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ILLINOIS STATE BAR ASSOCIATION

THE PUBLIC SERVANT

The newsletter of the Illinois State Bar Association's Standing Committee on Government Lawyers

All members of public bodies required to complete Attorney General's Open Meetings Act training curriculum

Effective January 1, 2012, subsection 1.05(b) of the Open Meetings Act (5 ILCS 120/1.05(b)) requires that each elected or appointed member of a public body subject to the Open Meetings Act complete the electronic training curriculum developed and administered by the Illinois Attorney General's Public Access Counselor. Section 1.05 also requires that each public body member completing the training, file a copy of his or her certificate of completion with the public body which he or she serves. Public body members serving in office on January 1, 2012, must complete the training by December 31, 2012. Persons who become members of public bodies after January 1, 2012, must complete the training curriculum within 90 days of assuming office. School board members may satisfy the training requirements by completing a course offered by a school organization created under Article 23 of the School Code.

The Attorney General's Public Access Counselor's 2012 Open Meetings Act training is now available and may be accessed through the Attorney General's Web site: <http://foia.ilattorneygeneral.net/Default.aspx>. ■

Is information on privately-owned electronic devices subject to FOIA?—What Public Access Binding Opinion No. 11-006 means to you and your government clients

By John Redlingshafer – Heyl, Royster, Voelker & Allen (Peoria)

Public officials are continuously advised by their counsel to be extremely mindful of potential pitfalls when they send out documents or otherwise communicate via electronic means. In years past, the concern was typically centered on potential violations of the Open Meetings Act, especially when simple, informational e-mails could lead to discussion of public business between everyone receiving the e-mail. For the most part, the Freedom of Information Act ("FOIA") was never a major concern, as the information disseminated was likely already included in the definition of "public records." However, a new binding opinion from the Illinois Attorney General's Public Access Bureau ("Opinion 11-006") will change that past practice. Opinion 11-006 firmly establishes that electronic communications, whether shared on publicly *or privately-owned devices*, can be considered "public records" and therefore, may be subject to FOIA.

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Is information on privately-owned electronic devices subject to FOIA?—What Public Access Binding Opinion No. 11-006 means to you and your government clients

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Background

What became Opinion 11-006 was born on July 15, 2011, when a reporter for *The News Gazette* of Champaign filed a request under FOIA to the City of Champaign seeking:

> [a]ll electronic communications, including cellphone text messages, sent and received by members of the city council and the mayor during city council meetings and study sessions since (and including) May 3.[1]

The requester further specified he was seeking information from "both city-issued and personal cellphones…e-mail addresses and Twitter accounts."

The City provided the requester with documentation that was held by in house or by other subsidiary public bodies. The documents provided were further redacted to remove personal e-mail addresses and other personal identifiers under 5 ILCS 140/7(1)(b).

The City also partially denied the request, maintaining that "[p]rivate citizen's communications to the Council member's or the Mayor's privately owned electronic devices is not within the scope of the Freedom of Information Act."

To support its position (and as more fully discussed below), the City supplied the requester with a memorandum from counsel advising the Illinois Appellate Court has held in a similar fashion in *Quinn v. Stone*. *Quinn*, 211 Ill.App.3d 809 (1st Dist. 1991), (where the plaintiff sued an individual alderman for records related to travel expenditures and the Court held, among other things, only a public body is subject to FOIA, and not a public official).

During the course of this dispute, however, the City further conceded that if the records on the private devices were actually in the City's possession, they would be subject to FOIA.

After reviewing the City's response to his request, the reporter sought Public Access Counselor review. The requester maintained the privately held information should be disclosed, as, for example, any communication between or used by members of a public body "in their role as a member of that public body during an ongoing public meeting—should be public records."

Review by the Public Access Counselor

The Attorney General's Office issued its opinion on November 15, 2011, after requesting an appropriate extension to file its decision. Right away, we learned that the Attorney General's review "concern[ed] perhaps the most fundamental issue in interpreting the Freedom of Information Act—What is a public record?" Specifically, Opinion 11-006 was drafted to answer the question: do communications withheld by the City coming from electronic devices owned by officials and not by the City fall into the definition of a "public record?"

However, there were two provisions of FOIA the Attorney General Office asked the City (and quite frankly, all of us) to consider when determining whether or not a record should be disclosed under FOIA, including those contained on privately-held devices.

