



THE CORPORATE LAWYER

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

Writing agreements clients can understand

By Christine M. Kieta

The other day I reviewed a contract that was written so poorly that I could not tell which party was identified when I saw the first or second-person pronouns. I think I sighed visibly when I saw the block-text, ten-line paragraphs, and no road maps to distinguish the sections. I concluded that the contract was written this way for one of two reasons: 1) the other party wanted to discourage the smaller party from reading it before signing which is a common, calculated approach; or 2) it really was a terrible contract. Based on the bad grammar and run-on sentences I determined the latter was the case.

Despite the arcane way that most lawyers learn to write contracts—by studying poorly written ones that find themselves in law school text books—they are getting better slowly. In-

deed, my favorite part of being an attorney is writing agreements that clients can understand. When written well they improve business relationships and control future problems. The following strategies are the ones that I find are most helpful.

Strategy 1: Ensure That The Contract Is Aesthetically Appealing To The Reader's Eyes

Contracts need curvy paragraphs, bolded sentences, and spicy indentations. The best way to do this is to start with point headings. They break up documents so that the reader can digest them in small portions. Expertly crafted point headings

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Employer 401(k) plan and health care plan disclosures to be made in second half of 2012

Bernard G. Peter of Kubasiak, Flystra, Thorpe & Rotunno, P.C.

Over the next three months virtually all employers will be required to provide their employees a substantial amount of information regarding the employee benefits plan they sponsor. First of all, employers must give employees detailed disclosures of all of the fees that are charged to the funds in which participants direct the investments of their account balances in 401(k) retirement plans and other individual account defined contribution plans the employer sponsors. In addition, employers must provide employees a summary of the benefits and coverage of the health care plans offered by employers to employees. The following summa-

rizes these new employer obligations.

1. New Retirement Plan Fees Disclosures Are Required to be Made by Providers to Employers and by Employers to Plan Participants

A. As of July 1, 2012 in accordance with regulations issued by the U. S. Department of Labor ("DOL") under Section 408(b) (2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), a covered service provider ("CSP") of covered plans ("Covered Plans") services was required to provide to

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(Notice to librarians: The following issues were published in Volume 49 of this newsletter during the fiscal year ending June 30, 2012: July, No. 1; August, No. 2; September, No. 3; November, No. 4; January, No. 5; March, No. 6; May, No. 7; June, No. 8).



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Writing agreements clients can understand

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serve as lamps along a hallway giving light to each section in the contract. More importantly, point headings in contracts lead the author to write focused sections. In the end, they produce different contours on the face of the contract permitting a reader's eyes scan it and know immediately that it will not be drawn into too much at once.

Strategy 2: Explain The Contract Terms As Though You Are Teaching A Child

Contract clauses are important. They have specific functions which often materially affect transactions and any resulting problems. When the clauses are written more clearly, especially for non-lawyers, there is less room for confusion. These are the potential jury questions. The problem is that few non-lawyers understand the importance of these clauses or how they affect a business.

When I helped build an organization I gained a dramatically different understanding of 'confidential and proprietary information' now it was the sweat of my brow. So when it was leaked to a competitor I wrote the restriction differently:

As a member you will receive materials which this organization works hard to create. These are confidential and proprietary. That means this organization owns all the materials that it sends to you and can restrict your ability to use them or profit from them. This is important to understand. This organization has a compelling reason to protect the good will that surrounds it and the materials which it attracts.

Needless to say, our clients then understood what we meant when we said that they could not 'copy, distribute, or reproduce' our 'confidential and proprietary information.' This is the balance between using contract clauses that a court knows and interprets in a certain way but written so that non-lawyers comprehend it.

Strategy 3: Write The Contract With Simple Sentences

Contracts are scarred by ten-lined paragraphs and semi-colons that come from outer space. The crash landing is obvious when they do not follow an independent clause.

This happens with many other punctuation marks, too.

