ILLINOIS STATE BAR ASSOCIATION

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The Challenge

The newsletter of the Illinois State Bar Association's Standing Committee on Racial and Ethnic Minorities and the Law

Chair's column

Ringing in the New Year with trepidation over the new D.C. landscape and dismay at the intolerance of 'burkinis'… Tempered with faith in my fellow lawyers

BY SHARON L. EISEMAN

As I write this column at the start of 2017, I find myself feeling anxious and fearful about what the future holds rather than excited about the potential for new opportunities and challenges that await us—as one is supposed to anticipate on the brink of a new year. A substantial reason for this atypical feeling is my fear about how we will ultimately be impacted by the controversies that have arisen from media coverage and other communication sources in response to degrading statements made by public figures about persons who are deemed "other" than the person uttering the comments. Those who fall in the category of "other" include Muslims, other minorities, immigrants and refugees, the disabled and women—who are routinely demeaned except when

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SCOTUS upholds affirmative action program at University of Texas at Austin

BY KHARA COLEMAN

This spring, many in legal and higher education circles anticipated the opinion of the Supreme Court of the United States in *Fisher v. University of Texas at Austin,* No. 14-981. On either side of the aisle on the issue of affirmative action in college admissions, spectators awaited the decision with eagerness and with dread, perhaps in equal measure. On June 23, 2016, the Court issued its opinion in *Fisher*, upholding the University's plan in the face of strict scrutiny review. For these litigants, this was the second time before the justices of the Court, the case having previously been remanded to the United States Court of Appeals for the Fifth Circuit in 2013.[1]

This litigation was initiated in Texas

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Chair's column

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comments are just "locker room banter."

Within that context, I am reflecting, almost wistfully, upon the advances the ISBA and its leadership have made to become more inclusive and to expand diversity at all levels, and also, despite some setbacks, the progress we have seen in the communities where we live and work. That progress has been palpable in our enhanced awareness of and sensitivity to both the differences among us and to the value that those differences contribute to an enriched environment wherever we gather. And we are grateful that such an environment can often be found in our workplaces, our places of worship, our board rooms, our cultural and social arenas, and our homes—as well as in the spaces where we resolve disputes and solve problems, including our courtrooms, our offices and our mediation venues.

During the election period and since November 9, we have been learning about a substantial and growing population of Americans who are intolerant of anyone other than heterosexual Caucasians, referred to by themselves as the "real Americans." And I recently read in a NYT article of a movement among some individuals who align with the Alt-Right for a disbanding of the "United States" as we know it in favor of separate nation-states divided by race, religion and ethnicity, thus isolating various groups of people from those who differ from or disagree with each other. It is reminiscent of the internment camps in which we imprisoned the Japanese during WWII.

Learning about such thinking among what should be "my fellow Americans" reminded me of a recent trend in France and other places that seek to ban Muslim women from wearing their chosen beach attire because it poses a security threat. The particular clothing item, dubbed a "burkini," consists of a pair of pants, a long-sleeve shirt and a head covering all made of swimsuit material—created by a woman in the fashion industry who wanted to offer an option to Muslim women interested in wading into the water, a common activity at beaches during the summer. This outfit allows such women to cover themselves as their religion and culture require but enables them to swim like others who are visiting the beaches.

According to the article in the August issue of the International NYT that covered this phenomenon, entitled "When a swimsuit is a security threat," 15 towns in France had issued bans against the wearing of the burkini, claiming that such attire posed a security risk. The burkini was being described as attire that "ostentatiously displays a religious affiliation" and, at a time when France was being targeted by terrorists, was "likely to create risks to public order." This form of beach attire was also called the uniform of "extremist Islamism, not of the Muslim religion."

In a touch of irony revealing an absurd inconsistency, French Prime Minister Manuel Valls stated that the swimsuit is part of "the enslavement of women," suggesting a view of Muslim women as victims who need protection from their own culture, yet at the same time, law enforcement was patrolling beaches in the French towns looking for offenders. When found, the women in burkinis were issued tickets and in the process, humiliated in public and before their families simply for wearing a different kind of swimsuit. It almost seems that those women in burkinis could have avoided a ticket by disrobing in public—maybe down to the bikinis commonly worn by European women that cover almost nothing.