The first provision is perhaps one of the most obvious and important parts of FOIA, but yet one of the most overlooked - the very beginning of the Act itself - Section 1 (5 ILCS 140/1). It is in this Section we are reminded of the General Assembly's intent under FOIA in that any:

> [r]estraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. *The provisions of this Act shall be construed in accordance with this principle.*
>
> (Emphasis added in Opinion).

Section 1 provides this broad overview and instills in us the concept that we must almost always assume any document arguably responsive to a FOIA request will need to be disclosed. The only qualifier to this assumption will be to establish whether or not the document(s) are "public records," which leads us to the second important provision of FOIA—that which defines the phrase "public records" found at 5 ILCS 140/2(c).

5 ILCS 140/2(c) states in relevant part:

> [a]ll records * * * and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any body.

In its review, the Attorney General's Office concluded the City simply focused on the phrase "in the possession of," and did not consider the statute as a whole. Specifically, Opinion 11-006 stated that records in a public body's possession "are only one class of records defined in FOIA."

In what is perhaps the most important line of the analysis, we learned:

> Whether information is a "public record" is not determined by where, how, or on what device that record was created; rather the question is whether that record was prepared by or used by one or more members of a public body in conducting the affairs of government. (Emphasis added).

With this in mind, the Attorney General's Office came to the conclusion that any request for a public record, even those contained on privately-owned devices, should be reviewed with a "focus…on the creation of the record itself, and how it was used." As an example, it was suggested that if a member of a public body sends or receives communications on personal devices during meetings or sessions (or whatever specified in a FOIA request), and the communications relate to public business, they are "public records" under FOIA.

Opinion 11-006 did not simply end there. The Attorney General's Office did further consider other arguments put forth by the City at various points during the dispute (in addition to the original argument that the documents were not in its possession).

First, Opinion 11-006 noted the City's reliance on the *Quinn* decision was "undermined by the facts of that case." The City argued the Mayor and city council were not public bodies and therefore, consistent with *Quinn*, the communications received from privately-owned devices are not subject to FOIA.

However, the Attorney General's Office asserted Opinion 11-006 is "completely consistent" with the Appellate Court's ruling. In

essence, review of the facts in *Quinn* that demonstrate a proper action under FOIA was to direct a request to a public body is consistent with the facts here—"that the records of the City officials in question pertaining to the transaction of public business are not records of the individual officers but records of the city." Therefore, both decisions can be read together to show public records must be made available if required of a public body (no matter where they originate).

The City's last argument was that a decision to provide all of this privately-held information would have "First Amendment implications well beyond this statute." However, it was determined this opinion was not supported by any evidence demonstrating the First Amendment would be implicated when records at issue in a request "clearly relate to the transaction of public business." It was advised that this clear relation to public business is exactly what will protect personal business and/or political issues from being released. Earlier in Opinion 11-006, it was even noted that the Attorney General's Office "strongly agree[d]" with the City that "messages regarding 'personal business meetings or family matters' do not fall within the definition of 'public records'" and do not need to be produced.

Going Forward

Opinion 11-006 ends by giving us all guidance as to how we are to handle similar requests in the future by summarizing:

> A public body that receives a FOIA request for records generated on private equipment could clearly distinguish between communications that are either political in nature or simply mention public business are subject to disclosure under the requirements of FOIA, and any applicable FOIA exemptions can be asserted with respect to those records.

However, there are now many other issues we must consider and work with public bodies to properly comply with FOIA (and other areas of the Illinois law). These issues include, but are in no way limited, to:

1. Who now has the obligation to store and/or maintain public records originating from privately-owned devices?

Opinion 11-006 defined private electronic devices to include "cell phones, iphones, ipads, blackberries, computers, or any other device used to send and receive communications by means of e-mail, voice and/or text messages."

Almost all of us have at least one of these devices. So does a public official forward everything (text message strings, voicemails, facebook and/or twitter messages) to the FOIA officer for storage?

2. Who determines what is a public record?

If a public official is now holding information in his or her device, is the obligation on that official to determine whether or not its substance is directly related to the transaction of public business and therefore must be disclosed under FOIA? Do we need some sort of "fail safe" provision where a public body has to review everything on everyone's device before they are allowed to delete them?

If we take a step back from here, does this mean someone is now responsible for checking every piece of data forwarded to the public body to ensure it relates to the transaction of public business or do we allow each official that right to make that determination (especially if their private business is included on certain messages—essentially creating a reverse-FOIA scenario: a chance to redact their private data and send the rest to the public body for storage)?