Grammar is the first way the meaning of a document is controlled. Strong contracts begin with well written sentences. The shorter they are the stronger they are. Longer sentences are confusing to deconstruct. They also run a higher risk of improperly employed punctuation marks which can permanently alter the meaning of a sentence.

Well structured contract clauses begin with a short sentence that identifies what the clause does: "Waiver of one clause in this contract is not a waiver of any other." The next sentence should define the ramifications of the first especially when dealing with more complex contract clauses. But now a reader does not have to pilfer through improperly used commas to determine the meaning of a critical contract clause.

For example, one of the first organizations that I helped build had about five people all working in different directions. This is how small businesses grow. It is also how problems breed. The contract, therefore, with the clients needed a merger clause so strong that a client could not allege later that it was told something else during the relationship. I wrote it as follows:

This agreement represents all the terms by which you and ___ are bound. This is important for you. It

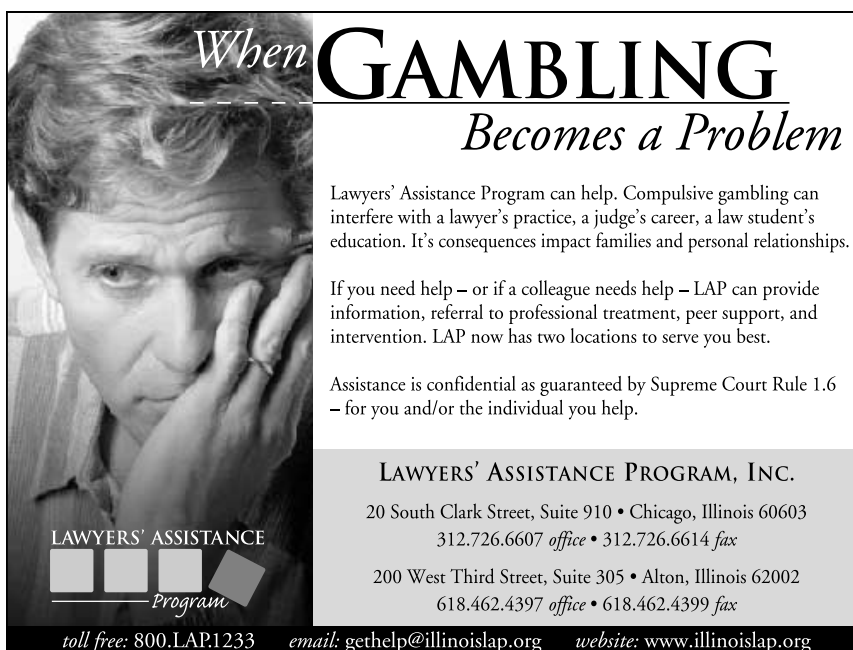
means that you must not rely on information about the rules if it is not included in or conflicts with what you are reading now.

The first sentence structures the merger clause. The meaning of it cannot go beyond the period. The next sentence highlights the importance of the first. The third explains what it means. Although a merger clause typically is not that complex it is against the background of the process that it was protecting. Writing the contract this way permits it breathe and grow with the business as the business grows.

From Chief Operating Officers to partners at law firms I have never had one turn down a contract written with these three strategies. Arcane contracts are difficult to deconstruct and can result in problems that can lead to costly litigation. Contracts that are appealing to someone's eyes, simple to comprehend, and easy to read can improve dramatically the business relationships that they form. ■

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Employer 401(k) plan and health care plan disclosures to be made in second half of 2012

