



# FAMILY LAW

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

## Chair's column

*By Pamela J. Kuzniar*

A new documentary film titled "Divorce Corp." is out lambasting family law as it is practiced in the United States; never mind the distinctions between states. Two willing members of the section council went beyond the call of duty and took a field trip with me to the AMC Showplace in Galewood over a recent weekend to see this film. Thank you to Hon. Jeanne Reynolds and Jacalyn Birnbaum!

Unfortunately, I arrived early and saw it twice. If you decide you must see this film I suggest you see Disney's Frozen instead or immediately afterwards. I saw both movies twice and I much prefer the latter. One of our attendees will give

a detailed report in this newsletter and I do not want to steal her thunder. However, I can not completely leave this topic without comment.

"Divorce Corp" purports to be a documentary concentrating on the bar and judiciary's failure to identify and respond to conflicts, lack of ethics, and corruption, and it does little to indicate that this is not routine. Long ago and far away when I took a film study elective as an undergrad I understood that documentaries were ostensibly based upon reality. This documentary is sensational though it does identify

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## Movie review: "Divorce Corp"

*By Hon. Jeanne Reynolds*

At the request of our fearless leader, Chair Pam Kuzinar, three ISBA Family Law Section Council members ventured out on a cold Sunday afternoon in January to see the documentary "Divorce Corp." I had been warned ahead of time that this documentary would be a brutal smack down on the family law justice system. Besides the five ISBA attorneys, there were only two other people in the theater, which also told me this movie was not a contender for an Academy Award. SPOILER ALERT – STOP READING NOW if you ever intend to see this movie. In addition, you better hurry as it is only in limited theaters and probably will not be there for long. My movie review gives it a "D". But, it is a conversation starter.

The documentary was made and directed by Joseph Sorge following his own divorce and custody battles. It is narrated by Dr. Drew Pinsky and contains interviews by celebrity legal commen-

tator Gloria Allred, T.V. Divorce Judge Lynn Toler, law professors, judges, attorneys, psychiatrists, investigators, and not surprisingly husbands, wives, and parents who have not been successful in family law courts. It is 93 minutes of repetitious assault on the family law justice system, which is depicted as corrupt, sleazy, and driven by the greed of attorneys, judges, and related expert evaluators. It does not single out Illinois or Cook County, but claims the family law courts are a complete disaster nationally, and that the entire family law justice system is broken beyond repair. The failure of the court system to provide for jury trials in family law cases and to appoint attorneys to represent the litigants if they cannot afford legal representation is decreed unconstitutional. Over and over again, the movie insists that money and greed are the driving forces of this \$50 million a year divorce industry. The film alludes

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## Chair's column

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problems and conclusions often reached by litigants who are soured by their litigation results or experiences. The solution the film offers to the high cost and adversarial nature of family law practice in the United States is not collaborative law or mediation, rather it is Scandinavia. I am sure you didn't see that coming.

According to the film, litigants in Norway, Sweden, Denmark, Finland and Iceland do not experience the problems faced in the United States (because divorces in Texas are the same as California, Wisconsin and Illinois). Apparently, in "Scandinavia" maintenance terminates upon the entry of a judgment, child support is no greater than \$150 per month per child, and everyone is entitled to 50/50 time with their children. The film's use of "Scandinavia" as a solution without distinguishing the separate countries is odd, but comparing the United States to countries where citizens have the benefits of

government subsidized medical care, child care and pensions is in essence saying the solution to the problem is not to live in the United States. The parade of contested Scandinavian divorcees was notably absent. The film paints in very broad strokes and offers no realistic solution based on the economic reality of living and working in the United States. I now turn the matter over to the Honorable Jeanne Reynolds for further exploration in this newsletter.

As promised in my last column, the Family Law Section Council's recent historical minutes and reports are now available on the ISBA Web site for your review. Your review of the reports will reveal why we as a council voted not to support HB 1452 as drafted and why we support HB 1243. Thankfully, this is to be a vehicle to update readers rather than me droning on endlessly about the proposed legislation. We will work toward securing the posting of past minutes as well. ■

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## Family law professionals welcome new collegial forum

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to lawyers, judges, and the court system as willing participants in a giant conspiracy aimed at defrauding families. It blames the system for allowing “simple” non-contested divorce cases to linger for years while racking up expensive legal fees averaging \$50,000 a case. No actual statistics for these claims are provided.