3. What do we do if a public official loses or otherwise has to replace a device?

While this is primarily a concern for text messages and voicemail, is a public official now required to go to his wireless provider and pay for recovery of this data, if possible?

We also cannot overlook the implications of the potential destruction of public records (whether intentional or not) without following the appropriate standards of the Local Records Act (50 ILCS 205/) if lost data is not retrievable.

It is not clear if any of these problems are solved if we issue public officials city-owned devices, as they would still likely have their own devices to handle political matters or possibly have a third through another employer. Opinion 11-006 makes clear it does not matter on what device a record is created if it involves transactions of the public's business, it is now a public record. ■

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1. All direct citations, except where otherwise noted, are taken from sources cited in Opinion 11-006 or directly cite the opinion itself.

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Public employees and free speech

By Matthew Feda

With the Supreme Court yet to decide whether the determination of official job duties is a factual or legal question, the issue of public employee free speech is of timely concern, especially when public employment is also a major issue in the national political debate. Public employee free speech is an important issue because it affects the First Amendment rights of over 20 million public workers.[1] Also, the general public has an interest in the government working transparently, and punishing employees for speech may have adverse effects such as suppressing useful speech or deterring whistle-blowing.[2] In other words, "public employees will speak out on matters of government abuse, waste, or fraud, but only if they are assured that they do not risk those very jobs every time they speak."[3] This article provides background information on the issue of public employee free speech through brief analyses of the seminal cases heard by the Supreme Court, those being *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1967), *Connick v. Myers*, 461 U.S. 138 (1983), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Next, I'll bring your attention to legal trends in the different Circuits, focusing primarily on the Seventh and Ninth since these provide the most insight into the how the issue of official job duties can be determined as a question of law or a question of fact. Lastly, this article concludes with practice advice for attorneys, including when and how to bring a claim. In all, this article provides practical insight into this particular area of employment law.

Pickering dealt with a teacher being fired from his position after sending a letter to a local newspaper that was critical of the decisions made by the school board.[4] Pickering's letter was critical of the way in which the school board allocated funds between the educational and athletic programs.[5] Basically, Pickering argued that too much money was spent on athletics rather than education.[6] The Court decided in Pickering's favor and found that his freedom of speech rights were violated when he was terminated for writing the letter.[7] In deciding the case for Pickering, the Court balanced the interests of Pickering with those of the school's administration and found that since the speech touched on matters of public concern, Pickering's and the public's interests outweighed the administration's interests in suppressing the speech.[8] This has come to be known as the *Pickering* balancing test in which the Court balances the employee's interest, as a citizen, speaking on matters of public concern with the government's interest, as an employer, in providing the particular public services efficiently.[9] So for the *Pickering* test to be applicable, the employee must be addressing a matter of public concern, the speech cannot interfere with the employee's job duties, and the employee must be speaking as a private citizen.[10]

Connick was the next major public employee free speech case taken by the Supreme Court. In *Connick*, a prosecutor brought a First Amendment claim challenging her termination and alleging that it was in response to her circulating a questionnaire about office policies to her coworkers.[11] The fired prosecutor had solicited the opinions of her coworkers on issues such as office morale, the transfer policy, faith in the supervisors, whether or not there should be a grievance committee, and whether any workers felt compelled to assist political campaigns.[12] The Court applied the *Pickering* balancing test and found that the employer's interest outweighed the interest of the employee as a citizen since the questionnaire was not directly related to matters of public concern.[13] In other words, the questionnaire was not protected by the First Amendment because it was very limited in how it addressed issues of public concern.[14] Therefore, *Pickering* and *Connick* illustrate that the Court is willing to give the government greater authority to control the speech of its workers than the speech of the general public.

The last Supreme Court case to focus on this issue was *Garcetti*. *Garcetti* dealt with the First Amendment challenge of a deputy district attorney who alleged retaliatory employment actions due to his having relayed concerns of potential police misconduct to his supervisors in a memorandum.[15] The Court focused on whether the speech was made pursuant to the district attorney's official job duties, and by doing so, the Court expanded the employers' power over employee speech.[16] In finding that the memo was made pursuant to Ceballo's official job duties, the Court found that he was not speaking as a citizen on matters of public concern and the First Amendment does not protect his speech.[17] Thus, in *Garcetti*, the Court added a new threshold inquiry in determining public employee free speech cases.[18] After *Garcetti*, courts must first determine whether the speech was made pursuant to the employee's official job duties, and if so, the First Amendment claim fails.[19] If the speech was not made pursuant to official job duties, the court then continues in applying the *Pickering* test.[20] Therefore, there is no First Amendment protection to public employee speech as long as a court determines it to have been made pursuant to official duties.[21]