And in case you didn't know, such singling out of Muslim women—in different environments—has been upheld by the European Court of Human Rights so that it is permissible for schools to ban female teachers from wearing their head scarves in the classroom and to bar a university student from sitting for an exam while wearing her head scarf. In one case, the court stated that a woman in a hijab could not deliver "the message of tolerance, respect for others and, above all, equality

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and nondiscrimination that all teachers in a democratic society must convey to their pupils." (*Dahlab v. Switzerland*, 2001).

These rulings arise from the Court's application of a public safety exception to the broad freedoms of thought, conscience and religious expression set forth in Article 9 of the European Convention on Human Rights. Such rulings are still difficult to absorb considering, among other examples, that the Catholic Church seems to allow, nay REQUIRE, their nuns to wear "habits" in the classroom and elsewhere, but who knows what would happen if a group of nuns showed up at a beach and walked into the water to swim —fully clothed. Would they too be issued tickets by the local police? It is also part of the Jewish Orthodox faith for the women to cover their heads and limbs in public so as not to expose their bare flesh but we don't (yet) deem them security risks and require them to cease such a religious practice when they travel outside of their own neighborhoods.

Because of the implications that inhere in such specific, targeted discriminatory actions for impeding the already difficult work of teaching, spreading and even *enforcing tolerance* in the future, it might be tempting to fall into despair. That is what I feel lately on some mornings because I can't figure out how to counter the increased variety and intensity of ways in which individuals from different cultures and other countries, and of different colors, are being sidelined and demonized.

Now more than ever we must keep vigilant and not retreat from our responsibilities because that is easier than facing the challenges. We all know how fortunate we are to have our professional, collegial, bar-associated and other friendship support networks of people who are inspired by one another to continue our work—to assure that we don't leave alone, and sobbing in the dark, those less fortunate and those who may be targeted because they are *labeled* as different. Instead, we must let our voices be heard and make sure our alliances for pursuing justice for the mistreated remain strong. As Rabbi Hillel the Elder expressed 2,000 years ago in his three questions: If I am not for myself, who will be for me? But if I am only for myself, what am I? And if not now, when?

Addenda…

Upcoming CLE Programs

I got carried away in my above narrative and neglected to mention that, starting in January of 2017, we are featuring a terrific four-part CLE Series on Housing Justice vs. Housing Injustice that will start off with an analysis of a recent SCOTUS Opinion on prosecutions under the Fair Housing Act and how barriers to affordable housing for many groups of people are reinforcing segregation and the inequality of resources available in predominantly minority populations. In addition, in the late spring or early summer, we are offering a two hour CLE studio program on Implicit Bias that will cover both courtroom dynamics and the law firm setting. The fabulous program panel includes DePaul Law School Dean Jennifer Rosato Perea, Loyola Law School Prof. Juan Perea and Chasity Boyce, Diversity and Inclusion Projects Manager with Skadden Arps—and the program moderator is our very own **Masah Renwick**. Information on both of these practice relevant programs can be found under the CLE programs section on the ISBA website or by contacting the CLE Department.

REM Committee Vote on ABA Model Rule 8.4(g)

In addition, we want to share with you our report on the action our REM Committee took at its last meeting—in December, during the ISBA Mid-Year Meeting—on the ABA Model Rule 8.4(g) which the ABA's House of Delegates approved at its Annual Meeting in August, with some modifications to the Rule as it had been originally proposed. As background, at the ISBA's June 2016 Annual Meeting in Rosemont, REM had discussed the *proposed* rule change (as all committees and section councils were asked to do) and voted 9-3 to oppose it, citing numerous reasons for our decision. Those reasons included that Subsection 8.4(g) was too broad in scope, may be constitutionally suspect due to its seeming restraint on free speech and association, and would be difficult to enforce. Moreover, we believed that existing state and federal laws prohibiting discrimination and sexual harassment provide recourse for complainants. Then at the June Assembly meeting, Assembly members voted resoundingly to oppose the proposed Model Rule.

However, as the Illinois Supreme Court is now weighing whether to adopt the new Model Rule, the Commission on Professional Responsibility requested the ISBA to submit its position on the *approved ABA Model Rule*. Accordingly, the ISBA leadership asked all Committees and Section Councils to reconsider the Model Rule as amended and to report their votes to the Assembly which was scheduled to discuss and vote upon the new Model Rule at its December 10th Meeting.

