate, but it was first introduced into the Illinois House under the sponsorship of Rep. Scott Drury (D-Highwood). The House passed the bill in March of this year and it went over to the Senate. Interestingly, Sen. Michael Connelly (R-Wheaton) spoke passionately in favor of the bill in the Senate Criminal Law Committee because his brother-in-law, Martin O’Connor, had recently been arrested and detained for eight days in Turkey for allegedly attempting to smuggle an artifact out of that country.

In November 2014, Mr. O’Connor had purchased a bombardier’s sword at Istanbul’s Grand Bazaar as a souvenir while on vacation. He was stopped at the airport and placed under arrest because a museum archaelogist mistakenly believed the sword to be protected historical property. Mr. O’Connor was taken to jail and was not given consular notice and access to the U.S. consulate in Turkey. His wife returned to the United States and was able to obtain legal assistance for him. Eventually the Turkish authorities were convinced of the mistake and dropped the charges. Had that effort not been successful, Mr. O’Connor would have remained in a Turkish jail for up to six months awaiting trial.

Mr. Connelly’s support and understanding of the importance of consular assistance helped the bill to pass out of the Senate favorably in May. The bill then went to Governor Rauner, who signed it into law on July 30, 2015. The new law, now known as Public Act 099-0190, will take effect on January 1, 2016.

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

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

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

This new law will ensure that notice is given in a timely manner and at a stage where consular assistance could make a difference by defining the requirement to provide consular notice “without delay” to mean “within 48 hours of booking or detention.” It also will reduce litigation regarding whether the notice was given “without delay.” Further, the law clarifies which law enforcement officer is responsible for giving the notice to eliminate confusion in this regard. Finally, having judges check to ensure that notice is given will not only increase compliance, but will preserve a record of compliance for appellate or post-conviction proceedings.

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

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

Public Act 099-0190
HB1337 Enrolled LRB099 07209 RLC 27304 b

AN ACT concerning criminal law.

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

Section 5. The Code of Criminal Procedure of 1963 is amended by changing Sections 103-1 and 109-1 as follows:

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

Sec. 103-1. Rights on arrest.

(a) After an arrest on a warrant the person making the arrest shall inform the person arrested that a warrant has been issued for his arrest and the nature of the offense specified in the warrant.

(b) After an arrest without a warrant
the person making the arrest shall inform the person arrested of the nature of the offense on which the arrest is based.

(b-5) This subsection is intended to implement and be interpreted consistently with the Vienna Convention on Consular Relations, to which the United States is a party. Article 36 of that Convention guarantees that when foreign nationals are arrested or detained, they must be advised of their right to have their consular officials notified, and if an individual chooses to exercise that right, a law enforcement official is required to notify the consulate. It does not create any new substantive State right or remedy.

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

(2) If the foreign national requests consular notification or the notification is mandatory by law, the law enforcement official in charge of the custodial facility shall ensure the notice is given to the appropriate official at the consulate of the foreign national in accordance with the U.S. Department of State Instructions for Consular Notification and Access.

(3) The law enforcement official in charge of the custodial facility where a foreign national is located shall ensure that the foreign national is allowed to communicate with, correspond with, and be visited by, a consular officer of his or her country.

(c) No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance.

(d) “Strip search” means having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of such person.

(e) All strip searches conducted under this Section shall be performed by persons of the same sex as the arrested person and on premises where the search cannot be observed by persons not physically conducting the search.

(f) Every peace officer or employee of a police department conducting a strip search shall:

(1) Obtain the written permission of the police commander or an agent thereof designated for the purposes of authorizing a strip search in accordance with this Section.

(2) Prepare a report of the strip search. The report shall include the written authorization required by paragraph (1) of this subsection (f), the name of the person subjected to the search, the names of the persons conducting the search, and the time, date and place of the search. A copy of the report shall be provided to the person subject to the search.

(g) No search of any body cavity other than the mouth shall be conducted without a duly executed search warrant; any warrant authorizing a body cavity search shall specify that the search must be performed under sanitary conditions and conducted either by or under the supervision of a physician licensed to practice medicine in all of its branches in this State.

(h) Any peace officer or employee who knowingly or intentionally fails to comply with any provision of this Section, except subsection (b-5) of this Section, is guilty of official misconduct as provided in Section 103-8; provided however, that nothing contained in this Section shall preclude prosecution of a peace officer or employee under another section of this Code.

(i) Nothing in this Section shall be construed as limiting any statutory or common law rights of any person for purposes of any civil action or injunctive relief.

(j) The provisions of subsections (c) through (h) of this Section shall not apply when the person is taken into custody by or remanded to the sheriff
or correctional institution pursuant to a court order.
(Source: P.A. 81-1509.)

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

Sec. 109-1. Person arrested.
(a) A person arrested with or without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, except when such county is a participant in a regional jail authority, in which event such person may be taken to the nearest and most accessible judge, irrespective of the county where such judge presides, and a charge shall be filed. Whenever a person arrested either with or without a warrant is required to be taken before a judge, a charge may be filed against such person by way of a two-way closed circuit television system, except that a hearing to deny bail to the defendant may not be conducted by way of closed circuit television.

(b) The judge shall:
(1) Inform the defendant of the charge against him and shall provide him with a copy of the charge;
(2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code;
(3) Schedule a preliminary hearing in appropriate cases;
(4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code; and
(5) Order the confiscation of the person’s passport or impose travel restrictions on a defendant arrested for first degree murder or other violent crime as defined in Section 3 of the Rights of Crime Victims and Witnesses Act, if the judge determines, based on the factors in Section 110-5 of this Code, that this will reasonably ensure assurance of the appearance of the defendant and compliance by the defendant with all conditions of release.
(c) The court may issue an order of protection in accordance with the provisions of Article 112A of this Code.
(d) At the initial appearance of a defendant in any criminal proceeding, the court must advise the defendant in open court that any foreign national who is arrested or detained has the right to have notice of the arrest or detention given to his or her country’s consular representatives and the right to communicate with those consular representatives if the notice has not already been provided. The court must make a written record of so advising the defendant.
(e) If consular notification is not provided to a defendant before his or her first appearance in court, the court shall grant any reasonable request for a continuance of the proceedings to allow contact with the defendant’s consulate. Any delay caused by the granting of the request by a defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of Section 103-5 of this Code and on the day of the expiration of delay the period shall continue at the point at which it was suspended.
(Source: P.A. 97-813, eff. 7-13-12; 98-143, eff. 1-1-14; revised 12-10-14.)

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

2. While the Vienna Convention requires consular notice only if requested by the foreign national, many of the bilateral treaties require consular notice of all arrests or detentions regardless of the wishes of the foreign defendant. 3. 552 U.S. 491 (2008).
6. Id. All of the defendants except Zeigler, Chance and Healey were dismissed from the action.
8. Id. at 1165.
9. Id. The Court suggested in dicta that had Mordi sued the booking officers, the answer might have been different.
Memo

BY PATRICK M. KINNALLY AND CINDY G. BUYS

TO: ISBA Committees and Section Councils

FROM: International and Immigration Law Section Council
Patrick M. Kinnally, Chair
Cindy G. Buys, Legislative Liaison

DATE: August 15, 2016
RE: 725 ILCS 5/113-8

The International and Immigration Law Section Council has approved and urges the Illinois State Bar Association to support an amendment to 725 ILCS 5/113-8 relating to guilty pleas to improve compliance with judicial notification of the immigration consequences of guilty pleas.

Text of the proposed amendment (new language is underlined)

Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:

“If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States.”

Any plea accepted by the court without the benefit of this advisement shall be a nullity and shall have no consequences.

Background

In January 2004, the Illinois General Assembly passed an amendment to the Illinois Criminal Statute which says:

Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:

“If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States.”

725 ILCS 5/113-8 (emphasis added).

Prior to that time, persons who were not U.S. citizens sometimes accepted guilty pleas without understanding that they could face removal from the United States in addition to the agreed upon criminal sanctions. The defendant was then unpleasantly surprised when, after having completed his criminal sentence, he was taken into immigration custody and placed in deportation proceedings. Many defendants claimed they would not have pled guilty if they had known it would mean almost certain deportation from the country, separating them from their families, jobs and homes. For some time, members of the trial bar pushed for this legislation (Moran and Kinnally, “Aliens, Guilty Pleas and the Risk of Deportation: Time for Legislative Action,” Illinois Bar Journal (2001) Vol. 89, pp.194-198). As a result of the amendment to 725 ILCS 5/113-8, this warning is now posted on many courtroom walls or in hallways in circuit courts around the state.

Interpretation of 725 ILCS 5/113-8 by Illinois Courts

Despite the mandatory language of the statute, some trial judges are not giving this required admonition. Some judges may believe the posting of the notice of this advisement in courtroom walls or in courtrooms is sufficient. Other judges may be relying on written agreements in court orders signed by the accused. But this is not what the law requires. Quite plainly, it directs:

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“the court shall give the following advisement to the defendant in open court.”

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That language denotes it must be given, and insists, much like the waiver of a
jury trial, it be announced in open court when the accused is present. See People v. Thornton, (2nd Dist. 2006) 363 Ill.App.3d 481.

Moreover, the statute says the court “shall” give the admonishment as to a “misdemeanor or felony offense” in “open court”. Since this statutory requirement is mandatory, a cogent argument can be made that such warning must be given orally by the trial court in open court. It does not suffice merely to have placards attached to courtroom walls which state such a caveat.

Lower courts in Illinois split on the issue of whether the failure to provide the admonishment would result in vacation of a guilty plea. One division of the First District Appellate Court held the trial court’s failure to give the admonishment did not permit the defendant to vacate his guilty plea. See People v. Bilelgene (2008) 381 Ill.App.3d 292. But in People v. Del Villar (2008) 383 Ill.App.3d 80, another division vacated a plea where the admonishment was not announced in open court.

The Second District joined the Bilelgene majority opinion in concluding the language of the statute, even though it says the trial court “shall” give the admonishment, does not mean a trial judge has to do that. People v. Leon (2009) 387 Ill. App.3d 1035 (Ill.App. 2d Dist.). This ruling ignores the definite requirement of a statute in the guise of what the court deems as statutory interpretation. The Leon court found that even though the legislature said a trial judge shall give the admonition, the word “shall” does not mean “shall.” And, because it did not, the imperative of giving the admonition was not mandatory but only directory.

To get to this result, the Leon court noted there was no statement in the legislation which indicated that any consequence would ensue if the trial judge failed to obey the statute. (People v. Robinson (2005) 217 Ill.43). It is true, as the Leon court observed, that whether a statute is mandatory or directory is a question of legislative intent. However, Leon fails to focus on what consequences flow from the failure to give the admonition. It seems quite obvious that the General Assembly was concerned that unknowing defendants, not judges, prosecutors, or defense attorneys, were entering into plea arguments – contracts with the government – that were not undertaken with full knowledge of the consequences of the deal they were making. See People v. Reed (1997) 177 Ill.2d 389; People v. Youngbev (1980) 82 Ill.2d 556 The Leon tribunal ignored the fact that plea agreements are contracts that require the parties who enter into them must do so with full knowledge of all the terms of such a pact.

Instead, the Leon court focused on the “type of plea” which dictates whether the admonition must be given. Apparently, the variety of a plea only applies to people who are immigrants, whether documented or otherwise. The court observed the statute would also apply to every citizen, which the legislature could never have intended. This is odd logic for two reasons: although there may be different kinds of plea agreements (Alford, etc.) such contracts are not generally classified on citizenship status (or lack thereof). The statute does not classify whether a person is a permanent resident alien, is undocumented, or is a citizen. It applies to all defendants. Next, the legislature did say trial courts need to give the admonishment to every defendant in plain and concise terms and in “open court”. The legislature did not say you only give such a warning to non-citizens in some other venue such as chambers.

In reversing the Appellate Court in Del Villar, the Supreme Court effectively has rendered the Illinois guilty plea admonishment statute toothless. (People v. Del Villar, 235 Ill. 2d 507 (2009) (“Del Villar”).

Leobardo Del Villar, at a circuit court hearing on November 2, 2005, pleaded guilty to aggravated unlawful use of a weapon by a felon. Before doing so, the trial judge asked him whether he was entering into the plea agreement in return for a sentence recommendation, freely and voluntarily. He answered affirmatively. The trial court next asked, “Are you a citizen of the United States?” and Del Villar said, “Yes.” Sentencing was deferred until the end of November, when a term of four years imprisonment was to be imposed.

Two weeks later, Del Villar asked the trial court to vacate his plea stating he was a legal permanent resident alien, not a United States citizen, and the trial court failed to admonish him consistent with 725 ILCS 5/113-8. The trial court refused the request because Del Villar had lied to the court in November about his citizenship status. The Appellate Court reversed, stating the trial court was required by the statute to warn Del Villar based on the statute’s plain and mandatory language. The Supreme Court disagreed, and reinstated Del Villar’s plea based on the guilty plea he sought to withdraw in the trial court.