Most Circuits have determined the issue of speech pursuant to official job duties post-*Garcetti* as being only a question of law.[22] However, the Third and Ninth Circuits have found this to be a question of fact and have allowed it to be determined by a jury.[23] For instance, in *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121 (9th Cir. 2009), the Ninth Circuit held that official job duties should be determined through fact-finding, and until the facts are determined, the courts should reserve judgment on the issue.[24] The Seventh Circuit offers a good example of a Circuit that handles the issue as a question of law.[25] This results in courts determining whether speech was made pursuant to official job duties without necessarily knowing what the job duties were.[26] In other words, plaintiffs may lose the opportunity to argue whether or not their speech was made pursuant to official job duties when courts treat the issue as purely legal at summary judgment.[27] Therefore, in practice, it is important to introduce evidence that argues that the official job duties of the position did not actually include the speech in question.[28]

First Amendment claims of public employees are brought under 42 U.S.C. § 1983.[29] In practice, there are six things to consider when pursuing a First Amendment claim for a public employee. First, ask whether the employee is actually on the government's payroll.[30] If not, the public employee is left to only possible statutory or contract remedies.[31] Second, find out whether the employee has actually received retaliatory

Save the Date!

2012 Ethics Extravaganza for Government Lawyers

Presented by the ISBA's Standing Committee on Government Lawyers

Bloomington

March 7, 2012
12:00 - 4:15 p.m.
McLean County Museum of History
200 N. Main, Fifer Courtroom

4.00 MCLE hours, including 4.00 Professional Responsibility MCLE credit hours (PMCLE credit subject to approval)

The ethical issues government attorneys encounter differ from those faced by private practitioners. This lively program is comprised of skits, scenarios, and group discussions, allowing participants to gather invaluable information on identifying potential ethical dilemmas and applying the Rules of Professional Conduct in a fun and interesting way. Government attorneys with basic to intermediate practice experience will benefit from the ethical information presented throughout this seminar.

Agenda

12:00 – 1:00 p.m. Scenario 1 – Does the Mellon Get Thumped? - The Government Employee's Responsibilities

Ethics Topics:

- State Officials and Employees Ethics Act
- Responsibilities of Supervisory Attorneys
- Conflicts of Interest
- Reporting Professional Misconduct

1:00 – 2:00 p.m. Scenario 2 – Sam Slamm on the Edge – When is an Attorney Impaired or Conflicted?

Ethics Topics:

- Competence
- Diligence
- State Officials and Employees Ethics Act
- Reporting Professional Misconduct

2:00 – 2:15 p.m. Break (refreshments provided)

2:15 – 3:00 p.m. Scenario 3 – You Talking to Me, Punk? – The Pitfalls of Talking with Represented People

Ethics Topics:

- Fairness to Opposing Party and Counsel
- Communication with Person Represented by Counsel

3:00 – 3:45 p.m. Scenario 4 – Is There a Snake in the Grass? – The Prosecutor's Responsibilities

Ethics Topics:

- Trial Publicity
- Duties of the Prosecutor
- Responsibilities of a Subordinate Lawyer

3:45 – 4:15 p.m. Scenario 5 – What's the Fuss? – When is an Attorney an Attorney?

- Ethics Topics:
- Attorney-Client Privilege
- Attorney Work Product
- Attorney Competence

*Professional Responsibility MCLE credit subject to approval. *To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.*

action or has been substantially punished, such as being transferred or terminated.[32] If the client has not been punished in these ways, courts are very unlikely going to hear a First Amendment claim.[33] Third, make sure that the speech was the actual but for cause of the employee's punishment.[34] In other words, inquire into whether any additional reasons given by the employer for the punishment that don't involve the speech would bring about the same punishment.[35] Fourth, determine whether the employee's speech actually touched on a matter of public concern.[36] And when making this determination, look at the content, form, and context of the speech to decide whether it touched on a matter of public concern.[37] If the speech wasn't of public concern, courts wont consider First Amendment claims.[38] Fifth, apply the *Pickering* balancing test and determine whether the government's ability to efficiently provide services was adversely affected in a substantial way.[39] If so, the employee will lose on the claim.[40] Lastly, it is important to note that if political affiliation is not a requirement for the position, it is against the First Amendment for a public employer to consider it and use it as a basis for employment actions.[41]