In anticipation of the December 10th Assembly Meeting and in order to promote an informed vote among our REM members, we invited attorney Trisha Rich, a partner at Holland & Knight who, among other things, concentrates her practice in the field of ethics, to "deconstruct" the new Rule for us. After many questions from and an extended discussion among our REM members both during and following Trisha's presentation to us on the purpose and potential impact of subsection (g), the REM Committee, by 8-3 (+ a few abstentions), reversed its June vote and *approved the ABA Model Rule 8.4(g)* despite some of the same concerns as previously expressed.

On the whole, we determined that the Rule articulated an important "code of conduct" for attorneys that holds us to a higher standard regarding the kind of discriminatory and harassing conduct of a sexual nature that is similarly regulated by most other professional associations. We also determined that, based upon disciplinary reports from the IARDC, too many attorneys, especially in law firms, appear not to be abiding by standards set by state and federal anti-discrimination statutes and laws. Finally, we expressed confidence that the IARDC would be able to capably manage any increase in complaints based upon the new Model Rule.

As you all know, our voice at the December 10th Assembly Meeting was almost a lone voice among the Assembly members who again voted overwhelmingly to oppose the new Model Rule 8.4(g), even as amended, for many well-articulated reasons. While the voice vote to support the new Model Rule was almost inaudible, REM stands by its support and anxiously awaits whatever action the Illinois Supreme Court decides to take. In addition, we are eager to hear about the vote to be taken by the Chicago Bar Association which was also asked to submit its position regarding the Rule.

COUNT ME IN Reception = Save a Seat for Me at the Table!

We'd be remiss if we didn't note the very successful Reception held at the Sheraton on the Friday evening of the Mid-Year Meeting and hosted by the ISBA's Diversity Leadership Council and the Six Constituent Diversity Committees that are represented on the DLC. As Cook County Circuit Court Chief Judge Timothy Evans would say, let's give a BIG 'round of applause' to DLC Chair **Cory White**, with support from his planning committee, and to Director of Section Services **Melissa Burkholder** (who is also Staff Liaison for REM), for staying the course in organizing this event and making sure that everything, down to the small but important details, would go smoothly—and it did!

Besides the wonderful energy and synergy circulating throughout the party room the entire evening—supplemented by the free-flowing wine and tasty appetizer treats—we were gifted with some inspiring words from **President Vince Cornelius**. After welcoming everyone to the event, President Cornelius, as he routinely does, got right to the heart of the matter… and what matters to all of us the most: the importance of connecting diversity initiatives to the *goal of inclusion,* so that those to whom the door is opened and a hand extended will find a seat at the table with us. Once the table—and all tables—are populated with wonderfully representative individuals who are eager to share their ideas and explore issues, and are willing to contribute the brain power and the labor, we will be able to accomplish almost anything. Such a formula for progress would surely make the world a kinder, better and more productive place in which to live, love, laugh, dream and work.

Thanks to all who attended. We hope you were able to take home some visuals from the fun photo booth to remind you of what a great time you had chatting with friends, making new acquaintances and getting geared up to work together on some new diversity and inclusion projects. ■

SCOTUS upholds affirmative action program at University of Texas at Austin

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after petitioner Abigail Fisher applied for admission to University of Texas at Austin, the state's flagship public university, seeking a spot in the 2008 freshman class. Ms. Fisher has explained that although she had been a good student with a list of extracurricular activities, she noticed that other, seeming less-qualified students had been admitted. Fisher argued that the University had denied her admission in favor of less qualified minority applicants, which amounted to unlawful discrimination against her based on her race.[2] Ultimately, the question presented in the case was "whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause."[3]

There was no dispute before the Court that Texas uses a system that offers slots at its state schools to all students who graduate in the top ten percent of his or her Texas high school class. It was also undisputed that, at the time that Ms. Fisher applied for admission, she was not in the top 10 percent of her high school class, and therefore not automatically offered a slot. She competed for the remaining slots in the freshman class pursuant to a revised University admissions process that called for "holistic, full-file review."[4] After the Supreme Court remanded the case to the Court of Appeals to apply the correct legal standard, the Court of Appeals for the Fifth Circuit reassessed the case and again affirmed the judgment of the District Court for the University.[5]