The plain language of the statute says, “The trial court shall give the following admonishment to the defendant in open court”. This would seem to be a straightforward command that a lay person reading the statute would understand. However, in a bifurcated analysis predicated on a thirty-year-old California Supreme Court opinion (Morris v. County of Marin, (1977) 18 Cal. 3d 901, 908) (Marin), the Illinois Supreme Court said the admonition statute posed two questions: (a) whether the statute is mandatory or permissive; and (b) whether the statute is mandatory or directory. (see, e.g., People v. Robinson (2005) 217 Ill. 2d 43). Even though the initial inquiry may find a statute to incorporate an obligatory duty (i.e., “the trial court shall give the admonishment”), according to the Supreme Court, it is the resolution of the second question that determines whether a statute is truly mandatory. Thus, if the statute does not contain a provision which dictates a particular consequence for noncompliance by the governmental actor, it is directory in nature. The upshot being, in Del Villar’s situation, there is no consequence for the trial court’s failure to admonish him.

This interpretation of a legislative decree is remiss for various reasons. It relies on People v. Huante (1991) 143 Ill.2d 61, for the proposition that immigration consequences relating to a guilty plea and subsequent conviction are collateral to that process. Huante did not involve a legislative decree. Rather, Huante involved a claim of ineffective assistance of counsel under the Sixth Amendment due to the attorney’s failure to properly advise his client of the immigration consequences regarding entering a plea consistent. The admonishment statute is not an interaction between a client and a lawyer: it is a
governmental duty, the work of a trial judge, which has been created by the legislature.

In addition, the issue in Del Villar is one of procedural default: namely, the trial court’s failure to do what that statute requires. Indeed, the trial court asked Del Villar if he was a United States citizen. Later, when the trial court learned Del Villar was a non-citizen, he refused to admonish him because of his prior prevarication. The fact remains, however, he is still a non-citizen and the consequences which flow from that status are the ones the statute sought to address at the time the plea was entered, whether or not he lied about his immigration status.

Understandably, the trial court was concerned, as it should be, that Del Villar lied to the court. Yet, this does not diminish the court’s responsibility to comply with the statute, and ensure the plea Del Villar was entering was knowing and voluntary.

Whether one agrees with the trial court’s reliance on Marin, a decision of the California Supreme Court, is troubling. Procedurally, it is very doubtful that members of our Illinois General Assembly were reading California jurisprudence as to how the statutes they enact should be interpreted at the time the admonition statute was drafted. Also, the court’s mandatory/directory analysis in People v. Robinson postdates the admonition statute’s effective date.

On substantive level, as Justice Freeman observed in his concurring opinion in Del Villar, the majority opinion’s two-part test for determining when a statute is mandatory is confusing to say the least. Although the Marin court acknowledged the interpretive dichotomy of mandatory/ permissive and mandatory/directory, it rejected its application to the facts of the case before it. Marin had nothing to do with admonishing defendants in Illinois trial courts or California tribunals.

Whether one agrees with the requirement of advising any defendant, citizen or otherwise, of the consequences relating to a plea of guilty is not the issue, but the law. 725 ILCS 5/113-8 is not a Supreme Court Rule, but a law enacted by the Illinois legislature. Where the purpose of such legislation is to ensure that a defendant “knowingly and voluntarily” makes an agreement (i.e., guilty plea), then the analysis cannot proceed based on statutory interpretation alone. The statute’s purpose, as it states, is that a trial judge is to advise the defendant of the potential consequences a conviction may create with respect to “deportation, exclusion from the United States or denial of naturalization under the laws of the United States.” This is not a passive role, but one that ensures a guilty plea is knowing, voluntary and informed. It cannot be collateral to a conviction when it is the judge’s job to ensure the plea is knowing and voluntary and the admonition is the means to that end. The consequences of not complying with the statute must be the focus, and for non-citizens that consequence may be banishment to a country they never knew.

The purpose of the proposal is to make plain what the General Assembly stated over a decade ago, i.e., what 725 ILCS 5/113-8 means. The consequence of failing to give admonishment by a trial judge should denote the plea is a nullity; alternatively, it should accord the defendant the right to withdraw the guilty plea. The defendant would be placed in the same position as before the guilty plea.

Accordingly, the International and Immigration Law Section Council requests that the ISBA support an amendment to 725 ILCS 5/113-8 to provide the specific consequence of nullification of a guilty plea entered without the benefit of a judicial admonishment regarding potential immigration consequences to ensure that this admonishment is considered mandatory by the Illinois courts. ■

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Patrick Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat, currently 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 pkinally@kkklaw.com.

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How Much to Advise: What are the Requirements of *Padilla v. Kentucky*

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Note: This Advisory on Padilla v. Kentucky discusses in detail the Court’s reasoning and its requirements for defendants, and includes a discussion of the Court’s language regarding “clear versus unclear” consequences. For a shorter, practical Advisory on how to approach the task of representation under Padilla, see DIP, “Steps to Advising a Noncitizen Defendant under Padilla v. Kentucky.” For an analysis of all aspects of the case and a detailed list of resources for criminal defenders, see DIP, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky.” These Advisories can be found at the Defending Immigrants Partnership website, www.defendingimmigrants.org.

In Padilla v. Kentucky the Supreme Court held that because immigration penalties are inextricably
enmeshed with the outcome of criminal proceedings, and because of the importance and potential severity of immigration consequences, criminal defense counsel have a duty under the Sixth Amendment to address the immigration consequences facing a noncitizen defendant.3

The reactions to this decision among defenders have ranged from exultation to panic. Many defenders want to know specifically what they are required to do in order to provide effective counsel. Some defenders who are not experienced in this area fear that advising on immigration consequences will be an overwhelming burden in an already complex job. Some are interpreting the Court’s discussion on “clear” versus “unclear” consequences as a severe limit on the steps defenders need to take to provide effective counsel to noncitizens. Others want to know if merely consulting a chart will be sufficient.

This Advisory will discuss the standards set out by the Court in Padilla, as well as the steps involved in representing a noncitizen defendant. In addition, this Advisory will provide some key information about the extensive resources — many of them free or low cost - that are available to assist defenders to represent noncitizens. Immigration representation in a criminal case is challenging, but doable. Many

1 This advisory was authored for the Defending Immigrants Partnership by Katherine Brady and Angie Junck of the Immigrant Legal Resource Center, in collaboration with the Immigrant Defense Project, the National Immigration Project of the National Lawyers Guild, the Washington Defenders Association, Rebecca Turner and Norton Tooby.


small and large defender offices have been providing competent advice for many years, assisted by print materials, trainings, and expert consultation on individual cases.

To give a preliminary answer to the basic question, according to Padilla and the published professional standards that it references, to adequately represent a noncitizen defendant regarding immigration consequences in each case counsel must determine the immigration status and criminal history of the defendant. Based on this information, counsel must investigate the specific immigration consequences that the proposed plea would have on the particular individual. In some cases this will be a quick process, for example when the client, after receiving some key warnings, states that he or she cares only about the criminal penalty. Where counsel undertakes the immigration analysis, in some cases counsel will be able to state the immigration consequences with some certainty, while in others counsel may need to advise that there is a risk that the plea will have a particular immigration consequence but that the law is not clear. If immigration consequences are a priority to the defendant, counsel will conduct the defense with this in mind. This process is required not just at plea, but in other key points in the defense such as before going to trial, conducting a delinquency or sentencing hearing, accepting diversion, etc. See more information at Part III.

I. What is the Scope of Counsel’s Duty under Padilla?

Padilla provides several specific guidelines for defense practice.

Silence on the subject constitutes ineffective assistance of counsel. The Court held that immigration consequences of a conviction are included within the ambit of the Sixth Amendment: right to counsel. Not only incorrect advice, but failure to provide advice is ineffective assistance of counsel. Padilla v. Kentucky, slip opinion at * 8-9, 13.

Published standards of practice for representing noncitizen defendants are guides for determining counsel’s duty to advise. The Court then turned to standards for determining what constitutes effective assistance of counsel. Citing the familiar test in Strickland, the Court in Padilla stated that the first step in an ineffective assistance of counsel inquiry is to determine whether counsel’s representation “fell below an objective standard of reasonableness,” and the second step is to ascertain whether there was prejudice. Id. at *9. Regarding the first step, the Court said:
The first prong -- constitutional deficiency -- is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." We long have recognized that "prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." Although they are "only guides," and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

Ibid, citations omitted.

The Court cited among such standards the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999). See further discussion in Part II, infra.

The duty encompasses both avoiding becoming removable and preserving eligibility to apply for relief from removal. Noncitizen defendants wish to avoid becoming deportable (removable). In addition, a noncitizen defendant who is removable, whether because of a deportable conviction, simple lack of immigration status, or other factor, wishes to maintain eligibility to apply for status or relief from removal. Both issues are included within counsel's duty.

We too have previously recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." St. Cyr, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." St. Cyr, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347. We expected that counsel who were unaware of the discretionary relief measures would "[f]ollow the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. Ibid., n. 50.

Padilla slip opinion at * 10-11.

Defense counsel's duty is not just to advise, but to defend against adverse immigration consequences. Prosecutors also should take immigration consequences into account in plea bargaining. "Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." Id. at * 16.

Justice Alito's concurrence suggests a different standard, but this was not signed by any of the five justices in the majority. In his minority concurrence with Justice Roberts, which none of the five Justices of the majority signed, Judge Alito stated that he agreed in the result in this case but disagreed with the requirement to advise that the court imposed upon defense counsel. He pointed out that many basic immigration questions are complex (for example, whether the defendant is a citizen or not), and also posited several complex immigration situations in which the law was both unsettled and complicated. Concurrence by Justice Alito, slip opinion. at * 4-8 (concurrence). He asserted that the Court should have found the proper standard of duty to be that "when a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject." Id. at * 14.

II. The Standard for Determining Competent Immigration-Related Advice under Padilla, and Why a Bifurcated "Clear vs. Unclear" Strategy is Incorrect

In the initial attempts to determine the scope of immigration-related advice required to be effective under Padilla, some criminal defense counsel have singled out the Court's use of the "clear" vs. "unclear" language. In Padilla the Court noted that due to the complexity of immigration law, the analysis may not always produce a clear answer.
There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla slip opinion at * 11-12.

In footnote 10 the Court stated, "As Justice Alito explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice."

Based on this language, some criminal defense counsel have asked if they may obtain a list of offenses that carry "clear" immigration consequences, with the idea that they will warn a defendant specifically about a plea to these offenses, while just giving a generalized warning about offenses that carry "unclear" immigration consequences. While this might be a convenient characterization of Padilla, it is not a correct interpretation, and is inconsistent with the rest of the opinion, the published professional standards and practice advisories cited by the Court, and the reality of the factors that inevitably must be considered in an immigration analysis. This approach is akin to saying that a criminal defender can determine the outcome of a case by simply looking at the initial charging document.

In reality, to determine whether the immigration consequences threatening a particular defendant are clear or unclear, counsel must perform an actual immigration analysis.

First, Padilla must be understood in the context of how a conviction causes a particular individual to suffer adverse immigration consequences, which may vary depending on immigration status and prospects, criminal history, and other factors. While the immigration consequences of some offenses can be clearly characterized for - for example, unlawful possession of a firearm comes within the firearms deportation ground - this characterization alone is not enough to give competent advice to a defendant about the consequences of a plea. A correct analysis of the actual immigration consequences of a plea depends upon numerous factors beyond whether a particular offense clearly comes within a ground of deportation. Three of these factors are:

- Immigration Status. The immigration status of the defendant will affect the consequence of a particular plea. For example, a conviction such as unlawful possession of a firearm will cause a lawful permanent resident to become deportable, but will have no consequences for many undocumented defendants. Conviction of a different offense might be harmful to an undocumented person, but not make a permanent resident deportable.

- Criminal History. Analysis of immigration consequences of a plea will vary depending upon the prior criminal record of the individual. For example, if a defendant already is deportable, the defense goal may be to preserve eligibility for relief; or, if the defendant does not have any prior conviction of a crime involving moral turpitude, it is possible that he or she can take one such conviction without becoming inadmissible or deportable.

- Specific Structure of the Criminal Statute & Defendant's Plea Statement. Many criminal statutes are "divisible" in that they reach some offenses that carry an immigration consequence and others that do not. The immigration consequences of a plea can depend upon whether counsel can negotiate a plea to a portion of the statute that avoids/minimizes immigration consequences. This often requires careful crafting of the factual basis for the plea contained in defendant's plea statement.

These are not "unclear" situations. They are the normal issues that are present in the great majority of cases involving noncitizen defendants. Further, as the Court pointed out, competent representation on these issues goes beyond whether the plea will cause a noncitizen to become deportable, to whether the plea will eliminate eligibility for relief from deportation ("removal"). Consulting a list for offenses with a "clear" immigration consequence cannot address these issues.
Second, Padilla should be understood in light of requirements in the professional standards referenced by the Court. For a more thorough discussion of these standards see the Defending Immigrants Partnership "Duty of Criminal Defense Counsel" Advisory, supra, posted at www.defendingimmigrants.org. In sum, these standards provide that defense counsel must ascertain every client's citizenship or immigration status at the initial interview. Counsel should advise the defendant of the full consequences of any plea or other disposition, including the certain or potential immigration consequences, and ensure that the client understands them. "[C]ounsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." Counsel should be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant."4

Third, consider what was deemed "clear" in Padilla. In Padilla the defense counsel had advised a permanent resident that a conviction for transporting marijuana would not make the defendant deportable under the controlled substance deportation ground. The Court stated that "[t]his is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." Id. at *12.