Since *Garcetti*, government employers have much more power and control over the speech of their employees. This is seen mostly in the issue of speech made pursuant official job duties. However, while courts have given the government more authority as employers, attorneys for the public employees can present evidence to determine what the job duties actually were and hopefully push the case past the *Garcetti* threshold inquiry and into the *Pickering* balancing test. This would help preserve plaintiffs' claims that otherwise would have been thrown out at the summary judgment phase. By discussing some of these key issues and providing some brief practice guides, this essay highlights that even after *Garcetti*, there are still ways to litigate these cases for the employees, with a focus on job duties being a question of fact as an important tactic. ■

This article was originally published in the December 2011 issue of the ISBA's Labor & Employment newsletter, Vol. 49, No. 3.

1. Helen Norton, "Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression," 59 *Duke L.J.* 1, 1 (2009).

2. *Id*. at 1-2.

3. Paul M. Secunda, "Neoformalism and the Reemergence of the Right-Privelege Distinction in Public Employment Law," 48 *San Diego L. Rev.* 907, 923 (2011).

4. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 564 (1968).

5. *Id*. at 566.

6. *See id*. at 571.

7. *See id*. at 565.

8. *See id*. at 573.

9. *Id*.at 568.

10. Secunda, 48 *San Diego L. Rev.* at 923.

11. *Connick v. Myers*, 461 U.S. 138, 140-42 (1983).

12. *Id*. at 141.

13. *Id*. at 154.

14. *Id*. at 154.

15. *Garcetti v. Ceballos*, 547 U.S. 410, 413-15 (2006).

16. *Id*. at 421-22.

17. *Id*. at 421-22.

18. *See* Norton, 59 *Duke L.J.* at 13.

19. *Id*. at 13.

20. *Id*. at 13.

21. Secunda, 48 *San Diego L. Rev.* at 914-15.

22. Sarah R. Kaplan, Note, "Public Employee Free Speech after *Garcetti*: Has the Seventh Circuit been Ignoring a Question of Fact?" 5 *Seventh Circuit Rev.* 459, 470 (2010), at <http://www.kentlaw.edu/7cr/v5-2/kaplan.pdf>. (Last visited Dec. 3, 2011).

23. *Id*. at 470.

24. *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121, 1129-31 (9th Cir. 2009) (high school security specialist wrote a letter complaining of inadequate safety at the school and the Court reverses summary judgment and decides that the issue of job duties is a question of fact), *See also* Kaplan, Note, 5 *Seventh Circuit Rev.* at 471.

25. Kaplan, Note, 5 *Seventh Circuit Rev.*at 477, *See also Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007); *Davis v. Cook Cnty.*, 534 F.3d 650 (7th Cir. 2008); *Biven v. Trent*, 591 F.3d 555 (7th Cir. 2010).

26. Kaplan, Note, 5 *Seventh Circuit Rev.* at 482.

27. *Id*. at 484.

28. *See id*. at 487.

29. *See Garcetti*, 547 U.S. at 415.

30. Doug Linder, *Exploring Constitutional Conflicts: Free Speech Rights of Public Employees* (2011), <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/publicemployees.htm>. (Last visited Dec. 3, 2011).

31. *Id*.

32. *Id*.

33. *Id*.

34. *Id*.

35. *I*d.

36. *Id*.

37. *See Connick*, 461 U.S. at 147-48.

38. Doug Linder, *Exploring Constitutional Conflicts: Free Speech Rights of Public Employees* (2011), <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/publicemployees.htm>. (last visited Dec. 3, 2011).

39. *Id*.

40. *Id*.

41. *Id*.

Final regulations for the Americans with Disabilities Amendments Act are now available

By Eileen Geary

On March 25, 2011, the EEOC published its final regulations on the Americans with Disabilities Amendments Act (ADAAA). The regulations may be found at 29 C.F.R., sections 1630.1 through 1630.16. The appendix immediately following section 1630.16 provides definitions and more specific guidance in interpreting and applying the regulations. The new regulations were mandated by the ADAAA, which amended the original Americans with Disabilities Act and became effective January 1, 2009.