The University's holistic review process had a considered history. In the 1990s, in response to a series of opinions issued by the federal courts, the State of Texas had enacted legislation guaranteeing admission at any of the state's public universities to students graduating in the top 10 ten percent of a given class at a Texas high school.[6] Years after the law went into effect in 1998, the Court's decision in *Grutter v. Bollinger* upheld a challenged admissions program used by the University of Michigan Law School, which employed "a system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate's application."[7] In response to *Grutter*, the University of Texas-Austin went on to develop and adopt a system that would "take race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University."[8]

Although the University did begin in 2004 to fill some of the slots in its classes using the holistic review process,[9] by the time Ms. Fisher applied for admission in 2007, the Top Ten plan played a more significant factor in whether or not she would be admitted, as approximately 75 percent of each freshman class was filled by students who had guaranteed slots. Justice Kennedy explained that, "[a]s a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the

Plan continues to be referenced as a 'Top Ten Percent Plan,' a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category."[10] In this litigation, Fisher did not challenge the Plan, despite the fact that the plan was, in fact, intended to help promote racial and ethnic diversity in Texas colleges and universities.[11] Fisher challenged only the legality of the holistic review process.

In holding that the University's holistic review process did not amount to unlawful discrimination in violation of the Equal Protection Clause, the majority opinion noted that, "although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus. Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities."[12] Phrased another way, "Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class.[13] The Court rejected all four of Ms. Fisher's arguments against the portion of the University's admissions process that uses holistic review.[14]

In upholding the University's process against Ms. Fisher's challenge, the Court took care not to suggest that the University's holistic review process was receiving any kind of permanent stamp of approval.

The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary. The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.[15]

Notably, while the majority opinion, authored by Justice Kennedy, described the challenged admissions process as "race conscious," Justice Alito's dissenting opinion described the program as "race-based."[16] This difference in description highlights a fundamental difference in the way that the majority and the dissent view any consideration of race in the admissions process. While the majority opinion noted that the person making the final decision on admission for applicants being considered under the holistic review process was not aware of the race of the applicant,[17] Justice Alito's dissenting opinion rejected that view, instead insisting that "[b]ecause an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation."[18] According to the dissent, "Consideration of race therefore pervades every aspect of UT's admissions process."[19] Justice Alito's dissent also asserts that the admissions program as a whole is intended "to increase the number of African–American and Hispanic students by giving them an admissions boost vis-à-vis other applicants." Justice Alito writes, "Given a limited number of spaces, providing a boost to African–Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission."[20]

Justice Alito's dissenting opinion also rejects the University's use of race in admissions in part based on an argument that the University's admissions process discriminates against Asian-Americans, which Justice Alito calls "particularly troubling" in light of a history of racial discrimination in education against Asian Americans. Justice Alito cites *Gong Lum v. Rice*, 275 U.S. 78, 85–86 (1927), an early Supreme Court decision upholding the application of "separate but equal" to the education offered to a Chinese citizen of the United States.[21]

The striking contrast between the manner in which the majority and the dissent view the consideration of race as a factor in admissions is alarmingly difficult to reconcile with the notion of an America that has—or can—come to terms with a history of legally sanctioned racism. That any of our esteemed Justices might refuse to see race, or flatly decline to value diversity, inspires a justified fear that America might never be willing to face the racism that has pervaded so much of our history, up to and including the Supreme Court, as reflected in decisions such as *Gong Lum*. The members of our judiciary view race—and the impact of racism and segregation – from such fundamentally different perspectives that it can appear impossible to imagine that each side is actually observing the same American landscape. For now, perhaps those of us who see value, not discrimination, in diversity can find promise in this line of the dissent, in hopes that those who see no value in diversity might take it to heart: "History should teach greater humility."[22] ■

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1. *Fisher v. University of Tex. at Austin, 570 U.S. ––––*, 133 S.Ct. 2411 (2013) (Fisher I).
2. *Fisher v. Univ. of Texas at Austin,* 136 S. Ct. 2198, 2204 (2016)
3. Id.
4. Id. at 2202.
5. *Fisher*, 758 F.3d 633 (5th Cir. 2014).
6. Tex. Educ.Code Ann. § 51.803 (West Cum. Supp. 2015).
7. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)
8. *Fisher*, 136 S. Ct. 2198, 2206 (2016)
9. Id.
10. Id.
11. Id. at 2209.
12. Id. at 2207; *Fischer v. U. of Texas at Austin*, 645 F.Supp.2d 587, 608 (W.D. Tex. 2009)
13. *Fisher*, 136 S. Ct. 2209.
14. Id. at 2210-14.
15. Id. at 2214-15.
16. Id. at 2227, 2240.
17. Id. at 2207.
18. See also 645 F.Supp.2d 597.
19. Id.
20. Fisher, 136 S. Ct. 2198, 2227 dissent, fn. 4, (internal marks and citations omitted).
21. Gong Lum v. Rice, 275 U.S. 78, 85–86 (1927) ("The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black.")
22. *Fisher*, 136 S. Ct. 2228 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting)).