The controlled substance ground of deportation is similar in structure and ease of interpretation to most of the 52 conviction-based grounds of deportation and the grounds of inadmissibility. Of these, most are no more complex or difficult to decipher. Some are arguably more difficult to interpret and apply to state convictions, such as the crime involving moral turpitude grounds5 and the aggravated felony crime of violence ground.6 These grounds, however, are the subject of extensive discussion in practice aids and case law. Once defense counsel has researched the matter, counsel may inform the defendant whether, e.g., the offense clearly will be held a crime involving moral turpitude, or whether the law is unclear but the offense might be so held. Counsel must provide this advice in the context of an immigration analysis, which in this example would include what the impact would be if the offense were ruled to be a crime involving moral turpitude, both on deportability and eligibility for relief.

III. What Are the Steps Required to Advise Regarding Immigration Consequences?

Competent representation in light of immigration consequences involves several steps.

1. In each case counsel must determine the immigration status and criminal history of the defendant. This can be done using a questionnaire; samples are posted at www.defendingimmigrants.org.

2. Based on this information, counsel should investigate the specific immigration consequences that the proposed plea would have on the particular individual. As with many aspects of defense strategy, in some cases counsel will be able to advise that the plea is nearly certain to have a particular immigration consequence, while in other cases counsel can say that it carries a risk but that the law is not clear. See discussion below of resources to help in this analysis.

   This process must take place not only at plea, but in other key decisions such as before defendant goes to trial, enters a diversion or drug treatment program, handles a charge of violating the terms of probation or of a protection order, admits addiction, or conducts a sentencing or delinquency hearing. If an incarcerated defendant has an immigration hold or detainer, before obtaining release from criminal custody counsel should inform her/his client that DHS might detain him or her. Because


persons often are transferred multiple times and long distances in immigration custody, criminal custody may be preferable.

5a - 16
3. In some cases the defendant may have to choose whether to prioritize getting a good immigration result versus a lesser criminal penalty. Some immigrant defendants care only about getting the smallest period of incarceration. Other immigrant defendants would trade any concern in order to remain with their families. They would be willing to plead to a more serious offense, take additional jail time, or even go to trial and risk a significantly higher sentence, if it meant that they might be able to remain in the U.S. with loved ones. A defendant can only make this crucial decision if he or she understands the potential criminal and immigration penalties.

4. If the defendant states that immigration consequences are the highest or a high priority, counsel will conduct the defense with this in mind.

IV. Meeting Padilla's Challenge: Resources to Help Defenders Provide Competent Advice

A challenging question is how are criminal defenders - especially indigent defenders with limited budgets and time - going to be able to provide competent representation? This is a larger discussion that will be undertaken across the country in light of Padilla. These discussions should take account of existing resources, as well as how to create new ones. Keep in mind that many defense offices, including indigent defenders from small counties to statewide organizations, currently provide competent representation on immigration consequences.

There are "numerous practice guides" for criminal defense counsel assisting noncitizens. Id. at * 11; see also Appendix B "Resources for Criminal Defense Lawyers" in Defending Immigrants Partnership, "Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky" at www.defendingimmigrants.org. For example, see state-specific analyses of the immigration consequences of commonly charged offenses, manuals explaining immigration consequences, and other free resources written for criminal defenders, as well as information about obtaining hornbooks on the subject, at www.defendingimmigrants.org. Training materials including power points can be downloaded, and there is information about live and online trainings.

As important as print resources and training is the possibility of obtaining expert consultation on individual cases, which can save a lot of time and ensure a level of competence. Defender offices obtain expert advice under a range of different methods, so that not every attorney on staff needs to understand the immigration component. Offices may appoint a research attorney to devote part-time to becoming an in-house expert; may take advantage of free expert consultation, or else contract with non-profit or private experts to provide consultation on difficult cases; or may move for court funding for an immigration expert on a particular case. Private offices often require noncitizen clients to pay for immigration consultation as part of the defense work. See discussion of various immigrant service plan models in "Protocol for the Development of a Public Defender Immigrant Service Plan" at www.immigrantdefenseproject.org/w
Special Needs & Pooled Trusts & ABLE Tax Savings Accts.

Julia Mezher,
Assistant Vice-President & Trust Counsel, The Chicago Title Land Trust Co.

Scott Nixon,
Executive Director, Life’s Plan Inc.
About The Faculty

JULIA MEZHER is responsible for educating realtors, lenders and attorneys of the benefits of Land Trusts As Assistant Vice-President and Trust Counsel; advising attorneys regarding the structuring and drafting of new trust accounts, the administration of existing accounts and legal issues arising in land trust/real estate transactions; and developing partnerships with law firms to assist in their business and law practice. She is experienced in handling complex residential and commercial real estate transactions and commercial and residential property tax appeals.

Ms. Mezher is a graduate of the John Marshall Law School, where she served on the Board for the Trial Advocacy Honors Program as Barrister. While at John Marshall, she competed on four trial advocacy teams, reaching the quarterinals in 2010 and nationals in 2009. She has utilized her trial advocacy skills as a 7/11 for the Cook County State’s Attorney’s Office as an intern in the Felony Trial division. Upon graduating from John Marshall Law School, Ms. Mezher coached several trial teams. She also loves to spend time with her friends and family.

SCOTT NIXON has been the Executive Director of Life's Plan Inc. pooled trust services for over 10 years. Life's Plan is an Illinois 501 c 3 corporation that manages Pooled trusts (3rd party/OBRA D4C subaccounts) and individual trust management for people with disabilities.

Life's Plan Inc. can offer attorneys, families and individuals a way to protect a disabled person’s assets, whether private assets from an inheritance, or personal assets as a result of a personal injury settlement or medical malpractice in establishing either a pooled trust or managing an individual Special Needs Trust.

A Special Needs Trust will provide protection of a special needs person’s assets, but will also allow distributions in wide array of supplemental supports and services improving the overall quality of life of a beneficiary while insuring their public benefit programs are not lost.

Scott graduated from the University of Colorado with a bachelor’s degree in Psychology/Sociology. Scott worked for 4 years for Nesbitt Burns trading group at the Chicago Board of Trade, a BMO Harris backed group in the futures/options market 30 year treasury bonds and 10 year notes.

Scott has worked for non-profit organizations since 1998 including Mercy Home for Boys, the Marriott Foundation for people with disabilities. He has taught, mentored, and advocated for individuals with disabilities and their families in the areas of self-sufficiency, employment, disability rights under ADA and Social Security Law. He is an expert in the area of Pooled Special Needs Trust management.
Real Estate, the Internet and Privacy in the Information Age

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David.Lanciotti@ctt.com
“The fantastic advances in the field of electronic communication constitute a greater danger to the privacy of the individual.”

-Earl Warren, Chief Justice, United States Supreme Court, 1953 - 1969

This is how people used to snoop on your property...
......this is how people snoop on property now!
WHAT IS A LAND TRUST?

A Land Trust is a form of holding title to real property

CREATION OF THE LAND TRUST

Two Step Process:
(1) Trust Agreement
(2) Deed in Trust

KEY FEATURES OF THE LAND TRUST

Three components: Trustee, Beneficiary, Property

Beneficiary retains all management and control rights to the property
Trust Agreement:

“This agreement shall not be recorded in the county in which the property is situated, or elsewhere, but any recording shall not be notice of the rights of any person derogatory to the title or powers of the trustee.”

*People v. Chicago Title & Trust Co.*, 75 Ill.2d 479, 389 N.E.2d 540 (1979):

“The land trust has, over the years, served as useful device for maintaining secrecy of ownership...”

WHO BENEFITS?

- Anyone who wants to keep the details of their purchase transaction off the internet and keep ownership of their real estate holdings confidential and shielded from public view
- High profile: celebrities, athletes, media personalities, political figures
- High net worth: Homes worth $500,000 or above
- Subject to liability through profession: physicians, attorneys, accountants, small business owners
- Safety Issues with Profession: First responders, Law Enforcement
Privacy Uses

- Confidentiality of Ownership
- Insulation From Asset Searches
- Anonymous Offers to Purchase

Subject: My New Home in Plainfield

Hi everyone!

I just bought a new home for $1.2 million! The address is 422 W. Renwick Road, Plainfield, IL. My lender is Great Loans USAA, and my mortgage is $800,000.

Thanks,
Jill S. Smith
Mystery buyer pays $7 million for Wilmette house.

The sale was the third high-end sale of the past six months on that block, whose houses have private beaches. In all three cases, rumor circumspectly says about hiding the buyer's identity.

The purchase is the endpoint in a Wilmette sale between CNA Chairman and CEO Dennis Cavanaugh and his wife.

President of Christian University Drops $2M on Trump Condo

The president of a Chicago-based university is said to have agreed to purchase a high-rise condo and a penthouse apartment in a new high-rise building near Trump Tower for $2 million, according to sources familiar with the negotiations. The president has lived in the area for nearly 20 years, and the sale will likely be finalized in the coming weeks.
Limitations

Mandatory Disclosure Laws

- 765 ILCS 405/1  Land Trust Beneficial Interest Disclosure Act
- 765 ILCS 425/1  Building Law Violation Ownership Act
- 765 ILCS 425/1.1  Disclosure of Beneficial Owners in Suspected Arson Investigations
- 765 ILCS 425/2  Penalty for Non-Disclosure
- 765 ILCS 430/2  Sale of Residential Property Subject to Land Trust Act

Other Disclosure Issues

- Subpoenas
- Lawsuits naming trustee as party
- Citations to Discover Assets
- Court Orders
LITIGATION

• Class Actions
• Commercial Cases
• Collection Matters.

Attorneys perform asset searches, on both businesses & their officers, before filing lawsuits.

How do you want your client to appear?
THIS OR THAT?
Common Pitfalls & Traps

• Property tax info on deed
• Recording trust agreement
• Beneficiary name on deed or mortgage
• Deeding into trust after closing.
• Disclosing address elsewhere (e.g., on secretary of state or on a domain registration).
Limited Liability Companies, Trusts and Privacy
### LLC Managers

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[Curbed.com](https://curbed.com)

**See the Lovely Lake Forest Home New Chicago Bears Coach John Fox Just Bought**

The newly named Chicago Bears coach John Fox will have a little pressure to beat things around with the innovations of the Illinois, but when it comes to making his mark, he'll likely find comfort in the expansion of his Lake Forest home. According to the [Real Estate Journal](https://www.real-estate-journal.com), the nearly 6,000 square-foot home in a 290-acre park with Lake frontage and a private pool, is a blend of traditional and modern design. The home features an in-ground pool, a two-car garage, and a separate guest house. It's expected to sell for around $2.5million. 

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**Curbed.com**
Loss Of Bargaining Power

• The transparency provided by the internet has eroded our bargaining power. A company’s identity and assets are easily ascertainable.

• PrivateBid is a quick and easy way to make anonymous offers to purchase real estate.
Situations Where Buyer’s Bargaining Power Eroded

- Seller knows buyer has money
- Seller dislikes buyer
- Seller objects to buyer’s intended use of the property

Or, the very act of buying a property sends an unintended message about your business plans.
Don’t Lien on Me: False Liens & Paper Terrorists

• A false lien is a document that purports to describe a lien against a piece of property, but which is based upon false, fictitious, or fraudulent statements or representations, and has no legal basis.
• Used as a tool of harassment, often against government officials.
• Federal law has criminalized the filing of false liens: 18 USC 1521.
• United States Sentencing Guidelines treat the filing of a false lien against a government official as equally serious to threatening a government official.

Don’t Lien on Me: False Liens - Examples

• The “Paper Terrorist”

• City of Chicago Treasurer Stephanie Neely & the Sovereign Citizens
Federal & Illinois Statutes Applicable to False Lien Filings

• 18 USC 1521

• Illinois Judicial Privacy Act, 705 ILCS 90/1-1 et seq.

• A word about Land Trusts

As private as you make it…horror stories and cautionary tales
County Property Fraud Alert Services
Special Needs Trusts, Pooled Trusts, ABLE Tax Savings Accounts for Individuals with Disabilities: Where Do We Begin?

Presenter: Scott Nixon, Executive Director Life’s Plan Inc., Lisle, IL
Government Benefit Factors 101
One of the first questions an attorney needs to ask their client with special needs or their guardian when involved with a lump sum settlement or inheritance or some other form of back payment is, “Do they receive Supplemental Security Income (SSI) or do they receive Social Security Disability Insurance (SSDI)?”

The difference between each of these benefits is huge in clearly understanding what options they have in protecting a lump sum of assets. Whether considering the need to set up a Special Needs Trust or something else, perhaps an ABLE account. The amount of money involved will also play an important factor. A few hundred dollars will not be as important for the client’s public benefits as a few thousand dollars will be in triggering problems for retaining their eligibility.