The film paints all judges as having God complexes and making arbitrary decisions without protecting the constitutional rights of parents. Further, the judges and attorneys are accused of malicious prosecution of the parties simply for sport. The Court is labeled the ultimate marketer for this 50-million-dollar business. However, no mention is made of the Appellate Court’s powers of review, or that a violation of ethical rules will subject a judge to the Judicial Inquiry Board and an attorney to the ARDC. The “best interest of the child” standard is defined as who can scream the loudest, who has the most influence with the judge, or even which attorney has contributed the most to the judge’s campaign coffers. There are no substantive discussions of the relevant statutory factors of a custody evaluation or even case analysis to explain how a determination is made pursuant to the best interest of the child standard.

Interestingly, the film is silent on what, if any, responsibility should be attributed to the parties in divorce proceedings. Instead of the parties, it is the lawyers and judges that are blamed for the delay in resolution of cases and increased expenses as a result of the parties failing to agree on issues. Accordingly, it is the lawyers and judges who insist on a trial. What about a disgruntled spouse’s desire to use the divorce proceedings to needlessly harass and intimidate the other party and drain the marital estate in the process? In this film, the parties have no accountability for their actions. Further, the film does not address any alternatives to resolve problems when two parties cannot divide their marital assets and debts or when parents cannot decide how to co-parent their children. Divorce Corp does not acknowledge that only 2% of cases ever go to trial.

The film condemns the family law justice system but provides no solutions to the problems. Curiously, the film suggests that we look at the Scandinavian legal system where maintenance and custody trials are simply not allowed. There, the husband and

wife and their respective priests or marriage therapists meet outside of court to work things out. However, what happens in Scandinavia if two parents cannot agree on custody and parenting issues? What happens in a long term marriage if a husband or wife has not worked during the marriage and has stayed home to care for the parties’ children? What happens if there isn’t money or retirement savings left to split? What happens when one spouse cannot get a job? Again, no actual facts or statistics as to the Scandinavian system are provided.

The family law justice system is not perfect, but there are extraordinary family law attorneys and judges of the highest integrity and legal expertise who assist families to successfully move forward following a divorce. None of these individuals were interviewed. I will acknowledge that there are a few “bad apples” in any profession. This film highlights several “bad apples” including the tale of an unscrupulous 604(b) evaluator by day and porn star at night who offers to fix an evaluation for \$7,500. In addition, the film includes the disturbing film clip of the Texas family law court Judge William Adams who viciously beat his own child and still remains on the bench today. Another story is the poor father jailed for threatening a judge after he lost custody of his children. The film does not discuss the father’s failure to agree on custody and that presumably a trial with witnesses and evidence occurred, but focuses solely on the father’s perceptions of a mean spirited bad judge out for spite to block his rights to be a father. Once again, Divorce Corp only tells one side of the story. Of course, if both sides were told, there probably wouldn’t be a movie. The film blames the failure to reform these perceived atrocities again on the corrupt, sleazy and driven-by-greed attorneys, judges, and expert evaluators. We can all agree that these scenarios cannot be tolerated and that statutory safeguards must be in place.

U.S. statistics do confirm that 50% of all marriages end in divorce. In addition, in the last 25 years, the number of parentage actions has increased dramatically. There are no compatibility tests, financial disclosure forms, or psychological tests required for people to pass before getting married or engaging in a sexual relationship, but there are emotional, financial and social repercussions when the relationship ends. Often a party

does not understand the realities post relationship. Expenses have increased and incomes may not support the expenses of two households. While each parent may want the children to live 100% with him or her, it is currently impossible to clone children. If the parties insist on a custody fight, someone will be unhappy with the outcome and both will be upset about the cost of litigation. The family law attorney must educate the client on the divorce process and timeline, provide reasonable expectations, and continually strive to manage the client’s expectations. Alternative dispute resolution, mediation, arbitration, and the collaborative law process must be considered at all appropriate phases of a case. It does not have to take years to finalize a divorce proceeding if the parties can responsibly agree to resolve it. Katie Holmes and Tom Cruise were divorced in 11 days. Our system is not perfect and can always be improved.