Batson revisited: Exploring racial bias in contemporary jury selection

BY TIMOTHY JAMES TING

Thirty years have passed since the hallmark decision of *Batson v. Kentucky*, 476 U.S. 79 (1986). While racial discrimination in jury selection may no longer exist in such a blatant fashion as it did in yesteryear, attorneys should be aware of the subtle racial bias still present in contemporary jury selection.

Not too long ago, the United States Supreme Court had to make a decision which seems fairly obvious for today's practitioners of law – "purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86. Specifically, in *Batson*, an African-American defendant was convicted of second-degree burglary and receipt of stolen goods in a Kentucky State Court. *Id*. at 82. Upon appeal to the United States Supreme Court, Mr. Batson successfully claimed that his Fourteenth Amendment Right to Equal Protection under the United States Constitution was violated because the prosecutor used peremptory challenges to systematically strike all four African-American persons on the venire, resulting in a selected jury composed only of Caucasian individuals. *Id*. at 79. At the trial level, Mr. Batson's attorney objected to the prosecutor's removal of the African-American potential jurors but the trial judge simply ruled that the parties were entitled to use their peremptory challenges to "strike anybody they want to." *Id*. at 83.

Upon examining these facts, the United States Supreme Court established a three-part inquiry to determine whether the selection of the jury panel was impermissibly based on race. *Id*. at 96. First, the defendant was required to show that he was "a member of a cognizable racial group and that the prosecutor ha[d] exercised peremptory challenges to remove from the venire members of the defendant's race." *Id*. Secondly, the defendant was entitled to rely on the fact "that peremptory challenges constitute[d] a jury selection practice that permit[ed] 'those to discriminate who are of a mind to discriminate.' " *Id*. Lastly, the defendant was required to "show that these facts and any other relevant circumstances raise[d] an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.* Once the defendant made a *prima facie* showing, the burden shifted to the prosecution to establish a neutral explanation for excluding the group of jurors, an exclusion which could not be remedied by the prosecutor's "intuitive judgment – that they would be partial to the defendant because of their shared race." *Id*. at 97.

Ultimately, in *Batson*, the United States Supreme Court remanded the case to the trial court to conduct this examination, noting that "by requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice." *Id*. at 99. In writing the majority opinion for the United States Supreme Court, Justice Powell emphasized that "in view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Id*.

Five years later, the United States extended the holding of its decision in *Batson* in *Powers v. Ohio*, 499 U.S. 400 (1991). In *Powers*, a Caucasian defendant "objected to the State's use of peremptory challenges to remove seven black venirepersons from the jury." *Id.* The prosecution argued that Mr. Powers could not be afforded the Equal Protection claim established in *Batson* because he – a Caucasian male – could not have standing for the exclusion of African-American jurors. *Id*. at 406. The United States Supreme Court disagreed and established that "a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race." *Id*. at 415. The United States Supreme Court clearly noted that "to bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id*.

While the holdings of *Batson* and *Powers* certainly aided the United States in eradiating racial bias in jury selection, it is significant that neither of those cases was unanimously supported by the Justices of the United States Supreme Court. See, *Batson*, 476 U.S. at 112 (Justice Burger and Justice Rehnquist dissented); *Powers,* 499 U.S. at 417 (Justice Scalia and Justice Rehnquist dissented). It would simply be naïve to believe that racial discrimination, albeit in a more nuanced way, doesn't still occur during jury selection in criminal trials all across the country and specifically in Illinois.