It is very important for the legal professional to clarify exactly what are the benefits your disabled client receives in order to provide the best advisement on their behalf. A rash decision to directly distribute a lump sum of money to the client or their guardian could immediately put at risk a client’s public benefits.

Many people with disabilities solely rely on SSI and Medicaid for their monthly benefits. A client on SSI/Medicaid means they have very restrictive government benefits, means tested programs where additional income and assets discovered will jeopardize the future of these benefits.

Today, there are many planning options to choose from for your client, but it will depend on the type of government benefits they receive. It will also be relevant as to what amount of money they will be coming in receipt of and do they have capacity to handle this large financial responsibility. The type of disability from Developmental disability such as Down Syndrome or autism to Mental illness or to someone with a physical or medical disability may be important to factor in whether they are competent or not and whether a trustee is essential or not.

SSI and Medicaid Income have very strict asset rules when it comes to individuals with disabilities. The asset limit is a maximum of $2000 for individuals/$3000 for married couples. So there is very little room for savings each month. Any new found asset over $2000 will put their SSI/Medicaid benefits at risk.

SSDI and Medicare do not have any asset tests, but SSDI may change with any newfound earned income from wages. An annuity will not affect their SSDI. SSDI and Medicare benefits are not a means-tested programs. It is based on earnings paid into the Social Security system. So if your client is on SSDI and Medicare. These government entitlements will not be jeopardized by a large inheritance or settlement.

You may also need to be aware that some clients with disabilities who receive SSDI and Medicare benefits, may be receiving Medicaid or even SSI. Social Security calls these clients a Dual-Eligible candidates. So a person on SSDI/Medicare who receives Medicaid for long term care, in home care or a group home may require Medicaid to cover these important costs and thus they too are restricted in the amount of assets they receive, $2000. It is also possible your client could be receiving all four government benefits (SSDI, SSI, Medicare and Medicaid) in which you don’t want to forget the first whether it’s a means tested benefit program or not. The difference can be a malpractice claim.
What is a Special Needs Trust?

In order to understand the OBRA ‘93 Pooled Trust, one must first understand the purpose of a Special Needs Trust. A Special Needs Trust or Supplemental Needs Trust or SNT, as they’re often referred to, is specifically designed to benefit a disabled beneficiary by providing for their special needs beyond the public benefits supplied by the government. Special needs defined are those needs that foster and maintain the beneficiary’s health, safety and welfare, which are not provided for by any municipal, county, state or federal government.

SNTs assure that a disabled person receives a lifetime of adequate care and support that government benefits can offer. SNTs are generally not intended to pay for primary care costs nor “supplant” public benefits. They are intended to provide “supplemental” financial support to the beneficiary.

SNTs must be drafted in accordance with the OBRA 1993 Act, Social Security Administration (SSA) Procedure Operations Manual System (“the POMS”) and state Medicaid and federal Centers for Medicare & Medicaid Services (“CMS”) regulations. These trusts have a little magic in the language that makes them specialized trust instruments recognized under law. SNTs must be irrevocable to the beneficiary, whereby beneficiaries can never have any discretion over the trust, yet SNTs must give the trustee powers to terminate and amend, as these government agencies constantly change policies.

When a person with a disability is on public benefits such as Supplemental Security Income (“SSI”) and Medicaid, a Special Needs Trust will provide a legal solution for an attorney serving an individual with disabilities and their family. The disabled beneficiary through the SNT, is getting a greater level of care utilizing the private assets in the trust, while maintaining public benefit eligibility, to protecting many essential services for the beneficiary’s primary care needs.

How does a Special Needs Trust work?

Like a spendthrift trust, money from a SNT is not intended to be distributed directly to a beneficiary, but is used to pay providers for goods and services beyond what SSI and Medicaid can offer. The SNT is not intended to be used for basic food, rent or shelter-related utilities like heat, gas and electric and must specify that its intent is to “Supplement, not supplant”.

If the SNT is properly drafted and meets the requirements of OBRA ’93, the federal law, the Social Security POMS and Medicaid regulations, then the SNT’s assets will be “non-countable” as an asset or resource, allowing the beneficiary to remain eligible or immediately qualify for public benefits.

The Special Needs Trust ensures a family that a legal, financial mechanism will protect the family’s private interests and provide a lifetime of adequate care for a disabled loved one, while not jeopardizing their public benefits. The SSI benefits and Medicaid benefits received by a person with a disability (including services such as housing options and residential care, vocational services, day programs, in-home services, substance abuse and counseling, case management, co-payments for prescriptions and doctor co-payments and nursing care) are protected by the use of an SNT; a traditional estate plan or non-SNT will not protect from loss of those benefits.

Are there different types of Special Needs Trusts?

Yes, there are 2 basic kinds of SNTs:
**Third party trusts and self-settled trusts**

A third party trust is one that contains assets that belong to someone other than the disabled beneficiary. A classic example of a third party trust is one that is set up by a parent or grandparent in order to leave an inheritance to a disabled child or grandchild. Trust assets from a Third Party SNT are completely removed from Medicaid control or access.

A self-settled trust is a trust made up of the disabled beneficiary’s own assets, also called a 1st party trust or self-funded trust or an OBRA ’93 trust. For example, if a person with disability receives a personal injury settlement he/she might put the proceeds in a self-settled trust for his/her own use. A self-settled trust can also be funded with a person’s own savings account, an IRA, inherited assets, Social Security back payment, a divorce settlement and even child support payments.

If a person puts assets in a self-settled trust in order to obtain SSI benefits, then the trust must meet certain distinct requirements under the OBRA ’93 law, SSA POMS and the state Medicaid policies. Due to a wrinkle in the OBRA law, the trust must be created by a parent, grandparent, legal guardian or a court. The trust must also contain a Medicaid “payback” provision for reimbursement to the state for medical assistance (POMS SI 011203B.1.h.1).

**Is there more than one way to establish a Special Needs Trust?**

Yes, there are really 2 ways.

**Individual SNT Accounts** - Many SNTs are set up as an individual 3rd party trust. There is also a self-settled version called the OBRA (d)(4)(A) trust. These individual accounts are typically managed by a family trustee and/or a corporate trustee or both as co-trustees. The individual trust accounts use their own separate EIN number.

**Pooled Trust subaccounts** - There are also pooled Special Needs Trusts that can be set up run by a nonprofit organization. Pooled trusts also referred to as a Self-Settled OBRA ’93 (d)(4)(C) pooled trust, offer a beneficiary the option to set up their own account. Some nonprofits also offer a third party special needs pooled trust option for attorneys, families and individuals with disabilities. The pooled subaccounts share the same EIN for tax purposes.

**History of the Pooled Trust**

Many assume pooled trusts originated out of the 1993 OBRA federal law. Not true; the Ray Graham Association for People with Disabilities, a service provider that has served individuals with intellectual and developmental disabilities here in Illinois for over 60 years, had the vision to establish a pooled trust. The name of pooled trust program was called The Self-Sufficiency Trust of Illinois 2. The Self-Sufficiency Trust of Illinois was first of its kind in the country. The Ray Graham Association put together a legislative package that ultimately passed the Illinois legislature in 1986. Several states soon followed.

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1 Labeling a trust as a Medicaid payback trust, OBRA 1993 payback trust, established in accordance with 42 U.S.C. 1396p, is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language in POMS 1120.203b.1.h

Illinois to pass their own version of the Self Sufficiency trust program in South Dakota, Montana, and Alaska, which are all still in operation today.

In 1988, the ARC of Indiana established their own pooled trust called the ARC of Indiana Trust to allow families to provide for their loved ones. ARC-run organizations have been instrumental going back to the early 1990s in establishing pooled trust programs in many states across the country.

Most of these earlier programs established a “pooled trust” as a 3rd party pooled fund, in which there were no “payback” provisions. Once OBRA ’93 became law of the land, these early pooled trusts had to reset their service model to add the new OBRA (d)(4)(C) self-settled version of a pooled trust to complement their earlier third party pooled trust services.

**OBRA ‘93 Law (see addendum A)**

An Omnibus Reconciliation Act allows Congress to establish a federal law with amendments, changes and additions to address the federal budget. Often Congress has attempted to balance the national budget in hopes of a presidential signature.

In the Omnibus Reconciliation Act of 1993 (OBRA ‘93), although the 103rd Congress’s main goal was on reconciling tax laws toward balancing the national budget, it added sweeping restrictions on trust laws in protecting assets for individuals seeking Public Aid eligibility. This stricter guidance on traditional trusts also included the addition of a three new trust exceptions.

The exceptions under Section 1396p d(4) of OBRA ‘93 included the OBRA (d)(4)(A), an individual self-settled payback trust; a (d)(4)(B) self-settled (Miller trust, income protection trust), not used in Illinois; and a (d)(4)(C) pooled trust, as Medicaid qualified trusts. President Bill Clinton signed the Omnibus Reconciliation Act into federal law on August 10th, 1993.

**OBRA (d)(4)(C) POOLED TRUST**

A pooled trust is a combination of a 401K plan and a traditional special needs trust. Pooled trusts commingle the assets of multiple beneficiaries. Pooled funds, like mutual funds, are "unit trusts". This means that beneficiaries deposit funds into the trust in exchange for "units" of the fund, or simply a percentage of that pool, which reflects the beneficiary’s pro-rata share. The trust fund administrator will specify how the units are issued and redeemed, as well as handling the frequency of in and outflows, while overseeing the constant re-calibration of the pooled trust’s value on a daily/weekly basis.

Pooled funds can be either "closed" or "open". OBRA (d)(4)(C) pooled trusts are "open" pooled funds, which is the most common type of pooled account. This allows units to be redeemed at scheduled valuations, and accounts to be opened and closed at different times while allowing distributions to go out and deposits to come in as requested.

There are also "closed" pooled funds, which do not allow redemptions, except in specific circumstances or at termination of the trust. Closed pooled funds are usually established with illiquid assets, such as real estate, or set up as a hedge fund.

A nonprofit organization is required under OBRA ‘93 to have full authority and control over the pooled trust mechanism. It must maintain separate subaccounts for each client in which typically, monthly, quarterly and annual reports are made available for a beneficiary. The pooled trust is administered as
“one” investment fund for management efficiency. The pooled trust earnings are shared amongst the beneficiaries, which provides a greater return on investment, particularly for the smaller trust accounts in a much larger pool.

Many nonprofits of pooled trusts are closely connected to larger local and national disability-related networks (e.g. The ARC, Ray Graham Association). Many nonprofits that run pooled trusts work closely with a bank agent or trust company to manage the financial aspects of the pooled fund. In some cases a bank or trust company may act as a Co-Trustee with the nonprofit, while other nonprofits of pooled trusts manage their own pooled funds, handling their own administration, investments and delivery of distributions through trust software.

Nonprofit organizations are typically run by a board of directors or trustees or other governing bodies. The pooled trusts organizations are no different. Pooled trust staff typically work daily with beneficiaries and the bank agents (Co-Trustees) in handling all requests, opening and closing accounts, expediting delivery of distributions, and tracking and reporting each beneficiary’s trust account.

Pooled trusts can vary greatly in size and services, but most provide a litany of information about setting up a special needs pooled trust, finding a qualified attorney or trustee, and securing public benefits along with money management, housing, care planning, and trust distribution guidance.

42 U.S.C. 1396p (d)(4)  
TABLE 1

This subsection shall not apply to any of the following trusts:

*(A) A trust containing assets of an individual under age 65 who is disabled as defined in section 1614(a)(3)

*(B) A trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3)) that meets the following criteria:

*(i) the trust is established and managed by a nonprofit association

*(ii) A separate account is maintained for each beneficiary of the trust, but for purpose of investment and management of funds, the trust pools these accounts

*(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) by the parent, grandparent, or legal guardian of such individuals, by such individuals or by a court

*(iv) To the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays the state from which such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under a state plan under this title.

(d)(4)(A) Individual vs. (d)(4)(C) Pooled Trust comparison

*(C) a trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3))
The individual (d)(4)(A) and pooled (d)(4)(C) share some common requirements under the OBRA ‘93:

**Assets-** The assets to fund OBRA ‘93 trusts in most cases should belong to the beneficiary. There can be an exception to where third party monies were transferred into an OBRA trust along with the beneficiary’s own self-titled assets. The Social Security Administration will still exclude the trust as an exempt “non-countable” trust and will re-classify the self-settled trust as a “Mixed trust”.

SSA allows the trustee, as long as they can account for the “mixed” assets (third party monies and self-settled assets), to remain without “payback” tied to the 3rd party monies, as long as they expend the third party monies first and then the self-funded assets last. This mixed trust should only be utilized under limited situations, e.g. under a small estate affidavit where the mixture of asset classes (self-settled/third party) for a disabled person makes sense to pouring into “one” OBRA account versus multiple trusts for cost savings and management efficiency. You should never pour a beneficiary’s own assets into a third party SNT, individual or pooled account.

**Disability Criterion-** Both OBRA ‘93 trusts ([(d)(4)(A), (d)(4)(C)]) must be for a person who has a disability recognized by Social Security under section 1614(a)(3) of the Act, unlike Third party SNTs where there are no prerequisites of a beneficiary’s disability to establishing the trust.