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- the employer sponsors of Covered Plans a very detailed disclosure of the fees being charged to plan sponsors as well as a summary of these fees.
- B. A "CSP" is a service provider which enters into an arrangement with the Covered Plan and reasonably expects to receive at least \$1,000 in compensation for the services specified in the contract with the Covered Plan whether the compensation is received in a particular calendar year, plan year or stated term of the contract.
- C. "Covered Plans" include defined contribution (individual account) plans, 403(b) plans subject to ERISA, except certain frozen 403(b) contracts issued to employers before 2009, and defined benefit plans.
- D. The disclosure by the CSP of "indirect compensation" (i.e. compensation from a source other than the plan, plan sponsor, affiliate or subcontractor) must include a description of the arrangement between the payer and the CSP receiving the indirect compensation.
- E. The CSP must disclose to the employer sponsor the total operating expenses of a designated investment alternative ("DIA") expressed as a percentage and calculated in accordance with the DOL fee disclosure rules. The CSP must in addition disclose any other information or data about the DIA that is within the control of or is reasonably available to the CSP if this information will be helpful to the plan fiduciary in meeting the participant disclosure requirements under the DOL rules.
- F. If the CSP has not make the required disclosures to the employer sponsor by the July 1, 2012, deadline the employer sponsor *must request the disclosures in writing*. If the disclosures are not provided *within ninety (90) days* the employer sponsor must report the CSP to the DOL and terminate the future services of the CSP. Also, *it is the obligation of the employer sponsor to review the disclosures received from the CSP and make sure that the disclosures comply with the DOL regulations*. CSPs are in effect transferring their responsibility to employer sponsors by forwarding the disclosures to employer sponsors and telling employer sponsors to let the CSP know if the employer sponsor does not believe the disclosures comply with the DOL regulations.
- G. The purpose of the disclosures is that employer sponsors know exactly what they are paying for when they enter into an agreement with a CSP to provide Covered Plan services to the employees of the employer sponsor.
- H. The impetus for these new rules comes from the belief that the fees that employer sponsors and plan participants are paying is not transparent because much of the information is buried in prospectuses and similar documents.
- I. The employer sponsor as a plan fiduciary under ERISA is required to make sure that the fees being charged to employees in the Covered Plans maintained by the employer are reasonable. For this reason many employers either directly or with the assistance of a retirement plan adviser have undertaken bench mark projects or Requests For Proposals projects over the past year to be certain that the fees being charged by the CSP are reasonable.
- J. *By August 30, 2012* employer sponsors must take the fee information received from the CSP for its Covered Plans and make a similar disclosure to the participants in ERISA participant-directed individual account plans (e.g. 401(k), profit sharing and Internal Revenue Code Section 403(b) plans subject to ERISA, etc.). The first quarterly statements to participants reflecting the participant disclosure rules are due *November 14, 2012*.
- K. The DOL estimates that 77 million participants in 483,000 plans with total assets of nearly 3 trillion dollars will be impacted.
- L. The term "participant" includes plan participants, employees who are eligible but not participating, beneficiaries (by reason of the death of the participant) and alternate payees under a Qualified Domestic Relations Order (QDRO).
- M. The DOL guidance requires the employer sponsor or whoever the employer sponsor has designated as the plan administrator ("plan administrator") to provide four categories of plan-related information to plan participants.