Consider the recent case of *People v. Abram*, 2016 IL App (1st) 132785. In the *Abram* case, a jury found defendant guilty of possession of a controlled substance with intent to deliver and the circuit court sentenced him to seven years' imprisonment. *Id*. at ¶ 2. During jury selection, "Defense counsel expressed her concern that many African–American jurors were being dismissed for cause." *Id*. at ¶ 15 (fn 3). Additionally, Defense counsel had requested the trial court

to ask, in relevant part, the following questions: (1) "*Do you have any close friends, family members, or colleagues who are African–American?*" and (2) "*What is your closest relationship with a person of African–American descent?*" *Id*. at ¶ 58 (italics added). The trial court rejected the questions submitted by Defense counsel and noted at the Defendant's Motion for a New Trial hearing that "I believe that the court's refusal to ask the questions requested by [defense counsel] was appropriate." *Id*. at ¶ 60. The First District Appellate Court agreed, noting that the trial court was not required "to question potential jurors regarding the nature and extent of their personal relationships with African–Americans." *Id*. at ¶ 61. Pursuant to Illinois Supreme Court Rule 431(b), there are only four questions a trial court is required to ask of potential jurors in a criminal trial:

> A trial court is required to "ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects."

While the proposed questions in *Abram* were clearly not of such a fundamental nature as those required to be asked by a trial court pursuant to Illinois Supreme Court Rule 431(b), it bears at least some consideration as to why such seemingly harmless questions would be barred by the trial court. After all, the *Abram* defendant was African–American, the neighborhood where he lived and in which the car chase took place was predominantly African–American, and the officers and the experts for the prosecution were Caucasian. *Abram*, 2016 IL App (1st) at ¶ 61. Would it not make at least some semblance of sense to question potential Caucasian jurors regarding their relationships with African-Americans in order to determine if those jurors would have an adequate contextual understanding of the daily interactions between police officers and African-Americans in that particular community? The *Abram* court ruled with a resounding *no* – indicating that a trial court is "constitutionally required to question potential jurors specifically regarding racial prejudice only if 'special circumstances' exist that suggest a constitutionally significant likelihood that racial prejudice might infect a defendant's trial." *Id.* at ¶ 62. Thus, the *Abram* court reasoned that "the issue of race was 'tangential to the proceedings' and there were 'no racial overtones in the basic facts of the case,' such that asking the jury questions designed to identify racial bias may well have improperly 'injected considerations of race into a case where the issue was absent.' " *Id*. The *Abram* court further held that "the State had accepted three African–American jurors and exercised its peremptory challenges in a nondiscriminatory manner, against Caucasians and African–Americans of both sexes." *Id*. at ¶ 15 (fn 3).

Admittedly, racial discrimination may not have played a role in the jury selection of the *Abram* defendant, but the trial court's prohibition of the Defense counsel from asking neutral race-based questions is concerning. The very road that was paved in cases like *Batson* and *Powers* to eradicate racial discrimination in jury selection will be untraveled if criminal defense attorneys are unable to question potential jurors with neutral race-based inquiries. Given the climate of contemporary American culture regarding race – particularly the differing views on the relationship between African-Americans and police officers – the ends of justice would best be served by allowing neutral race-based questioning by defense lawyers in the *voir dire* process. ■

Trump's incoming administration—An immigration attorney's perspective

BY MARISSA HANSON

On November 9, 2016, once all votes had been accounted for and all electoral votes had been assigned, the United States selected their new president elect: Donald Trump. Prior to Donald Trump's election, he released his "100-day action plan to Make America Great Again. [A] contract between [himself] and the American voter."[1] Per Mr. Trump's plan, and within the *first* day of his administration, in summary, he intends to take the following five actions to restore security and the constitutional rule of law:

> "FIRST, cancel every unconstitutional executive action, memorandum and order issued by President Obama;
>
> SECOND, begin the process of selecting a replacement for Justice Scalia from one of the 20 judges on [his] list, who will uphold and defend the Constitution of the United States;
>
> THIRD, cancel all federal funding to Sanctuary Cities;
>
> FOURTH, begin removing the more than 2 million criminal illegal immigrants from the country and cancel visas to foreign countries that won't take them back; and
>
> FIFTH, suspend immigration from terror-prone regions where vetting cannot safely occur. All vetting of people coming into our country will be considered extreme vetting."[2]

Moreover, per Mr. Trump's plan and within the first 100 days of his administration, he pledges to "end Illegal Immigration Act Fully-funds the construction of a wall on our southern border with the full understanding that the country Mexico will be reimbursing the United States for the full cost of such wall; establish a two-year mandatory minimum federal prison sentence for illegally re-entering the U.S. after a previous deportation, and a five-year mandatory minimum for illegally re-entering for those with felony convictions, multiple misdemeanor convictions or two or more prior deportations; also reform visa rules to enhance penalties for overstaying and to ensure open jobs are offered to American workers first.[3] Upon the country learning about Mr. Trump's election, documented and undocumented immigrants alike began to ponder their future (and their family's future) within the United States and began to fear what potentially may become of their current immigration status. Hence, I called upon immigration attorney (a go-go) Diana Mendoza Pacheco[4] to discuss what might be on the horizon for immigrants. My interview of Ms. Pacheco follows a brief background of the current status of the DACA Program to benefit certain children of undocumented immigrants that was instituted by President Obama.