There are also some key differences under the OBRA ‘93 statute between the individual payback trust and the self-settled pooled trust.

**Payback-** Both the (d)(4)(A) and (d)(4)(C) require a “payback” provision written into the trust agreement stating that any medical assistance on behalf of the beneficiary that the state(s) provided must be paid back on death from the principle of an OBRA account. There should never be a “payback” provision on a third party trust.

**Age-** For now, under federal law there is no age restriction for pooled trusts. There is more to this story with age restrictions for beneficiaries 65 and older to discuss later. The OBRA (d)(4)(A) individual trust clearly defines an age limit. Under the OBRA law, a (d)(4)(A) must be for a disabled person under 65.

**Investments-** There is little guidance under OBRA ‘93 on how the (d)(4)(A) should be managed as an individual self-settled trust. However, it is assumed that the (d)(4)(A) can be set up as an individual trust account with its own Employee Identification Number (EIN) with greater latitude on who the trustee can be and how the investments and trust shall be administered, as long as it’s in compliance with SSA POMS and state Medicaid regulations.

Unlike the self-settled (d)(4)(C), which is required under OBRA ‘93 to be managed by a nonprofit and the assets must be “pooled”. The nonprofit association is required to also maintain full authority and discretion over the trust management and investments, even if its board hires out an outside bank or investment advisor or Co-Trustee.

**“Sole” benefit? -** Both OBRA (d)(4)(A) and (d)(4)(C)s must provide clear language in their trust documents that the benefits from the trust must be for the “sole” benefit of the beneficiary. This is explicitly clear for (d)(4)(C), but not so clear for the (d)(4)(A); nonetheless, it is interpreted to apply to both that the self-settled trusts must be for the “sole” benefit of the beneficiary, no exception.
Sole Benefit for a Third party SNT?
A third party SNT can have tremendous latitude to allow a trustee to pay for gifts, or provide spending money to a beneficiary, or even assign more than one beneficiary to the trust without restriction or oversight from the Social Security Administration or Medicaid.

Who can establish the account? - The (d)(4)(A) and (d)(4)(C) can be established by a parent, grandparent, legal guardian, or the court for a beneficiary with a disability. One distinct difference for the (d)(4)(C) pooled trust is that Congress added that a legally competent, disabled adult can also establish their own pooled trust subaccount, which can include their durable Power of Attorney (POA-Property).

At the time of these written materials, there is Senate Bill 349 awaiting approval in Congress called the Special Needs Trust Fairness Act. The intent of the bill is to remedy this disparity between the OBRA (d)(4)(A) and (d)(4)(C) trust sections. The legally competent disabled person or their POA-Property can only establish an OBRA (d)(4)(C) pooled trust from the OBRA ’93 law. But the Special Needs Trust Fairness Act, if passed, will allow a legally competent individual or their POA-Property to set up their own self-settled individual (d)(4)(A) SNT equal to the (d)(4)(C).

Trustee- One of the other key differences between the (d)(4)(A) and the (d)(4)(C) is the (d)(4)(A) can be managed by a legally competent adult that could be a family member, attorney, bank or corporate trustee. A family member and a corporate trustee can even manage a (d)(4)(A) as co-trustees. The (d)(4)(C) pooled trust, under federal law, clearly must solely be under the discretion of the nonprofit association.

What’s the deal with the “Payback”?
The OBRA ’93 trusts clearly define specific language to reimburse all states upon the death of the beneficiary for medical assistance that each state may have provided to a beneficiary. Under federal statute, the pooled (d)(4)(C) trust may also retain certain amounts remaining in the beneficiary’s account on his/her death, before payback to the state Medicaid agency.

SSI has additional requirements regarding this payback provision clearly defined under the Social Security POMS section SI 01120.203B.3.a. Here are acceptable expenses for a trustee to pay from an OBRA trust before satisfying the state’s payback lien:

- Taxes dues from the trust to the state(s) or Federal Government because of the death of the beneficiary;
- Reasonable fees.

POM SI 01120.203B lists prohibited expenses and payments from a Medicaid Special Needs and Medicaid pooled trust:

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4 Labeling the trust as a Medicaid pay-back trust, OBRA 1993 pay-back trust, trust established in accordance with 42 U.S.C. § 1396p, or as an MQT, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.
Upon the death of the trust beneficiary, the following expenses and payments are examples of some of the types not permitted prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

**NOTE:** For the purpose of prohibiting payments prior to reimbursement of medical assistance to the State(s), a pooled trust is not considered a residual beneficiary.

**What’s with the Pooled Trusts retained fees?**

In contrast to an individual (d)(4)(A), a pooled special needs trust has unique authority to retain funds from a deceased beneficiary’s subaccount, before payback to the state(s). Federal law and Social Security basically leave the retained amount up to the nonprofits. State Medicaid programs are not so friendly with this public policy.

States in recent years began to restrict, legally or illegally obstruct the pooled trusts’ authority to retain funds. Many states have varied opinions with their Medicaid policies in allowing pooled trusts to retain any funds or a specific amount before “payback” to the state for medical assistance.

In a 2012 case in Pennsylvania, *Lewis vs. Alexander*, a U.S. Court of Appeals for the Third Circuit affirmed a district court decision that struck down a Pennsylvania statute that severely restricted the use of pooled special needs trusts. The court ruled in favor of the pooled trusts who had filed class action against the state of Pennsylvania’s restrictive Medicaid policies. The Third Circuit court interpreted that the OBRA ’93 federal law, allows pooled trusts the ability to retain funds on the death of a (d)(4)(C) beneficiary equal to 100% of the trust remainder value, before “payback” to any state has to be made.

The nonprofit’s primary mission in managing a pooled trust is to serve people with disabilities and their families as trustee. These retained funds authorized under OBRA ‘93 offered pooled trusts financial assistance to these often small, startup entities. These funds have allowed pooled trust organizations to grow and provide essential staffing, marketing needs and other resources to continue operations in perpetuity. It has also allowed many pooled trust organizations to achieve their mission statement of giving back to their disability communities in the form of charitable distributions or grants. Other pooled trusts will use the retained fees to extend the life of all their beneficiaries’ pooled trust accounts, adding a larger dividend pay-in to each pooled subaccount. Under the 2012 SMART Act, Illinois has restricted OBRA pooled trusts’ authority to retain any funds, until “payback” is fully satisfied to the state of Illinois for Medical costs.

**The over 65 rule and its history**

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In 1993, Medicaid worked unsuccessfully through Congress to establish limits through the Omnibus Reconciliation Act. Their intent was to discourage the use of Medicaid-qualified trusts or any other financial mechanism for seniors in a spend-down toward finding immediate Medicaid eligibility for long term care.

In 1999, HR 3343, the Foster Care Independence Act\(^7\) was enacted by Congress to add section 1613 to the Social Security Act. This imposed new transfer penalties on gifting and transfers in using an OBRA ‘93 trust under 42 U.S.C. 1396p (d)(4)(A) and 42 U.S.C. 1396 p (d)(4)(C), which could limit a senior from using a Medicaid Qualified Trust (OBRA ‘93 trust), by way of a transfer penalty, from qualifying for SSI /Medicaid benefits. The Foster Care Independence Act did little to persuade states to change their Medicaid policies on this issue. For a 65-year-old beneficiary on SSI, using an OBRA pooled trust, they may be subject to a penalty of up to three years of their SSI benefits. The groundwork had been laid for future debate.

Due to sweeping Medicaid reform changes under the Deficit Reduction Act of 2005 (“DRA”)\(^8\), the federal government set out to make changes to states’ Medicaid policies, particularly in limiting use of OBRA pooled trusts for seniors. The DRA of 2005 was intended as a national law to provide states a cost-saving measure in preserving Medicare and Medicaid benefits. This established many new Medicare and Medicaid policies that included changes to the Medicaid lookback period from 3 years (36 months) to 5 years (60 months).

In 2008, Centers for Medicare and Medicaid (“CMS”) sent out a national memorandum to all states. It clarified their interpretation for the OBRA pooled trust used by a person 65 or older, in which under the Foster Care Independence Act may cause a transfer penalty. CMS revised this interpretation in the letter for how the transfer of a senior’s assets into an OBRA pooled trust should be reviewed. If the pooled trust met all the requirements under the OBRA federal law, CMS understood that it still would be an “exempt trust” under the normal Medicaid trust rules. But.....CMS built the argument that the assets going in to the trust would be for less than fair market value (FMV).

Here is the section of the letter stating CMS’ argument:

> Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older may be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value.

Typically under the Social Security Administration and Medicaid benefit criteria, a Fair Market Value transfer is an assessment that interprets fair market valuation of an asset in transfer as a gift to others or in exchange for something of equal value or a conversion to something like a trust. For a senior to

\(^7\) P.L. 106-169: Foster Care Independence Act of 1999 SEC. 206. DISPOSAL OF RESOURCES FOR LESS THAN FAIR MARKET VALUE UNDER THE SSI PROGRAM.

\(^8\) P.L. 109–171; 42 U.S.C. sec. 1305: Deficit Reduction Act of 2005 is a United States Act of Congress concerning the budget that became law in 2006; the act included a change in the Medicaid look-back period from 3 years to 5 years.
provide an outright gift to another family member to simply impoverish themselves for benefit eligibility purposes is considered an egregious attempt to qualify for long term care. A transfer penalty would incur under this circumstance based on a gift transfer that can easily be construed as for less than Fair Market Value exchange.

CMS’ weak argument in this memo, that a person transferring their assets into an exempt OBRA pooled trust, a “sole benefit” trust mind you, somehow does not offer anything in comparative value in return for the beneficiary, is an inane one. But what CMS set out to do with this memo in 2008 was to change the national tide on OBRA federal laws going back to 1993, to restrict the use of a specialized trust for seniors seeking long term care. CMS’ goal was to elicit a change in mentality at the states level, to ultimately change their Medicaid rules in disfavor of the pooled trust option for seniors and it worked. Today, over 20 states, including Illinois, do not allow such transfers to an OBRA (d)(4)(C) pooled trust for 65 and over individuals.

Following the 2008 memorandum from CMS, the Social Security Administration in 2009 issued revised POMS on the OBRA ’93 (d)(4)(C) pooled trust, on whether a transfer from a beneficiary 65 and older into a pooled subaccount would incur a transfer penalty. In the revisions, SSA indicated in their POMS that a person over 65 joining a Pooled Trust may incur a transfer penalty for purposes of SSI eligibility. So Social Security was finally catching up to the 1999 Foster Care Independence Act, but was indifferent to what Medicaid was doing in restricting use of pooled trusts for seniors.

Illinois enacted its own changes to Medicaid policy pertaining to the Deficit Reduction Act of 05 and OBRA ’93 trusts (addendum B & C). After 7 years, Illinois reformed their regulations under the “Save Medicaid Access Resources Together Act” (SMART Act 2012, see addendum B).

The Illinois SMART Act restricted OBRA ‘93 self-settled pooled trusts in Illinois from establishing subaccounts for beneficiaries 65 and older by way of a transfer penalty. It used CMS’ argument in their 2008 letter that seniors’ assets should be calculated differently than someone under 65, for less than Fair Market Value (FMV), thus making the exempt status of a pooled trust moot through the transfer when establishing a special needs trust account for a disabled senior seeking long term care Medicaid.

Along with the over-65 restriction, Illinois also added other changes to their Medicaid policies. Illinois restricted a pooled trust’s ability to retain any funds on the death of beneficiary as mentioned earlier, while strangely adding that a Public Guardian or a Guardian from the Office of State Guardianship could in effect create a pooled trust account for a ward over 65 without incurring the less than FMV transfer penalty.

In the 2012 Lewis vs. Alexander case, the Third Circuit also ruled in favor of the pooled trusts, holding there are no age restrictions written into the original OBRA ’93 statute. There are currently no pending litigation cases here in Illinois on these pooled trust restrictions.

**Distributions (See addendum D- Life’s Plan Supplemental Distribution Guide)**

After the SNT is set up, the work begins for the trustee when handling the distributions. Cash distributions are a big NO-NO! Any in-kind income support from the trust for an SSI recipient will result in a 1/3 loss of SSI benefits. The legal interpretations are a bit of a minefield, but it is important for the

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9 P.A. 97-0689.
trustee to get to know their beneficiary and their supports needs, but most importantly to know what government benefits they receive.

Trust payments for rent, food and other household utilities are potentially risky and likely to cause a chunk of the beneficiary’s SSI benefit to go away. Is it in the best interest of the beneficiary to lose 1/3 of their benefits? In some cases with larger trusts, it might be the right decision.

Finding ways as a trustee to make supplemental third party payments on behalf of a beneficiary can be challenging. Transactions cannot go directly through a beneficiary’s own banking accounts without issues and potential dollar for dollar deductions of SSI benefits. So, handling these transactions carefully through a guardian, a POA-Property or a personal agent or service provider of a beneficiary may be essential and best practice.

What happens when there are no personal agents to support a beneficiary? The trustee ultimately has to be careful with transactions and distributions, to not reduce the beneficiary’s SSI benefits or risk loss of their key Medicaid health benefits.