What most depressed me about this movie is the realization that the general public believes that the family law system is broken and that the failure to fix this system is the result of corrupt, sleazy, greedy attorneys, judges, and expert evaluators. Changing the public perception of our legal profession is a true battle which cannot be won overnight. However, Jackie Birnbaum wisely reminded me that every attorney or judge has the ability to make a difference for families and children one case at a time. Thank you to the many hardworking, ethical, professional attorneys and judges who specialize in the family law sector and work really hard to make a difference for a family going through the trauma of a divorce. ■



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# Utah takes center stage in the marriage equality debate

By Michele M. Jochner

The recently-concluded holiday season found parties on both sides of the marriage equality debate embroiled in what may prove to be the next matter decided by the United States Supreme Court on this issue. Within the past month, the eyes of the nation have focused on developments in Utah regarding the validity of same-sex marriage in that state, which are likely to have a major impact across the country.

A decade ago, in 2004, two-thirds of Utah's voters approved a ban on same-sex marriages, defining "marriage" as occurring only between a man and a woman. However, shortly before Christmas, U.S. District Judge Robert Shelby invalidated this law when he ruled that Utah's prohibition of these unions violates the right to due process and equal protection for gay and lesbian couples guaranteed under the United States Constitution. Judge Shelby's ruling in *Kitchen v. Herbert*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 6697874 (D. Utah), was the first decision to strike down a state marriage ban after the United States Supreme Court issued its opinion on same-sex marriage this past summer in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

In his ruling invalidating the Utah statute, Judge Shelby noted that prior decisions of the United States Supreme Court had recognized that the freedom to marry is a fundamental right based on individual liberty, privacy and freedom of association — rights that under the 14th Amendment trump a State's rights where there is a conflict between the two. Shelby also found that Utah presented neither a rational basis for denying same-sex couples the right to marry, nor a "rational link" between a ban on same-sex marriage and its interest in having children raised by opposite-sex, married couples. The Judge did determine, however, that a law barring same-sex marriage "humiliated" children in such households "for the same reasons that the Supreme Court [in *Windsor*] found that [the federal Defense of Marriage Act [DOMA]] harmed the children of same-sex couples."

Subsequent to Judge Shelby delivering his decision invalidating the ban, approximately 1,000 same-sex marriages were performed in Utah, a conservative state where the majority of the population is Mor-

mon. The State — claiming that the decision created a "rush to marry" before its validity could be tested on appeal — unsuccessfully requested that both Judge Shelby and the U.S. Circuit Court of Appeals for the Tenth Circuit impose an emergency stay of the ruling while it is being challenged on review.

Utah thereafter turned to its final option, elevating its request for a stay to the United States Supreme Court, filing a 100-page application which prompted a lengthy response from the plaintiffs. In their filings with the High Court on the stay issue, both sides likely provided an advance preview of the arguments which may be raised before the Tenth Circuit Court of Appeals in its review of Judge Shelby's ruling.

In its application for a stay, Utah argued that this case "squarely presents the question that this Court expressly left open" in its decision in *Windsor* i.e. whether states may bar same-sex couples from marrying and refuse to recognize marriages performed in other states. Recall that in *Windsor*, the Supreme Court struck down the DOMA provision as an improper federal intrusion because it barred same-sex couples from receiving federal benefits even in states where they were legally married. In Utah's view, the High Court's reasoning and decision in *Windsor* preserved the power of states to regulate and define marriage, and supported its position that Judge Shelby had improperly created a new constitutional right for same-sex couples by ruling that its ban violated federal guarantees of due process and equal protection.

In its filing, the State observed that "[n]umerous same-sex marriages are now occurring every day in Utah," and argued that "[e]ach one is an affront not only to the interests of the state and its citizens in being able to define marriage through ordinary democratic channels, but also to this Court's unique role as final arbiter." Utah further asserted that it is "indisputable" that states "have a powerful interest in controlling the definition of marriage within their borders," and argued that same-sex marriage is a "recent innovation" that is not "deeply rooted in the nation's history and tradition."