On June 15, 2012, President Obama, via executive order, instituted a new policy for undocumented immigrants who came to the United States as children and who met certain guidelines, to remain temporarily within the country pursuant to a form of prosecutorial discretion also known as "deferred action"[5] or Deferred Action for Childhood Arrivals (DACA). In essence, the Department of Homeland Security (DHS) would not remove qualifying individuals who were brought into the United States as children. Instead, DHS would focus its enforcement resources on the deportation of individuals who pose a danger to the community or who have committed a crime of moral turpitude[6] ("significant" misdemeanors or a felony offense).[7] Moreover, besides deferred action, DACA also granted an approved applicant lawful permission to work within the country.[8] In order to apply for DACA, besides meeting the prerequisite qualifications, the applicant must undergo a substantial and in-depth background check including full and accurate disclosure of the applicant's personal history and information. However, it must be noted that while DACA provided a means to defer removal proceedings, there is no direct path to permanent residence or citizenship, and it can be revoked at any time.[9] Over 728,000 immigrants have become "DACAmented" since the policy was announced.[10]

Q: Diana, with everything we are hearing about in social media and the news with regard to immigrants, and now knowing Trump's 100 day plan, what are some of the concerns impacting not just Hispanic immigrants, but immigrants in general?

A. First of all, immigration is more than just undocumented immigrants. You have a whole myriad of issues that go with immigration—you have the people that came here crossing the border; over-stayed visas; people that came to this country through family or through employment; or through a refugee program. However it is that they came to this country, they are all not going to have the same background; they are all not going to have the same concerns.

That being said, I have received calls from clients that are scared. I just had a conversation the other day with a client who is undocumented, as is his wife, and they are both hard working people. The wife has a business that she runs and

he works for a company as a significant player within the company. These people have been able to save up and work hard and have been able to amass three properties here in the U.S. Hence, being undocumented and having built his whole life here and having his family here, his questions are, "How do I plan?" "What do I do?" "What is going to happen?"

We do not have a magic crystal ball to know exactly what actions Trump is going to take. We perhaps can guess from the actions that he has taken so far that he has the intent to take a hard line on immigration. So, what may have first been perceived as political rhetoric, now, as we see and hear of the people that he is appointing as his advisors and staff, it appears that Trump is sticking to what he pledged. Hence, I told my client to plan. Plan as you have been doing all these years for the worst case scenario which is that you must be prepared from one moment to the next to leave the country. I am not trying to scare my client—this is not about scaring—I am trying to have my clients prepared.

Q: How do you recommend that immigrants "plan" as you have mentioned?

A. For example, if you have information that is important to you, have it entrusted to someone you trust. For example, with regard to my aforementioned client, his wife, children and their properties: have a Power of Attorney drafted so that if you are no longer present or able to act, you have identified someone in the United States that can execute certain transactions for you. Should a "Redada" come to your employment (when ICE comes to employment office and rounds up undocumented people and does document checks, and if those who are 'rounded up' cannot prove lawful status, they are sentfor processing) and you are one of the unlucky ones to have to face it, you won't be completely out of luck. Estate planning is also highly recommended. Take whatever steps are necessary should the worst case scenario happen: plan, but do not panic.

Q. Assuming the worst case scenario does happen and an immigrant is deported due to his undocumented status, does the undocumented immigrant lose any rights to their properties within the United States?

A. Foreign nationals have the right to have property in the U.S. Hence, to my understanding, the government can only seize their property via the appropriate laws.

Q. So, because of the mere fact that someone is undocumented or is deported, he or she does not automatically lose any property rights?

A. That is correct.

Q. You mentioned that you have received phone calls from your clients saying that they are scared now that Mr. Trump has been elected as our incoming President; why are they scared?