Today, gifts cards by the Social Security Administration are considered a cash distribution--another big no-no! What if the beneficiary is not on SSI? Well, maybe a gift card isn’t such a bad idea with limited use. Sometimes the trustee has to consider all the government rules that apply to determine best practice to either retaining all the benefits, or in some cases breaking the rules for the best interests of the beneficiary in the long run. This would likely pertain to someone who might have a larger SNT wanting to buy or live in their own home and the need for payment in securing adequate, suitable housing. Each beneficiary has to be assessed by the trustee to serve their best interests, while minimizing risks or even a loss of their public benefits.

I have included a general list of allowable distributions from an SNT to better understand what a typical SNT can be expected to pay for without issue. (See Distribution Guide Addendum D)

**What are the steps to setting up a pooled trust subaccount?**

A pooled trust organization provide a trust document called a “joinder” or “transfer” agreement that a client or their legal representative signs into toward establishing a subaccount. Along with the trust agreement, usually there are other application and bank forms that required completion before a pooled trust subaccount can be opened for a new client.

The pooled trust is established under a “Master” trust agreement by the nonprofit association. The “joinder” or “transfer” agreement is a skeleton version of the nonprofit’s “master trust”. The master trust typically is a more extensive document, not unlike a traditional trust agreement, covering all terms and conditions for establishment of the OBRA (d)(4)(C) pooled trust.

The “joinder” or “transfer” agreement is what allows the client, the disabled beneficiary, to establish their own SNT. Some pooled trusts use their master trust as their joinder agreement. The transfer of a beneficiary’s assets to an existing pooled trust conveys ownership of their “countable” assets to the pooled trust. Once these assets are established within the pooled sub account, they are no longer countable for SSI/Medicaid eligibility purposes. But as important the transfer of the countable assets into an exempt trust, has eliminated the requirements of a Medicaid spend-down with no further loss of
SSI/Medicaid benefits moving forward. NOTE: the pooled assets may be “non-countable” as a financial mechanism, but the transfer of the assets may present a different story as mentioned.

Yes, pooled trusts do charge fees for their trust and trustee service for management. A representative from a pooled trust should be able to explain how to set up a pooled trust subaccount for your client fairly easily. Fees can vary greatly between different pooled trusts. Fee costs may be charged as a flat rate or on basis points (bps) (100 bps=1%) based on the trust value, or a combination thereof. Be mindful that the fees for the mutual funds are typically not included in the pooled trust’s fee schedule.

Many pooled trusts have lower minimums to establish trust accounts that could range anywhere from $10,000-$40,000. Today, banks and corporate trust companies set minimums anywhere from $200,000 to $300,000 or substantially higher into the millions of dollars. Under federal and state law, there are no maximum dollar limits to fund an SNT, OBRA or third party pooled or individual trust.

In the last year, many of the “too big to fail” banks of the “2007 Great Recession” have discontinued trustee services over Special Needs Trust accounts, no matter the size. Certainly, this will likely bode well for the pooled trust industry.

The Benefits of the Pooled Trust
Pooled (d)(4)(C) trusts offer attorneys, families, caregivers, and individuals with disabilities the ability to establish relatively inexpensive and effective trust accounts that provide supplemental funds to the beneficiary, while protecting any loss of government benefits.

Nonprofit Associations are required under statute to run and manage pooled trusts, “pooling” the funds of all the beneficiaries into “one” fund for management and investment purposes. This provides the ability to offer higher quality investments, particularly for smaller trust accounts with lower management costs. The mission of most special needs trusts is the same—-to serve the supplemental needs of individuals with disabilities by improving their quality of life through the use of private trust funds. The pooled trusts use their own trust documents to establish a subaccount within the pool. This also can save upfront legal costs in the drafting of new trust agreements.

Though pooled trusts can vary greatly in size and experience, some pooled trusts play nicer with attorneys than others. Some pooled trusts have policies that either recommend or require that a potential trust client retain legal counsel before setting up a subaccount. Some pooled trusts work extremely well with attorneys, while others see the pooled trust option as the alternative solution to establishing a special needs trust.

Some non-profits that run pooled trusts often provide families and attorney expertise in setting up a special needs trust account. Pooled Trusts often offer other added services beyond trust management. Added services can include case management, advocacy, housing expertise and general social services to families and the beneficiary.

Pooled trusts can help individuals with disabilities and their families protect their financial choices. A pooled trust will allow an individual the opportunity to live independently with providing a wide array of supplemental goods and services to offset the beneficiary’s costs. Pooled trusts are ready to use entities particularly useful in crisis or during a Medicaid spend down. When a recipient may be on the clock in a Medicaid spend down because of an inheritance or unexpected windfall. A pooled trust account can be
set up fairly quickly, within days or weeks. The pooled trust can be a great way for an attorney, who
doesn’t practice in this specialty area of law, to effectively close out their cases in establishing a special
needs trust for their client with disabilities with a professional nonprofit organization.

Pooled trusts can be a considered as a contingent or successor trustee, particularly if the parents or
family do not have a ready-drafted SNT. In some cases the family trustee is a sibling who may pre-
decease the beneficiary unexpectedly. Finding a qualified trustee for an SNT can be challenging,
especially when there are no family members to serve in this capacity. Pooled Trusts are technically a
Corporate trustee run through a nonprofit. Some nonprofits also offer individual trust management
services.

**Pooled Trusts in your Community**
Pooled trusts need collaborative partnerships and advisors to be successful, especially working with
families, attorneys, service providers, trust companies, caregivers, guardians, and judges, but, most
importantly, the individuals with disabilities themselves as their own advocates.

Pooled trusts can vary greatly, but most serve under a charitable purpose or a mission as trustee to
serve in their communities, which is a service not always readily available in the financial industry.

Today, there are pooled trusts in every state, including several national pooled trust organizations
available to serve individuals with disabilities and their families. The proliferation of pooled trusts has
come, but may have slowed over the last few years, particularly in light of more restrictive public
policies limiting their use and ability to serve their communities.


After nearly 10 years on the Senate floor in Washington, D.C., the Achieving a Better Life Experience
(“ABLE”) Act\(^{10}\) was signed into law by President Obama on December 19, 2014. The original author of
the ABLE bill, Congressman Ander Crenshaw, re-titled the Act, the “Stephen Beck Jr. ABLE Act” in honor
of an instrumental Down syndrome advocate, who fought to see the ABLE bill through, but passed
shortly before its passage. Beck, the father of a young daughter with Down syndrome, passed away at
age 44, weeks before President Obama signed the ABLE bill into federal law. Illinois Governor Bruce
Rauner signed Illinois Senate Bill 1383\(^{11}\), the Illinois ABLE Act legislation, into law on July 27, 2015 and
now as February 1, 2017 there is an Illinois ABLE tax savings program for individuals with disabilities and
their families.

The ABLE Act creates a new option for some people with disabilities and their families to save for future
planning, while protecting eligibility for public benefits. The ABLE Act allows, under the new Section
529A Qualified ABLE Programs, for an individual who is determined disabled before age 26, to set their
own qualified savings accounts that receives preferred federal tax treatment.

Even though the ABLE Act falls under the IRS 529 code, similar to 529 college savings plans, there is very
little replication between the two 529 tax-free programs. There are but a few similarities with many
more differences between a 529 college savings plans and a 529 ABLE Act tax savings account. The most

\(^{10}\) P.A. 113-295 [H.R. 647 (113th Congress)]: Stephen H. Beck Jr. Achievement for a Better Life Experience (ABLE)

\(^{11}\) 15 ILCS 505/16.6 - Illinois ABLE account program
common similarity they both share is that they get special IRS consideration as tax-free accounts on earned interest. A 529 college plan is allowed to pay for college tuition and room and board. The ABLE accounts are accounts for people with disabilities that offer a wide, diverse list of qualified disability expenses. The ABLE account savings plan will get special privileges as a “non-countable” asset to meeting public benefit eligibility.

The ABLE accounts will improve the lives of individuals with disabilities who qualify and manage them successfully. Before the ABLE act, a person with a disability on means-tested public benefits was limited to no more than $2000 in assets/$3000 for married couples. ABLE will provide a way for these individuals to save their own money or monies from family or others in an ABLE account for disability-related expenses. Though the final IRS regulations have yet to be finalized or published on ABLE accounts, there are now four state ABLE programs up and operational. The Ohio STABLE program was first to launch an ABLE program. Tennessee, Nebraska and Florida have since followed with their own ABLE tax savings programs. All of these new ABLE programs are portable and open for business for ABLE beneficiaries across the country including Illinois residents.

Under the Illinois ABLE statute, the state’s Treasurer’s office has been appointed as the responsible party for the administration of the Illinois ABLE program. The Treasurer will work with the Illinois Investment Board to finalize details of the ABLE program, which will not happen until the final IRS regulations are published. As of February 1, 2017 Illinois opened the Illinois ABLE Program, see addendum under resources for website reference.

Contributions-
Contributions of no more than $14,000 per year, equal to the IRS maximum gift tax exclusion per person, are allowed into an ABLE account and distributions out of the savings account for Qualified Disability Expenses (QDEs) will be disregarded or given special exemption in determining eligibility for most federal means-tested benefits.

What are some of the important requirements of an ABLE account?

- An eligible individual may have only “One” ABLE account
- Designated beneficiary is the account owner (A parent or legal guardian may be allowed signature authority over the account)
- There is no longer a federal residency requirement related to establishing an ABLE account
- Total annual contributions (cumulative per year) may not exceed the federal gift tax contribution of $14,000 (this will be adjusted for inflation)
- Multiple individuals may make contributions to an ABLE account (any U.S. citizen can contribute)
- Aggregate contributions may not exceed the state limit for a 529 college savings account (Illinois- $350,000)

Who is eligible for an ABLE Account?
To be eligible, individuals must meet two requirements:

1. Age requirement: must be disabled before age 26

2. Severity of disability:
   - An individual applying for an ABLE account has been determined to meet the disability requirements for Supplemental Security Income (SSI) or Social Security
disability benefits (SSDI) (Title XVI or Title II of the Social Security Act) and are receiving those benefits.

- Person must submit a “disability certification” annually assuring the individual holds documentation of a physician’s diagnosis and signature, and confirming that the individual meets the functional disability criteria in the ABLE Act (related to the severity of disability described in Title XVI of Title II of the Social Security Act).

What may funds from an ABLE account be used for?

- Distributions from an ABLE account may be made for “Qualified Disability Expenses”.
- “Qualified Disability Expenses” are expenses that relate to the designated beneficiary’s blindness or disability and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life.
- The term “Qualified Disability Expenses” QDEs should be broadly construed to permit the inclusion of basic living expenses and should not be limited to:
  - Expenses for items for which there is a medical necessity, or which provide no benefits to others in addition to the benefit to the eligible individual.

Qualified disability expenses include the following:

- Education
- Housing
- Transportation
- Employment training and support
- Assistive Technology and personal support services
- Health, prevention, and wellness
- Financial management and administrative services
- Legal fees
- Expenses for oversight and monitoring
- Basic living expenses
- Funeral and burial expenses
- Any other expenses approved by the Secretary of the Treasury under regulations consistent with the purpose of the program

*Distributions for non-qualified disability expenses (non-QDEs) will be subject to possible 10% surtax and IRS income tax consequences and may affect eligibility for federal means-tested benefits.

*Income

Social Security will exclude contributions to an ABLE account from the income of the designated beneficiary. This will not exclude the original earned income by an SSI recipient from being countable at time of receipt. A distribution from an ABLE account is not income but is a conversion of a resource from one form to another, see SI 01110.6008.4.

Do not count distributions from an ABLE account as income of the designated beneficiary, regardless of whether the distributions are for non-housing QDEs, housing QDEs, or non-qualified expenses.

Other details about the ABLE Account
Rollovers- an established ABLE account can be rolled over to another eligible ABLE recipient who is a designated family member as a sibling, step-sibling or half-blood sibling or by adoption. The rollover has to be to a designated family member who qualifies under the ABLE Act’s disability criteria.

The ability for a family to rollover a 529 College savings plan to an ABLE account will not be a foregone conclusion as one might expect. The IRA will have to be worth less than $14,000 to make full transfer and it will depend on the 529 college plan termination policies and there will certainly be tax consequences and termination costs.

How do ABLE account assets impact eligibility for federal benefits?

ABLE assets, if used for “qualified disability expenses,” will be disregarded or receive favorable treatment when determining eligibility for most federal means-tested benefits:

- **Supplemental Security Income (SSI):** For SSI, only the first $100,000 aggregate in the ABLE account will be disregarded as a countable resource.
  - SSI payments (monthly case benefit) will be suspended if the beneficiary’s account balance exceeds $100,000, but SSI benefits (eligibility) will not be terminated. Funds above $100,000 will be treated as a resource.
  - Housing expenses are intended to receive the same treatment as all housing costs paid by outside sources. However, new SSA instructions (POMS SI 001130.740) clearly define a housing QDE for the month it pays for rent or utilities of the home will be considered a countable resource and charge as dollar for dollar deductions for next month’s SSI payment.