In addition, Utah claimed that Judge Shelby's decision caused irreparable harm based upon its belief that children should be

raised by a mother and father, rather than by a same-sex couple. Pointing to social science studies it claimed supported its position, the State contended that upholding the ban would allow it to ensure that more children are raised in this "optimal" environment.

In response to the state's rights arguments advanced by Utah, the attorneys representing the plaintiffs relied upon arguments grounded in individual rights. The plaintiffs' attorneys maintained that in *Windsor* the Court did not rely on principles of federalism but rather on the individual rights of due process and equal protection guaranteed by the U.S. Constitution, thereby requiring state marriage laws to pass constitutional muster. According to the plaintiffs, *Windsor's* recognition of a protected liberty interest in marriage "supports invalidation of Utah's refusal to recognize the lawful marriages of same-sex couples who married in other states." While acknowledging that *Windsor* did not decide the "ultimate" issue of whether a state is constitutionally required to allow same-sex couples to marry or to recognize their existing marriages, the plaintiffs' attorneys took the position that *Windsor's* reasoning and analysis "strongly" support the conclusions reached by the lower court.

The plaintiffs' lawyers also contended that in its application for a stay, Utah failed to address equal protection issues based on sexual orientation, which require the application of a heightened level of scrutiny. They wrote: "As the district court correctly held, the [Supreme Court's] analysis [in *Windsor*] of the profoundly stigmatizing impact of laws that single out same-sex couples for discrimination with respect to marriage applies equally to Utah's laws excluding same-sex couples from the ability to marry."

Further, in responding to Utah's argument characterizing same-sex marriage as a "recent innovation" that is not "deeply rooted in the nation's history and tradition," the attorneys stated: "When analyzing cases involving fundamental rights, this court has not held that the contours of a fundamental right can be limited based on who seeks to exercise it or on historical patterns of discrimination." They contended that the plaintiffs do not seek a new right, as Utah argued, but rather to exercise an existing fundamental right.



Finally, the attorneys for the plaintiffs also criticized Utah's claim that Judge Shelby's decision would likely be reversed based on a "hodgepodge of articles that purportedly show that same-sex parents are inferior to opposite-sex parents." The attorneys maintained that the State's premise was false, and, in any event, did not resolve the constitutional issue presented in the case.

The Supreme Court granted Utah's request for a stay within a week of its filing. The High Court - in a one paragraph Order consisting of two sentences - ruled that same-sex marriages could not continue while Utah's appeal of the ruling is pending in the Tenth Circuit. The Court's unanimous ruling contained no commentary which could offer a glimpse into the reasoning leading the Court to grant the stay.

Immediately after the Court's issuance of the stay, new questions arose regarding the validity of the approximately 1,000 same-sex marriages which were performed in Utah