The regulations provide that the ADAAA applies to discriminatory employment decisions involving alleged disabilities that occurred on or after January 1, 2009. The kinds of actions that may be brought under the ADAAA include failing to hire or terminating an individual and denying a person with a disability a reasonable accommodation. The regulations follow Congress' mandate in the ADAAA making it easier for persons to establish they have a disability.

A Question and Answer publication of the EEOC, available at <http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm provides>:

> These regulations apply to all private and state and local government employers with 15 or more employees, employment agencies, labor organizations (unions), and joint labor-management committees. [Section 1630.2(b)] Additionally, section 501 of the Rehabilitation Act applies to federal executive branch agencies regardless of the number of employees they have.

Individuals can establish they have a disability by showing that they have a physical or mental impairment that substantially limits one or more major life activities; a record of such a disability; or have been regarded as having such a disability. A physical or mental impairment includes any disorder or condition that affects one or more body systems, including neurological, musculoskeletal, respiratory, cardiovascular, reproductive, digestive, immune, genitourinary, circulatory, hemic, lymphatic, skin, endocrine, intellectual, emotional or mental illness. Major life activities include the operation of major bodily functions, including of the immune system, skin, digestive, neurological, circulatory, and other systems of the body.

An impairment substantially limits a major life activity when a person's impairment substantially limits the person's performance of a major life activity as compared to most persons in the general population. The determination must be made on an individualized basis, and medical and scientific evidence can be considered but is not required. Also, an impairment that is episodic or in remission is a disability if the impairment would substantially limit a major life activity when active. These impairments may include epilepsy, hypertension, asthma, diabetes, major depressive disorder, and others.

The new regulations follow the ADAAA's directive that mitigating measures not be considered in determining whether an impairment substantially limits a major life activity. Mitigating measures can eliminate or reduce the symptoms or impact of an impairment, and can include medication, prosthetics, and assistive technology. Only ordinary eyeglasses and contact lenses cannot be considered as mitigating measures. An employer cannot require a person to use a mitigating measure.

The employer cannot discriminate against a qualified individual. A qualified individual is a person who has the qualifications to perform a certain job, such as having the required educational background, skills, or license required to perform the duties of the position. The question is whether the individual can perform the essential functions of the position held or applied for, with or without a reasonable accommodation. Essential functions of a position are those duties that an employer requires of a person holding the position and those duties that are the reason the position exists.

A reasonable accommodation allows an individual with a disability to perform the essential functions of the position. The accommodation can include assistive technology, a change in start time, or a reallocation of non-essential functions. These accommodations, however, need not impose an undue hardship on an employer. An undue hardship must be a significant financial hardship that affects the employer's operation or an accommodation that is unduly disruptive or so costly so that it would fundamentally alter the nature or operation of the business.

The EEOC has a help line for persons with questions about the ADAAA. Persons can call 1-800-669-4000 (Voice) and 1-800-669-6820 (TTY). Also, there is a Job Accommodation Network, which can be reached by the Web site <www.askjan.org> or by calling 1-800-526-7234 (Voice) and 1-877-781-9403 (TTY). ■

New MCLE rule changes effective September 27, 2011

By Patrick T. Driscoll, Jr. and Julie Busch

The Illinois Supreme Court has changed the MCLE rules that apply to all attorneys. The rule changes include: the elimination of the $20 fee to claim MCLE credits for "non-traditional" courses or activities; carrying over professional responsibility credits between reporting periods; and more flexibility for newly admitted attorneys to obtain basic skills requirements. Under the new rules, attorneys admitted after October 1, 2011, will be permitted to participate in a mentoring program approved by the Commission on Professionalism. Additionally, Supreme Court Rules 791,792,793,794,795,796 and 799 have been amended. The following summarizes the significant changes to the Rules.

Amended Rule 793: Requirements for Newly-Admitted Attorneys

Under Rule 793(a), unless excepted, every Illinois attorney admitted to practice on or after **October 1, 2011**, must complete the requirements for newly-admitted attorneys described in Rule 793(c). Under Rule 793(b), the requirements must be completed by the last day of the month that occurs one year after the newly-admitted attorney's admission to practice in Illinois.

The requirements, under Rule 793(c), include:

1. **Completion of a basic skills course of no less than six hours** covering topics such as practice techniques and procedures under the Illinois Rules of Professional Conduct, client communications, use of trust accounts, attorneys' other obligations under the Court's Rules, required record keeping, or professional responsibility topics (which may include professionalism, diversity issues, mental illness and addiction issues and civility) **or participating in a mentoring program approved by the Commission on Professionalism** pursuant to Rule 795(d)(12);
2. **Completion of at least nine additional hours of MCLE credit** (may include any number of hours approved for professional responsibility credit); **and**
3. Reporting to the MCLE Board as required by Rule 796.