- **Medicaid:** ABLE assets are disregarded in determining Medicaid eligibility
  - Medicaid benefits are NOT suspended if the ABLE account balance exceeds the SSI countable resource threshold of $100,000, for Medicaid the maximum aggregate allowed here in Illinois for 529 college plan is $350,000, before loss of Medicaid benefits.
  - Medicaid Payback: Any assets remaining in the ABLE account when a beneficiary dies, subject to outstanding qualified disability expenses, must be used to reimburse a state for Medicaid payments made on behalf of the beneficiary after the creation of the ABLE account (the state of which the ABLE account retains Medicaid benefits is considered a creditor or lienholder of the ABLE account, not a beneficiary).
The Alternatives

Medicaid Spend Down

Medicaid spend down can be a nightmare for a person with a disability and their families, but in some cases it can be the attorney’s best friend when the right size lump sum is available. Spending down can be a great alternative to setting up an SNT or even pursuing an ABLE Account option.

If a client has less than $20,000, the goal for a single individual is to spend down their lump sum asset to the allowable level of $2000 to meeting SSI/Medicaid eligibility requirements. The SSI/Medicaid asset limit is $2000 for individuals and $3000 for married couples. To protect your client, you want to be sure, they have the ability to document all allowable spend down items without issue. Here are some spend down items to consider:

- prepaying funeral expenses (see resources page)
- dental care, present and future
- paying off a mortgage or 3rd party debt owed on behalf of a person with a disability
- making repairs to a home (accessibility needs a plus)
- replacing an old automobile, accessible van
- paying for medical care, co-payments not covered under Medicaid
- updating home furnishings, bedroom furniture
- paying for home healthcare or case management
- buying a new home or new car (one car/one house in name of SSI/Medicaid recipient allowed)

The decision to spend down should be made carefully by an attorney, understanding their client’s needs and public benefits. It’s important to know your client’s living arrangement, what is the amount of the assets they have come into, and how a spend-down will positively or negatively impact their benefits. Importantly, the attorney should be aware of the client’s capacity to handle financial decisions. Are they competent in your eyes to handle a lump sum in a spend-down? Can the client keep adequate records or documentation for a potential audit? The client’s level of independence will certainly predicate your decision to utilize a spend-down option for them. If there is guardianship, you will likely need to draft a petition to seek a spend-down plan over the use of an SNT or an ABLE Account for a judge’s final approval.

Health Benefits for Workers with Disabilities

Health Benefits for Workers with Disabilities (HBWD) is Illinois’ Medicaid Buy-In program that allows workers with disabilities the ability to purchase healthcare benefits through Medicaid. It allows individuals aged 16 to 64 to buy in to affordable healthcare coverage. You must be an employed resident of Illinois. It allows for a person with a disability to have access to Medicaid healthcare coverage with a higher income level and an IRA of any value. Once an individual becomes eligible for HBWD, they pay a monthly premium toward their healthcare coverage.

HBWD allows a larger increase in income of $3404 per month for an individual/$4588 per month for a couple. An individual can have up to $25,000 of assets in savings and a qualified IRA of any value managed by a corporate entity.

HBWD Covered Services:
- Hospital care
- Nursing facility care
- Doctor services
- Prescription drugs – up to four per month. (Prior approval is needed for more than four prescriptions in a month)
- Well-child care and immunizations
- Care at clinics
- Physical, occupational, and speech therapy
- Laboratory tests and X-rays
- Alcohol and substance abuse services
- Medical equipment, supplies, and appliances
- Transportation to medical providers
- Hospice care
- Home healthcare
- Renal dialysis
- Family planning
- Optometric care
- Podiatric care for diabetics
- Audiology services
- Mental health services

Eligibility for HBWD does not affect eligibility for Personal Care Assistants through the Department of Human Services home and community-based waivers. HBWD does not negatively impact eligibility for home health care attendants through the Department of Human Services. This program will not qualify an individual for long term care or community Medicaid for housing. This is less costly than Obamacare.

HBWD has a website with an online application here: http://www.hbwdillinois.com/abouthbwd.html.

An attorney can still choose disinheritaance as a planning option. The Affordable Care Act (ACA) or Obamacare as media often refers offers disabled individuals the opportunity to purchase health insurance without the $2000 asset limit as long as the recipient does not need housing or long term care. ACA care is based on one’s income or lack thereof and ability to find affordable health insurance through exchanges. As of these materials the future of the ACA is still unknown, likely to be repealed but with what?

A beneficiary can purchase exempts assets such as a condo, home or a vehicle. There are only but a few alternative trusts (discretionary, irrevocable income only trusts) and even fewer annuities (irrevocable Medicaid annuity), that can truly replace the effectiveness and value of establishing a Special Needs trust for a disabled client.

Attorneys today have many more planning options today at their disposal for a client with disabilities than ever before. Disinheritance is no longer necessary with the many types of Special Needs trusts available and now the advent of this new Illinois ABLE tax savings program. These new ABLE tax savings accounts will offer another tool in toolbox for the legal practitioner and trustees. A qualified ABLE account candidate will be able to save more of the monthly income and protect small amounts of their private assets for long term use without loss of key government benefits.
OBRA 1993- The Federal Statute
Sec. 1917. [42 U.S.C. 1396p] (a)(1)

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title.

(B) A trust established in a State for the benefit of an individual if—

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),
(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title, and
(iii) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V), but does not make such assistance available to individuals for nursing facility services under section 1902(a)(10)(C).

(C) A trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3)) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.
(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
(iv) To the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term “trust” includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

(e)(1) In order to meet the requirements of this section for purposes of section 1902(a)(18), a State shall require, as a condition for the provision of medical assistance for services described in subsection (c)(1)(C)(i) (relating to long-term care services) for an individual, the application of the individual for such assistance (including any recertification of eligibility for such assistance)
shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

Sec. 1614. [42 U.S.C. 1382c] (a)(1)
For purposes of this title, the term “aged, blind, or disabled individual” means an individual who—

(A) is 65 years of age or older, is blind (as determined under paragraph (2)), or is disabled (as determined under paragraph (3)), and

(B)(i) is a resident of the United States, and is either (I) a citizen or (II) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 212(d)(5) of the Immigration and Nationality Act [42], or

(ii) is a child who is a citizen of the United States, and who is living with a parent of the child who is a member of the Armed Forces of the United States assigned to permanent duty ashore outside the United States

(B)(A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this title if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), “work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this title if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

(ii) Notwithstanding clause (i), no individual under the age of 18 who engages in substantial gainful activity (determined in accordance with regulations prescribed pursuant to subparagraph (E)) may be considered to be disabled.
(D) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(E) The Commissioner of Social Security shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual’s ability to engage in substantial gainful activity. In determining whether an individual is able to engage in substantial gainful activity by reason of his earnings, where his disability is sufficiently severe to result in a functional limitation requiring assistance in order for him to work, there shall be excluded from such earnings an amount equal to the cost (to such individual) of any attendant care services, medical devices, equipment, prostheses, and similar items and services (not including routine drugs or routine medical services unless such drugs or services are necessary for the control of the disabling condition) which are necessary (as determined by the Commissioner of Social Security in regulations) for that purpose, whether or not such assistance is also needed to enable him to carry out his normal daily functions; except that the amounts to be excluded shall be subject to such reasonable limits as the Commissioner of Social Security may prescribe. Notwithstanding the provisions of subparagraph (B), an individual whose services or earnings meet such criteria shall be found not to be disabled.

(F) Notwithstanding the provisions of subparagraphs (A) through (D), an individual shall also be considered to be disabled for purposes of this title if he is permanently and totally disabled as defined under a State plan approved under title XIV or XVI as in effect for October 1972 and received aid under such plan (on the basis of disability) for December 1973 (and for at least one month prior to July 1973), so long as he is continuously disabled as so defined.

(G) In determining whether an individual’s physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual’s impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.
Section 120.347 Treatment of Trusts and Annuities

a) This Section applies to trusts established on or after August 11, 1993.

b) A trust is any arrangement in which a grantor transfers property to a trustee or trustees with the intention that it be held, managed or administered by the trustee or trustees for the benefit of the grantor or designated beneficiaries. A trust also includes any legal instrument or device that is similar to a trust, including an annuity.

c) A person shall be considered to have established a trust if resources of the person were used to form all or part of the principal of the trust and the trust is established (other than by will) by any of the following:

1) the person;

2) the person's spouse; or

3) any other person, including a court or administrative body, with legal authority to act on behalf of or at the direction of the person or the person's spouse.

d) This Section does not apply to the following trusts:

1) an irrevocable trust containing the resources of a person who is determined disabled (as provided in Section 120.314) and under age 65 that is established by a parent, grandparent, legal guardian or court for the sole benefit (as defined in Section 120.388(m)(2)) of the person, if language contained in the trust stipulates that any amount remaining in the trust (up to the amount expended by the Department on medical assistance) shall be paid to the Department upon the death of the person. This exclusion continues after the person reaches age 65 as long as the person continues to be disabled but any additions made by the person to the trust after age 65 will be treated as a transfer of assets under Sections 120.387 and 120.388. If the trust contains proceeds from a personal injury settlement, any Department charge (as described at 89 Ill. Adm. Code...
102.260) must be satisfied in order for the trust to be excluded under this subsection; or

2) Effective July 1, 2012, an irrevocable trust containing the resources of a person who is determined disabled (as provided in Section 120.314) that is established and managed by a non-profit association that pools funds but maintains a separate account for each beneficiary that is established by the disabled person, a parent, grandparent, legal guardian or court for the sole benefit of the disabled person, if language contained in the trust stipulates that any amount remaining in the trust (up to the amount expended by the Department on medical assistance) that is not retained by the trust for reasonable administrative costs related to wrapping up the affairs of the subaccount shall be paid to the Department upon the death of the person. After a person reaches age 65, any funding by or on behalf of the person to the trust shall be treated as a transfer of assets for less than fair market value unless the person is a ward of a county public guardian or the State guardian pursuant to Section 13-5 of the Probate Act of 1975 [755 ILCS 5] or Section 30 of the Guardianship and Advocacy Act [20 ILCS 3955] and lives in the community or the person is a ward of a county public guardian or the State guardian pursuant to Section 13-5 of the Probate Act of 1975 or Section 30 of the Guardianship and Advocacy Act and a court has found that any expenditures from the trust will maintain or enhance the person’s quality of life. If the trust contains proceeds from a personal injury settlement, any Department charge (as described at 89 Ill. Adm. Code 102.260) must be satisfied in order for the trust to be excluded under this subsection (d).
The Save Medicaid Resources Together (SMART) Act of 2012

On June 14, 2012, Illinois Governor Pat Quinn signed the Smart Act into law. The Smart Act (Public Act 097-0689) became effective on July 1, 2012. This law affects how the Medicaid program is administered in Illinois by the Illinois Department of Healthcare & Family Services. The law was brought about Deficit Reduction Act of 2005 that required changes to the management of Medicare and Medicaid funded services for cost savings.

As important in 2012, Illinois was projected to have a shortfall of about $2.7 billion for its Medicaid program. Thus the State felt it necessary to change the Medicaid program, including making cuts to what nursing homes are paid to care for their residents. The news media reported that changes were coming. A headline on the first page of The Chicago Tribune on April 17, 2012, read, “Big cuts loom for Medicaid in Illinois.”

Here are some of the changes brought on by the SMART Act:
1. Nursing homes and institutions for the mentally ill will receive less money for taking care of their residents.
2. The community spouse resource allowance was reduced to $109,560. (It had been $113,640 from January 1, 2012 until the changes under the Smart Act.)
3. The community spouse maintenance needs allowance (the monthly amount of income that a community spouse may have) was reduced to $2,739. (It had been $2,849 from January 1, 2012 until the changes under the Smart Act.)
4. A prepaid irrevocable funeral/burial contract may be up to $5,874 (not counting what part is for the “burial space”, as the burial space is not limited to any specific amount).
5. Prescriptions for long-term care residents have been reduced to a 14-day supply for each drug.
6. Other changes affect what services a person might receive. For example, a person on Medicaid can only get a new pair of glasses every two years. Adult dental care is only available for emergency extraction of teeth. Adult podiatric care is only available for diabetics.

The following pages provide parts of the Smart Act that are applicable to persons in long-term care facilities (nursing homes or assisted living facilities).