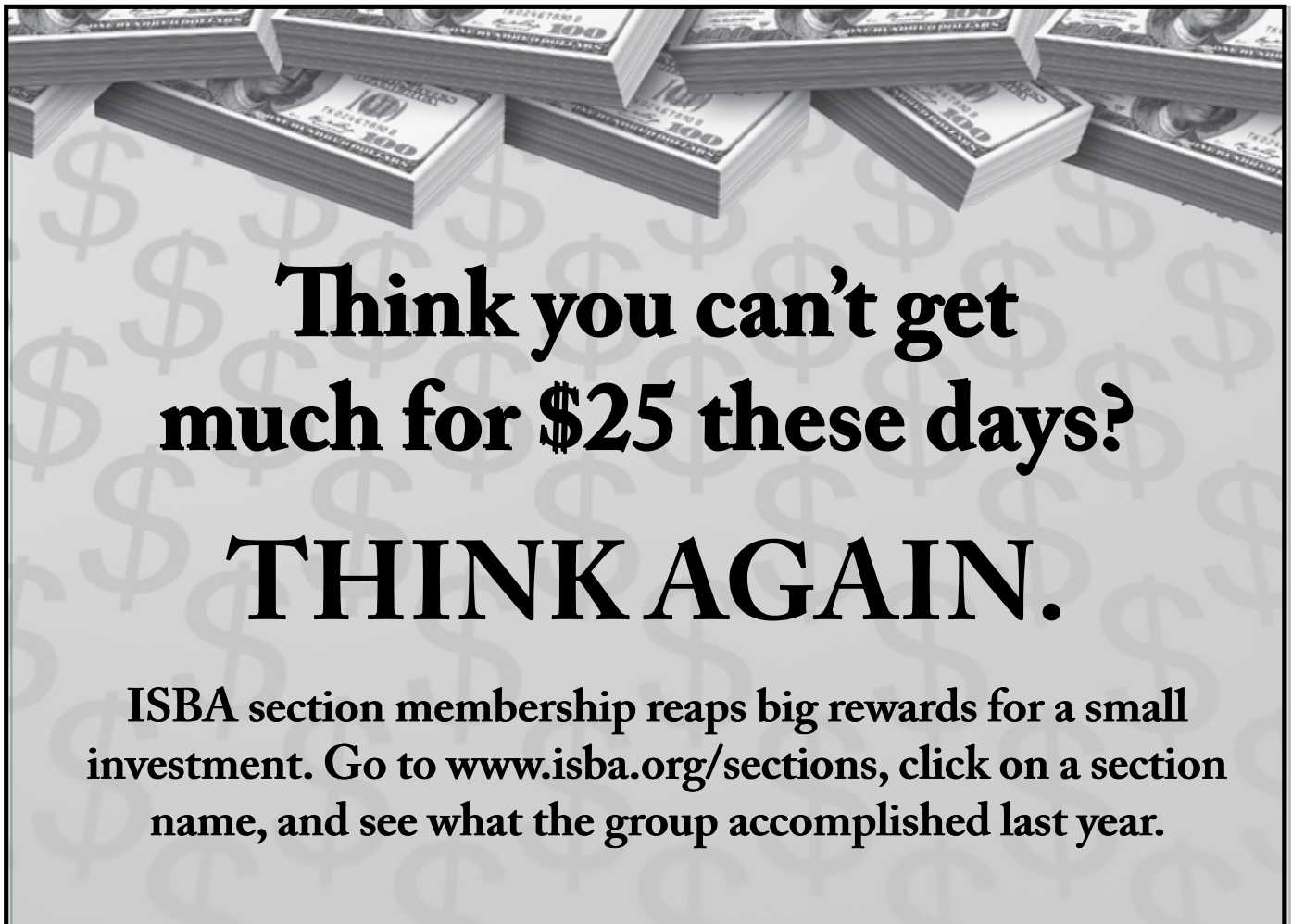
within the prior two-week period. Pending the appeal, Utah ordered its state offices to refrain from any actions acknowledging the same-sex marriages that were performed. In response, the Obama administration announced that the federal government will recognize the marriages performed in Utah during that interim period.

United States Attorney General Eric Holder confirmed that "for purposes of federal law, these marriages will be recognized as lawful and considered eligible for all relevant federal benefits on the same terms as other same-sex marriages," noting that "[t]hese families should not be asked to endure uncertainty regarding their status as the litigation unfolds." The Administration's decision opens up more than 1,000 federal benefits to the Utah couples, including the ability to file joint federal income tax returns. Although Utah has pledged to treat the same-sex couples as married when it is administering federal benefits, it will not recognize them as

married when considering state benefits.

Some observers believe that Holder's announcement that the federal government will recognize the Utah marriages signals that the Administration may be moving toward challenging state governments which refuse to recognize the validity of same-sex marriages, pitting protection of individual rights against the rights of states to define marriage.

Time will tell if these and other observations hit the mark. Briefing on Utah's appeal of the invalidation of its ban on same-sex marriages to the U.S. Court of Appeals for the Tenth Circuit is scheduled to be completed by the end of February. With same-sex marriage currently being debated in more than 25 states, and federal lawsuits pending in more than a dozen, this matter is certain to only be the beginning of litigation over these complex and novel issues of constitutional law. ■



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**Tuesday, 3/4/14- Live Studio Webcast**—Criminal Dispositions Without a Conviction! Presented by the ISBA Committee on Corrections and Sentencing. 3:30-4:30.

**Tuesday, 3/4/14- Teleseminar**—Employment Agreements, Part 1. Presented by the Illinois State Bar Association. 12-1.

**Wednesday, 3/5/14- Teleseminar**—Employment Agreements, Part 2. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 3/6/14- Webinar**—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:00.