The newly-admitted requirements do not apply to attorneys who are admitted to the Illinois bar before October 1, 2011 and who practiced in another state for a period of one year or more. Further, attorneys who were admitted to the Illinois bar on October 1, 2011 and thereafter do not have to comply with Rule 793(c) requirements, if the attorney was admitted in Illinois on **October 1, 2011** after practicing law in another state for a period of at least one year in the three years immediately preceding admission in Illinois. Those attorneys much complete 15 MCLE credit hours (including four hours of professional responsibility) within one year of the attorney's admission to practice in Illinois, which shall be reported to the MCLE Board pursuant Rule 796.

Attorneys admitted after December 31, 2005 and before October 1, 2011, have the option of completing a Basic Skills Course totaling at least 15 actual hours of instruction under the prior Rule 793(c) or satisfying the current requirements for Rule 793(c).

Amended Rule 794: Continuing Legal Education Requirement

Under Rule 794(c), for attorneys who have two year reporting periods, all CLE hours may be earned in one year or split in any manner between the two-year reporting period. If an attorney earns more than the required CLE hours in the two-year reporting periods of July 1, 2006 through June 30, 2008, or July 1, 2007 through June 30, 2009, the attorney may carry over a maximum of **10 hours** earned during that period to the next reporting period, **except for the professional responsibility credits**. If an attorney earns more than the required CLE hours in the two-year reporting periods of July 1, 2008 through June 30, 2010 or July 1, 2009 through June 30, 2011, and all reporting periods thereafter, they may carry over a maximum of **10 hours** to the next reporting period**, including professional responsibility credit**. Professional responsibility credit that is carried over to the next reporting period may be used to meet that requirement for the next reporting period.

Newly-admitted attorneys, subject to Rule 793, who have been admitted to practice in Illinois on January 26, 2006 through June 30, 2009, may carry over to their first two year reporting period a maximum of 10 CLE hours (except for professional responsibility credit) earned after completing the newly-admitted attorney requirement. Newly-admitted attorneys, subject to Rule 793, who have been admitted to practice in Illinois on July 1, 2009 and thereafter may carry over to their first two-year reporting period a maximum of **15 CLE hours** that are earned in excess of those required by Rule 793(c) or Rule 793(f)(2), if those excess hours were earned after the attorney's admission to the Illinois bar and before the start of the attorney's first two year reporting period. Those carry over hours may include up to six hours approved for professional responsibility credit. Professional responsibility credit carried over to the next reporting period may be used to meet that requirement of the next reporting period.

Amended Rule 796: Enforcement of MCLE Requirements

Under the reporting compliance section of Rule 796(a), on or before the first day of the month preceding the end of a newly-admitted attorney's requirement reporting period or two year reporting period, the Director shall mail the attorney at a mailing address maintained by the ARDC a certification to be completed by the attorney. Attorneys who fail to submit an MCLE certification, under Rule 796(b), that is received by the MCLE Board within 45 days after the end of their reporting period, or who file a certification that is received by the MCLE Board within **45 days** after the end of their reporting period stating they have not complied with these Rules during the reporting period, shall be **mailed** a notice by the Director to inform them of the noncompliance. Attorneys who are not fully exempt under Rule 791(a)(1), (2), (3), or (5), and who fail to complete, sign, and submit to the Board an MCLE certification that is received by the Board within **45 days** after the end of their reporting period, and who are sent a notice of noncompliance who pay a late fee, under Rule 796(d), in an amount that is set by the Board. Failure to comply or failure to report will result in the removal of the attorney from the master roll of attorneys.

All lawyers licensed in Illinois should keep abreast of the MCLE rules, plan ahead, and be sure to register on time. ■

Julie Busch is a third year student at the John Marshall Law School.

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

February

Wednesday, 2/1/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Thursday, 2/2/12- Teleseminar—2012 Ethics Update, Part 1. Presented by the Illinois State Bar Association. 12-1.

Friday, 2/3/12- Bloomington, Holiday Inn & Suites—Hot Topics in Agricultural Law 2012. Presented by the ISBA Agricultural Law Section. 8:30-4:15. Max 150.