The Smart Act states the following with regard to Pooled Trusts:

“Notwithstanding any other provision of this Code to the contrary, an irrevocable trust containing the resources of a person who is determined to have a disability shall be considered exempt from consideration. Such trust must be established and managed by a non-profit association that pools funds but maintains a separate account for each beneficiary. The trust may be established by the person, a parent, grandparent, legal guardian, or court. It must be established for the sole benefit of the person and language contained in the trust shall stipulate that any amount remaining in the trust (up to the amount expended by the Department on medical assistance) that is not retained by the trust for reasonable administrative costs related to wrapping up the affairs of the subaccount shall be paid to the Department upon the death of the person. After a person reaches age 65, any funding by or on behalf of the person to the trust shall be treated as a transfer of assets for less than fair market value unless the person is a ward of a county public guardian or the State guardian pursuant to Section 13-5 of the Probate Act of 1975 or Section 30 of the Guardianship and Advocacy Act and lives in the community, or the person is a ward of a county public guardian of the State guardian pursuant to Section 13-5 of the Probate Act of 1975 or Section 30 of the Guardianship and Advocacy Act and a court has found that any expenditures from the trust will maintain or enhance the person’s qualify...”
If the trust contains proceeds from a personal injury settlement, any Department charge must be satisfied in order for the transfer to the trust to be treated as a transfer for fair market value.”
Supplemental Needs Distribution Guide   Addendum D

The following are examples of allowable distributions under Life’s Plan Incorporated Trusts

Community Supports:

- Advocacy, oversight, monitoring or private case management, legal services
- Respite, day care
- Some crisis intervention, guardianship
- Vocational rehabilitation or habilitation not covered by Medicaid or Medicare
- Room and board incidental to long term care or medical care (i.e., a portion of charges for nursing home, CBRF, residential care, etc.), not covered by Medicaid.
- Personal care attendant
- Support and service coordination
- Social services, including supervision and reporting if not covered by Medicaid

Recreation & Leisure:

- Participation in sports, hobbies, recreational events, cultural events
- Vacations and travel
- Club memberships
- Movies (No refreshments, including sodas allowed)
- Television and cable, computer, Internet services, telephone, tablets
- Costs to visiting friends, companions, Guardian
- Musical instruments
- Life coach
- Special occasions

Maintenance:

- Clothing
- Home improvements and repairs
- Furniture and appliances
- Housekeeping services
- Lawn care, snow removal
- Storage
- Income taxes
- Grooming (e.g. manicure; haircut)

Transportation:

- Purchase of a car
- Car repair, maintenance and insurance
- Accessibility-related equipment and modifications
- Bus, rail and cab fare/Uber/Lyft services

Medical Care (not covered by Medicaid):

- Therapies
- Prescription drugs and medications (not covered by Medicaid)
- Medical supplies and equipment
- Assistive technology/devices
- Dental treatment, preventive health and devices
• Eyeglasses, contacts and optometry services
• Medical treatments not medically necessary
• Co-pays, deductibles, etc.
• Housing modifications for accessibility
• Ambulance or other medical transportation

**Insurance:**

• Life Insurance (MUST be for the benefit of beneficiary, others cannot be designated beneficiary of policy)
• Supplemental health insurance

**Education & Training:**

• Conferences and seminars
• Publication subscriptions
• Class tuition, books and supplies
• Software
• Music class

And other expenses to provide dignity, purpose and enjoyment for the beneficiary

**THE FOLLOWING EXPENSES CANNOT BE PAID FOR SSI RECIPIENTS**

**Supplementary Food and Shelter:**

• Rent
• Groceries
• Cost difference between shared and private room
• Property taxes
• Basic utilities (e.g. heat, gas, electric, water, sewer and garbage removal)

Note: Any recurring payments or big ticket purchases (e.g. car, TV, furniture) should be reviewed by your Trust administrator before purchasing. Certain distribution requests may require a “denial” by Medicaid or insurance providers to be considered a supplemental need. This is a partial, not exhaustive, list of possible uses of your trust fund assets.

Passed House amended (12/03/2014)

Achieving a Better Life Experience Act of 2014 or the ABLE Act of 2014 - Title I: Qualified ABLE Programs - (Sec. 101) States as the purposes of this title to: (1) encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life; and (2) provide secure funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary's employment, and other sources. (Sec. 102) Amends the Internal Revenue Code to exempt from taxation a qualified ABLE program established and maintained by a state, or by an agency or instrumentality of the state, to pay the qualified disability expenses related to the blindness or disability of a program beneficiary, including expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, and expenses for oversight and monitoring, funeral and burial expenses.

Requires officers and employees who have control of the qualified ABLE program to make reports as required by the Secretary of the Treasury. Imposes an additional 10% tax on individuals who do not use distributions from an ABLE account for disability expenses. Subjects ABLE accounts to the penalty tax for excess contributions and for failure to file required reports. (Sec. 103) Requires amounts in ABLE accounts to be disregarded in determining eligibility for means-tested federal programs, except distributions for housing expenses under the supplemental security income program and for amounts in an ABLE account exceeding $100,000. Suspends the payment of supplemental security income benefits to an individual during any period in which such individual has excess resources in an ABLE account, but does not suspend or affect the Medicaid eligibility of such individual. (Sec. 104) Amends the bankruptcy code to exclude funds placed in an account of a qualified ABLE program from a bankruptcy estate, but only if: (1) the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor; (2) such funds are not pledged or promised to any entity in connection with any extension of credit and are not excess contributions to an ABLE account; and (3) such funds do not exceed $6,225 during a specified time period. (Sec. 105) Amends the Internal Revenue Code to permit contributors to or beneficiaries of a qualified tuition program (529 program) to direct the investment of contributions to a 529 program (or any earnings thereon) up to two times in any calendar year (currently, no investment direction is allowed).

Title II: Offsets - (Sec. 201) Amends title II (Old Age, Survivors, and Disability Insurance Benefits) of the Social Security Act to change the age at which disability benefits are no longer subject to reductions from 65 to the normal retirement age range as set forth in such Act. (Sec. 202) Amends title XVIII (Medicare) of the Social Security Act to: (1) accelerate the beginning date for adjustments of relative value targets for misvalued services in Medicare physician fee schedules from 2017 to 2016; and (2) treat items and services for vacuum erection systems furnished on and after July 1, 2015, in the same manner as erectile dysfunction drugs for purposes of defining covered drugs under Medicare part D.

Section 204: Amends the American Taxpayer Relief Act of 2012 to delay to January 1, 2025, the implementation of oral-only end stage renal disease (ESRD)-related drugs in the ESRD prospective payment system. (Sec. 205) Amends the Internal Revenue Code to increase the Inland Waterways Trust Fund financing rate to 29 cents per gallon for fuel used after March 1, 2015. (Sec. 206) Amends the Internal Revenue Code to treat Internal Revenue Service (IRS)-certified professional employer organizations (PEOs) as employers for employment tax purposes (thus allowing such PEOs to pay wages and collect and remit payroll taxes on behalf of an employer). Sets forth IRS certification requirements for PEOs, including independent financial review and reporting requirements. Requires a PEO, each year, to post a bond equal to the greater of 5% of the PEO's liability during the preceding calendar year (not exceeding $1 million) or $50,000. (Sec. 207) Amends the Internal Revenue Code to exclude dividends received by a U.S. shareholder from a controlled foreign corporation from the definition of "personal holding company income" for purposes of personal holding company taxation. (Sec. 208) Amends the Internal Revenue Code to require an annual inflation adjustment to tax penalty amounts for: (1) failure to file a tax return or pay tax, (2) failure to file certain information returns or registration statements, (3) noncompliance of tax return preparers, (4) failure to file partnership or S corporation returns, and (5) failure to file correct information returns or correct payee statements. (Sec. 209) Amends the Internal Revenue Code to increase from 15 to 30% the rate of the continuous levy on payments due to a Medicare provider or supplier for overdue taxes.
Resources

Nadworny, John
Haddad, Cynthia
Lovelace, Renee
The ARC
Chamberlin, Darcy
Jackins, Barbara, Blank, Richard
Shulman, Ken
Macy, Peter
Onello, Harriet

p. 202-209
Pooled Trust Options, A Guidebook produced by the National Plan Alliance, p. 21-27, p. 32-39 & p. 54-55
POOLED TRUST PROGRAMS FOR PEOPLE WITH DISABILITIES, A GUIDE FOR FAMILIES, 2002
“Special Needs Trusts and Alternatives” IICLE Special Needs Planning Basic and Advanced

Stetson University, ed., Special Needs Trust pre-conference materials Pooled Trust intensive Stetson University College of Law, October 2015.

Websites

SSA Procedure Operations Manual System (POMS) –
SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203!opendocument#b

89 IL Admin Code Treatment of Trusts

The Academy of Special Needs Planners consists of Special Needs Planners is to provide a general overview of strategies for parents and others to plan for their own futures and for those of family members with special needs. The Academy has have one of the few national listing sites on pooled trusts: http://specialneedsanswers.com/pooled-trust

The Special Needs Alliance (SNA) is a national, not for profit organization of attorneys dedicated to the practice of disability and public benefits law. Individuals with disabilities, their families and their advisors rely on the SNA to connect them with nearby attorneys who focus their practices in the disability law arena. http://specialneedsalliance.com/home
**Illinois ABLE program**

The Illinois ABLE program is a tax-advantaged investment program that provides persons with blindness or disabilities the option to save for disability-related expenses without putting their federal means tested benefits at risk. Illinois ABLE is a member of the National ABLE Alliance, a partnership of 14 states representing over one quarter of the population of the United States. The goal of the National ABLE Alliance is to provide the most robust ABLE services possible at the lowest cost to account owners.  
http://illinoistreasurer.gov/Individuals/ABLE

**ABLE National Resource Center**

The ABLE National Resource Center (ANRC) is a collaborative whose supporters share the goal of accelerating the design and availability of ABLE accounts for the benefit of individuals with disabilities and their families. We bring together the investment, support and resources of the country’s largest and most influential national disability programs.  http://www.ablenr.org/

**Special Needs Alliance Trustee Handbook**

The Special Needs Alliance offers a free booklet on administering special needs trusts. In plain English and Spanish, it can help a trustee understand the choices and obligations in managing a Special Needs Trust.  http://specialneedsalliance.com/free-trustee-handbook
Partnering with Your Insurance Carrier to Improve Practice Mgmt. & Avoid Malpractice

Jeffrey B. Strand,

President & CEO of ISBA Mutual Ins. Co.
About The Faculty

JEFF STRAND is the President and CEO of ISBA Mutual. He has been in the insurance industry since 1987. Starting in 1991, he began providing professional liability insurance and risk management services to lawyers in Illinois as the CFO and Senior Vice President of ISBA Mutual Insurance. Jeff joined ISBA Mutual in its infancy and provided leadership in developing risk management products for lawyers and law firms. He has been a leader in technological innovation, while always keeping the focus on serving Illinois lawyers.
Partnering with Your Insurance Carrier to Improve Practice Management & Avoid Malpractice

Jeff Strand

April 28, 2017

COMMUNICATING WITH YOUR CARRIER
The Application

► Complete and accurate information serves your best interest

Do I Have a Problem?

► What is an Incident?
► What is a Claim?
► What is a Suit?
When In Doubt

► Call your carrier
  ► ISBA Mutual Risk Management Hotline: 866 473-4722
► Call the ARDC: 800 826-8625
► Call the ISBA Ethics Infoline: 217 747-1452

COMMON ERRORS
The Most Common Alleged Errors

Source: American Bar Association Standing Committee on Lawyers' Professional Liability Profile of Legal Malpractice Claims 2012-2015; 2015 Study

Top 5 Claims by US Area of Law

PERCENT OF CLOSED CLAIMS
- Personal Injury – Plaintiff 18%
- Real Estate 15%
- Estate, Trust & Probate 14%
- Collection & Bankruptcy 13%
- Family Law 12%
- All Other 11%

Source: American Bar Association Standing Committee on Lawyers’ Professional Liability Profile of Legal Malpractice Claims 2012-2015; 2015 Study
TIPS FOR AVOIDING CLAIMS

ISBA Mutual Lawyers’ Malpractice Insurance

Client Screening

► Are the client’s expectations realistic?
► Have they hired and fired several lawyers?
► Do you really want to work with this person?
► Have you had bad experiences with clients like this in the past?
► When is it time to terminate the relationship?
Conflicts of Interest

- Establish a system
- Dealing with the “unrepresented party”
- Representing multiple parties
- Conflicts to avoid
- Get it in writing!

Know Thyself

- “Stick to your knitting…” know how to apply the law in the areas where you practice
- Manage your caseload
- Know how to say “No”
Put it in Writing

- Engagement, Nonengagement, and Disengagement Letters
- Manage Expectations
- Progress Reports
- Invoices
- When something goes wrong, tell your client! (and your carrier)

Communicate. Communicate More.

- Good customer service is a best practice
  - Answer your phone / return phone calls
  - Don’t make promises unless you can keep them
  - Listen to your clients
  - Explain everything
- More than half of all ARDC grievances relate to client-attorney relations
Remember You Aren’t Alone

- Bar Associations
- Mentoring Programs
- Law School Career Centers
- Chamber of Commerce
- Your Carrier!

Misplaced Causes Malpractice

- Calendaring
- File Documentation, Management, Retention & Destruction
- Billing & Collection of Fees
- Computer Backups
- Backup Lawyers
Sharing Risk with Other Counsel

- Referrals
- Office Sharing
- Letterhead
- Co-counsel / Local Counsel
- Of Counsel
- Contract Lawyers
- Former Associates /Partners

ISBA Mutual Lawyers' Malpractice Insurance

It’s a Team Effort

Everyone Contributes to Risk

- Admins
- Paralegals
- Professional Staff
- Short-term Staff

They All Need to Know

- Procedures
- Ethical Rules
- Loss Prevention
- Backup Plans

ISBA Mutual Lawyers' Malpractice Insurance
Social Media

- The internet is everywhere forever

Technology As a “Frenemy”

- Phishing
- Wire Transfer
- Cyber Liability
Thank You