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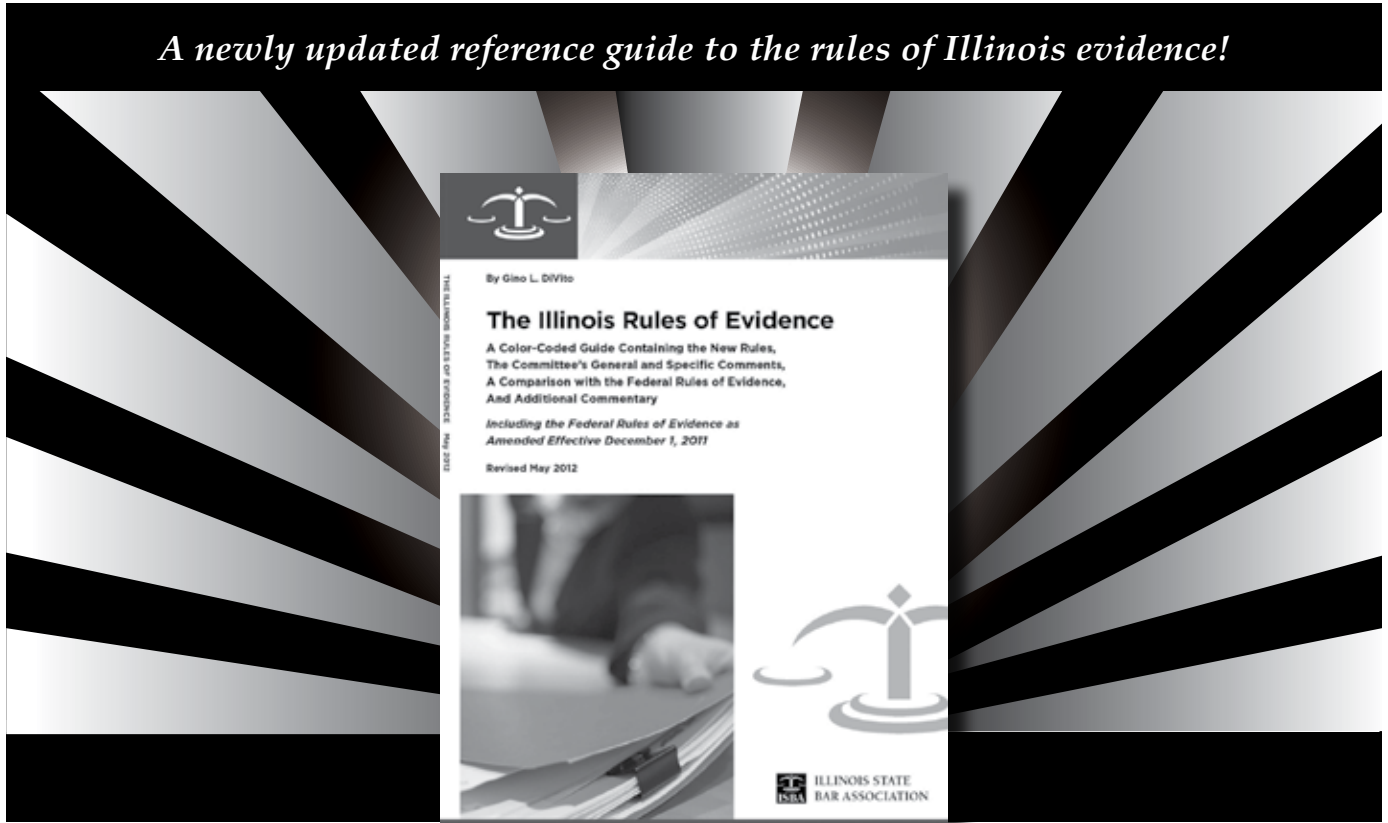
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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