**Thursday, 3/6- Friday, 3/7/14- Chicago, IIT Chicago-Kent School of Law**—13th Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. 8:30-4:45 with reception from 4:45-6; 8:30-1:30.

**Tuesday, 3/11/14- Webinar**—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:00.

**Tuesday, 3/11/14- Live Studio Webcast**—Game On- What's Happening in the Illinois Gaming World. Presented by the ISBA Local Government Section. 11-1.

**Tuesday, 3/11/14- Live Studio Webcast**—Municipal Animal Ordinances. Presented by the ISBA Animal Law Section. 2-4.

**Tuesday, 3/11/14- Teleseminar**—Planning with Special Needs Trusts. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 3/13/14- Chicago, ISBA Chicago Regional Office**—Litigating, Defending, and Preventing Employment, Housing and Public Accommodation Discrimination

Cases: Practice Updates and Tips Concerning the Illinois Human Rights Act. Presented by the ISBA Human Rights Section. 9-4.

**Thursday, 3/13/14- Live Webcast**—Litigating, Defending, and Preventing Employment, Housing and Public Accommodation Discrimination Cases: Practice Updates and Tips Concerning the Illinois Human Rights Act. Presented by the ISBA Human Rights Section. 9-4.

**Thursday, 3/13/14- Teleseminar**—Diligence in Business Transactions. Presented by the Illinois State Bar Association. 12-1.

**Friday, 3/14/14- Fairview Heights, Four Points Sheraton**—Spring 2014 DUI & Traffic Law Conference. Presented by the ISBA Traffic Law Section. All Day.

**Friday, 3/14/14- Chicago, ISBA Chicago Regional Office**—Medical Malpractice Seminar. Presented by the ISBA Tort Law Section. 8:30-4:30.

**Tuesday, 3/18/14- Live Studio Webcast**—City Dogs- Dog Complaints, Shootings & Other Issues Arising in Urban Environments. Presented by the ISBA Animal Law Section. 2-4.

**Tuesday, 3/18/14- Teleseminar**—“Crowd-funding” in Business Ventures: Raising Capital from the Public. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 3/20/14- Teleseminar**—Employment Law Torts in the Workplace. Presented by the Illinois State Bar Association. 12-1.

**Tuesday, 3/25/14- Chicago, ISBA Chicago Regional Office**—Master Series: The Cybersleuth's Guide to the Internet: Super Search Engine Strategies and Investigative Research. Presented by the Illinois State Bar Association. All day.

**Tuesday, 3/25/14- Teleseminar**—Designing and Drafting GRATS in Estate Planning. Presented by the Illinois State Bar Association. 12-1.

**Wednesday, 3/26/14- Teleseminar**—LIVE REPLAY: Joint Ventures in Business, Part 1. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 3/27/14- Teleseminar**—LIVE REPLAY: Joint Ventures in Business, Part 2. Presented by the Illinois State Bar Association. 12-1.

**Friday, 3/28/14- Chicago, ISBA Chicago Regional Office**—Master Series: The Uniform Commercial Code Made Easy: A Groundbreaking Approach to Incorporating the UCC into Your Practice. Presented by the Illinois State Bar Association. All day.

**Friday, 3/28/14- Live Webcast**—Master Series: The Uniform Commercial Code Made Easy: A Groundbreaking Approach to Incorporating the UCC into Your Practice. Presented by the Illinois State Bar Association. All day.

**Friday, 3/28/14- Quincy, Quincy Country Club**—General Practice Update 2014: Quincy Regional Event. Presented by the ISBA General Practice Section; co-sponsored by the Adams County Bar Association. 8:15 a.m.-5 p.m.

### April

**Tuesday, 4/1/14- Teleseminar**—Planning and Drafting Revocable Trusts. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 4/3/14- Chicago, ISBA Chicago Regional Office**—Exempt Offerings: Regulation D to Crowdfunding. Presented by the Business and Securities Law Section. 9-11:30am.

**Thursday, 4/3/14- Live Webcast**—Exempt Offerings: Regulation D to Crowdfunding. Presented by the Business and Securities Law Section. 9-11:30am.

**Thursday, 4/3/14- Live Webcast**—Insurance Coverage Issues for the General Practitioner. Presented by the ISBA Insurance Law Section. 12-2:15. ■

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