Friday, 2/3/12- Teleseminar—2012 Ethics Update, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 2/3/12- Chicago, ISBA Chicago Regional Office—Navigating the Foreclosure Maze. Presented by the ISBA General Practice, Solo & Small Firm Section. 8:25-5:15.

Tuesday, 2/7/12- Teleseminar—Estate Planning for the Elderly, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 2/8/12- Teleseminar—Estate Planning for the Elderly, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 2/9/12- Lincolnshire, Lincolnshire Marriott—Lake County General Practice Update- Regional Event. Presented by the ISBA General Practice Section; co-sponsored by the Lake County Bar Association, the North Suburban Bar Association and the Northwest Suburban Bar Association. 8-5.

Thursday, 2/9/12- Chicago, ISBA Chicago Regional Office—Starting Your Own Law Firm: A Nuts and Bolts Primer. Presented by the ISBA young Lawyers Division. 12:30-5:00.

Friday, 2/10/12- Chicago, ISBA Chicago Regional Office—Limited Representation: The Ethical, Legal and Practice Issues Exposed. Presented by the ISBA Law Office Management and Economics Committee and the ISBA General Practice Solo and Small Firm Section. 8:30-12:45.

Tuesday, 2/14/12- Teleseminar—Compensation & Other Techniques for Getting Money Out of a Closely Held Business. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 2/15/12- Webinar—Advanced Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 2/15/12- Webcast—The Prosecutor's Duty to Seek Justice. Presented by the Illinois State Bar Association; originally presented by the Illinois Academy of Criminology on October 6, 2011

Thursday, 2/16/12- Teleseminar—Ethics Issues for Lawyers Supervising Other Lawyers and Paralegals. Presented by the Illinois State Bar Association. 12-1.

Thursday, 2/16/12- Chicago, ISBA Chicago Regional Office (DNP)—Mentoring Pilot Program Orientation Program. Presented by the ISBA CLE Committee. 12-1:30.

Thursday, 2/16/12- Live Webcast (DNP)—Mentoring Pilot Program Orientation Program. Presented by the ISBA CLE Committee. 12-1:30.

Monday, 2/20/12- Chicago, ISBA Chicago Regional Office—Advanced Worker's Compensation- Spring 2012. Presented by the ISBA Worker's Compensation Law Section. 8:30-4:00.

Monday, 2/20/12- Fairview Heights, Four Points Sheraton—Advanced Worker's Compensation- Spring 2012. Presented by the ISBA Worker's Compensation Law Section. 8:30-4:00.

Tuesday, 2/21/12- Teleseminar—Negotiating and Drafting the Purchase of Bank-Owned Commercial Real Estate. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 2/22/12- (DNP) Chicago, ISBA Chicago Regional Office—CopyRIGHTS and WRONGS: Creating CLE Materials and Avoiding Liability. Presented by the Illinois State Bar Association. 12-1:30.

Wednesday, 2/22/12- (DNP) LIVE Webcast—CopyRIGHTS and WRONGS: Creating CLE Materials and Avoiding Liability. Presented by the Illinois State Bar Association. 12-1:30.

Thursday, 2/23/12- Chicago, ISBA Chicago Regional Office—Family Law Spring Training- From Rookie to Major League. Presented by the ISBA Family Law Section. 8-5.

Saturday, 2/25/12- Oakbrook, DoubleTree Chicago—DUI, Traffic, and Secretary of State Related Issues- 2012. Presented by the ISBA Traffic Laws and Courts Section. 9-4:30. Max: 175.

Monday, 2/27/12- Webinar—Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 2/28/12- LIVE Studio Webcast—Bringing a Confession of Judgment Action. Presented by the Commercial Banking, Collections and Bankruptcy Section. 12-1.

March

Thursday, 3/1/12- Chicago, ISBA Chicago Regional Office—eTechnology in the Courthouse: Present and Future. Presented by the ISBA Bench and Bar Section. 1:30-4:45.

Friday, 3/2/12- Chicago, ISBA Chicago Regional Office—Legal Trends for Non-Techies: Topics, Trends, and Tips to Help Your Practice. Presented by the ISBA Committee on Legal Technology. 9-4:30.

Monday, 3/5/12- Chicago- ISBA Chicago Regional Office—Foundations, Evidence and Objections. Presented by the ISBA Tort Law Section. 9-12:30.

Monday, 3/5/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 3/6/12- Teleseminar—Defending Against IRS Audits & Collections, Part 1. Presented by the Illinois State Bar Association. 12-1. ■