- (i) General plan information
 - (ii) Administrative expense information
 - (iii) Individual expense information
 - (iv) Dollar amount of administrative and individual expenses actually charged to or deducted from the account of an individual during the preceding quarter with a description of the services for which the charge or deduction was made.
- N. In addition the following investment-related information must be provided to plan participants in a comparative format:
- (i) The name and the type or category of each investment alternative
 - (ii) Performance data
 - (iii) Benchmark comparisons
 - (iv) A description and the amount of each shareholder-type fee such as commissions and loads
 - (v) As described above, the operating expenses expressed as a percentage (expense ratio) and calculated in accordance with DOL regulations
 - (vi) A link to an internet web site providing investment information for each investment alternative
 - (vii) Statements that fees and expenses are only one of several factors to be considered in making investment decisions and the cumulative effect of fees can be substantial
 - (viii) A reference that more information is available on the DOL website
 - (ix) A glossary of financial and investment terms.
- O. The DOL has provided a model comparative chart for investment options. If Plan administrators use the model comparative chart they are considered to have complied with the comparative disclosure requirement.
- P. If a plan provides a brokerage window, self-directed account or similar arrangement that enables participants and beneficiaries to select investments beyond those designated by the plan as investment options, the DOL on July 30 in Field Assistance Bulletin 2012-02R eliminated the requirement that annual fee and expense information must be provided to all participants and beneficiaries on these arrangements even though only a small number of participants or beneficiaries use them. However, where a brokerage window or similar offering is made available to participants the plan administrator may have additional fiduciary obligations.
- Q. The disclosures do not have to be provided as stand-alone documents but can be furnished as part of the summary plan description or pension benefit statement for the plan; provided that the disclosures are furnished in accordance with the applicable timing requirements in the regulations.
- R. For enforcement purposes, if the CSP and employer sponsor have acted in good faith based on a reasonable interpretation of the regulations, the DOL states in Field Assistance Bulletin 2012-02R that enforcement action generally would be unnecessary even if the disclosures do not meet all the requirements as of the July 1 deadline for the CSP and as of the August 30 deadline for the plan sponsor as long as the CSP and/or plan sponsor have a plan in place to meet all the requirements.
- 2. New Group Health Plan Disclosures**
- A. Added by Patient Protection and Affordable Care Act as amended by the Health Care and Education Act of 2010 (the "Act") which health care legislation recently was upheld by the Supreme Court.
- B. A summary of benefits and coverage (the "SBC") which is not to exceed four double-sided pages must be provided to all participants and beneficiaries who enroll or re-enroll through an open enrollment period that begins or after *September 23, 2012* unless the DOL would postpone this due date. For participants and beneficiaries who enroll in coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees) the SBC must be provided beginning on the first day of the first plan year that begins or after *September 23, 2012*.
- C. Stand-alone dental and visions plans and health savings accounts (HSAs) are not required to provide an SBC.
- D. If certain requirements are met the SBC can be provided electronically.
- E. In parts of the U. S. if at least 10% of the population in the county only are literate in the same non-English language the SBC must disclose that the SBC is available in the relevant language.
- F. The SBC must provide a uniform glossary of health insurance and medical terms so that consumers are able to compare health coverage and understand the terms of the coverage.
- G. The SBC must provide a description of the coverage, including cost-sharing (i.e. deductibles, coinsurance and co-payment obligations), exceptions, reductions and limitations on coverage.
- H. Examples to illustrate common benefits scenarios (such as pregnancy and serious or chronic medical conditions) must be provided.
- I. Contact information for questions and internet addresses for network providers and obtaining information on prescription drug coverage also must be provided along with a statement that the SBC only is a summary and that the plan document, policy or certificate of coverage should be consulted.
- J. The SBC may be provided electronically to participants and beneficiaries in connection with their online enrollment or online renewal of coverage under the Plan. Also, the SBC may be provided electronically to participants who request an SBC online. In either case, the individual must have the option to receive a paper copy upon request.
- K. If a health care plan provides coverage through two or more issuers of health care contracts, during the first year in which the SBC regulations apply, the DOL will consider the provision of multiple SBCs that together provide all the relevant information to meet the SBC content requirement.
- L. The penalty for failure to comply with the requirement to provide an SBC is \$1,000 for each enrollee who fails to receive a timely and accurate SBC. Additional penalties may be applied under ERISA and under the Internal Revenue Code of 1986, as amended. However, during the first year in which the SBC requirement is applicable, the DOL will not impose penalties on plans and issuers that are working diligently and in good faith to comply.
- M. A model SBC and glossary of terms as well as instructions on how to prepare the SBC is available on the DOL Web Site at <www.dol.gov/ebsa/healthreform>. ■

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September

Friday, 9/7/12- Chicago, ISBA Chicago Regional Office—Child Custody and the Military Family. Presented by the ISBA Family Law Section and the ISBA Military Affairs Committee. 8:25-4:00 pm; Reception 4-5 (lunch and reception included)

Friday, 9/7/12- Teleseminar—Valuing Closing Held Interests and Effective Planning without Discounts. Presented by the Illinois State Bar Association. 12-1.

Monday, 9/10/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Monday, 9/10/12- Friday, 9/14/12- Chicago, ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Presented by the Illinois State Bar Association. 8:30-5:45 daily.

Wednesday, 9/12/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Thursday, 9/13/12-Saturday, 9/15/12- Itasca, Westin Hotel—8th Annual Solo and Small Firm Conference. Presented by the Illinois State Bar Association. Time TBD.

Tuesday, 9/18/12- Teleseminar—Ethics in Pre-Trial Investigations. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/20/12- Teleseminar—Tax Planning for the Entrepreneur. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/20/12- Chicago, ISBA Chicago Regional Office (DNP)—Introduction to Improvisation for Lawyers: Basic Communication Skills for Public Speaking, Teaching and Presenting. Complimentary for ISBA Law Ed Faculty. 9-11; 12-2; 2:30-4:30.

Friday, 9/21/12- Chicago, ISBA Chicago Regional Office—Introduction to Impro-

visation for Lawyers: Basic Communication Skills for Attorneys. Presented by the Illinois State Bar Association. 9-11; 12-2; 2:30-4:30.

Monday, 9/24/12- Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Tuesday, 9/25/12- Teleseminar—Individual Trustees-Duties and Potential Traps. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/27/12- Teleseminar—Breaking Up: Ethical Considerations When a Law Firm Dissolves. Presented by the Illinois State Bar Association. 12-1.

Friday, 9/28/12- East Peoria, Stoney Creek Inn—Deconstructing Delinquency. Presented by the ISBA Child Law Section. 8:00-4:45.

Friday, 9/28/12- Chicago, ISBA Chicago Regional Office—The Basics of the Americans with Disabilities Act. Presented by the ISBA Standing Committee on Disability Law. 9:15-12:45.

Friday, 9/28/12- Live Webcast—The Basics of the Americans with Disabilities Act. Presented by the ISBA Standing Committee on Disability Law. 9:15-12:45.

October

Tuesday, 10/2/12- Teleseminar—Compensation Issues in Nonprofits. Presented by the Illinois State Bar Association. 12-1.

Monday, 10/8/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 9-10.

Monday, 10/8/12- Chicago, ISBA Chicago Regional Office—Advanced Workers' Compensation- Fall 2012. Presented by the ISBA Workers' Compensation Law Section. 9-4.

Monday, 10/8/12- Fairview Heights, Four Points Sheraton—Advanced Workers' Compensation- Fall 2012. Presented by the ISBA Workers' Compensation Law Section. 9-4.

Tuesday, 10/9/12- Teleseminar—Franchise Agreements: A Practical Guide to Reviewing and Negotiating. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/10/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 9-10.

Wednesday, 10/10/12- Thursday, 10/11/12- Chicago, ISBA Chicago Regional Office—A Primer on Administrative Law and Rulemaking. Presented by the ISBA Administrative Law Section; co-sponsored by the ISBA Civil Practice and Procedure Section, the ISBA Real Estate Law Section and the ISBA Energy, Utilities, Transportation and Telecommunications Section. All day both days.

Friday, 10/12/12- Chicago, ISBA Chicago Regional Office—Transitions, Economics and Ethics- Ready or Not! Presented by the ISBA Senior Lawyers Section. Half Day PM program.

Friday, 10/12/12- Bloomington, Holiday Inn and Suites—Fall 2012 DUI & Traffic Law Updates. Presented by the ISBA Traffic Laws and Courts Section. 9-4.

Tuesday, 10/16/12- Teleseminar—Understanding Financial Statements for Business Lawyers, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/17/12- Teleseminar—Understanding Financial Statements for Business Lawyers, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/17/12- Chicago, ISBA Chicago Regional Office—What Every Lawyer Should Know About Intellectual Property. Presented by the ISBA Intellectual Property Law Section. All day program. ■

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