A. As I mentioned before, it appears that Trump does have the intent to take a hard line on immigration, especially when we take a look at the people that he is appointing as his administrative staff. With that said, one of the reasons my clients are scared is due to the uncertainty as to their immigration status—My client's children are old enough to know what is going on and they are old enough to be scared for their parents and ask: "Are they going to send you back to Mexico?"

Again, I tell my clients to keep the panic level down as a lot of legislation needs to happen to change things. However, in my opinion, the first thing that is going out is DACA.

Q: Can you tell us a little about DACA?

DACA as we all know was created via executive order as our current president was blocked with regard to immigration reform. He went ahead and resorted to the executive order which was clearly not welcomed by many people. DACA had two main components: 1) the security that you would not be deported and (2) that the government would stay removal [deportation] and the individual would have the opportunity to work (employment authorization).

Q. Is DACA still valid today?

DACA is still valid. There are two versions of DACA. The first version of DACA launched in 2012 is still in effect; however, there is currently an injunction on the 2014 version that expanded DACA. The 2014 version has not been held unconstitutional by the Supreme Court, but there was a 4 to 4 split decision, in effect upholding the fifth circuit court's decision to block the expanded version of DACA on procedural grounds. The ruling did not address the constitutionality of the President's order.

Q. Why do you believe that DACA will be the first thing to go?

Trump has vowed to get rid of it the moment he enters office. President-elect can decide if he would like to repeal DACA.

Q. How is this uncertainty affecting undocumented immigrants?

A. People who are working under DACA and who are up for renewal feel as if they are in limbo based upon Trump's election. Those cards that are issued under DACA are issued for a certain amount of time. [Upon Trump taking office], some people will still have time remaining via DACA and the question is, "Is [Trump] going to take it away?" "What happens to my employment authorization if DACA goes away?"

That is not only a concern for the immigrant but also for employers because the employers are also aware that a person has an employment authorization (also known as Employment Authorization Document), hence, they are also wondering "What is going to happen then?" "Will the employers be going afoul of the law?" Based off of current law, there is a specific procedure that must be followed to repeal employment authorization documents (EADs) and notice must be given to EAD holders. Should DACA be repealed, EAD cards can also be revoked.

With that said, another example is NAFTA—Trump has said he wants to get rid of NAFTA—and there are employment visas given under NAFTA andven those can become compromised. You remove

NAFTA and you remove the visas. There is so much that is up in the air and people know that things will become very hard for immigrants and for employers as well.

Q. Are there any other concerns should DACA be repealed?

A. Yes. The second main concern is that DACA requires someone to voluntarily tender their information to the government and identify who [they] are, where [they] live and any information needed to reach the person. When DACA began, the government promised that they were only going to be using the information for purposes of DACA and would not disclose it. However, if the person appointed by Trump to create policies does in fact change or repeal DACA, the information component may change as well. Hence, it is a fear that many people also have.

Q. What kind of information do people have to provide under DACA?

A. Any applicant must submit themselves to a very extensive background search because in order to be eligible for DACA, among other things, they must not have been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety.

Q. Is it safe to say that now DACA holders are concerned as to what will happen to the information that they have provided?

A. Yes, but in my personal opinion, I do not believe that DACA holders will be placed on a high priority list [for deportation]. Obama was one of the most deportation heavy presidents that we have had—tons of people were deported under Obama's administration. The way that Obama did it, he prioritized criminals for deportation and if you have been convicted of a major crime, you will be on that priority list. Hence, I do not think that DACA holders will be at the top of the list. However, Trump may want to follow what Obama has been doing pretty aggressively and perhaps even elevate (WHAT?) to a next level.

Q. If there are any DACA holders who are up for renewal, should they renew?

A: I would recommend people not make any new applications because you will be giving information that we do not know how the new administration might use it. Some immigration attorneys are saying that if you are up for renewal, go for it. My opinion? If you think you can renew prior to Trump coming into office, it may be worth a shot, but January is right around the corner.

Q. Are you aware of any deportation procedures now that may change under Trump's administration?

A. I do not concentrate my practice in deportation defenses, but I do know that there is currently a "catch and release" program under which[INS] will catch undocumented immigrants and then release them (they are actually released prior to even having a hearing because they are given low priority). That procedure has not been very popular or well received with the new and incoming administration, so perhaps that might be another change we can expect. That obviously puts people at greater odds, because at least if you were caught and released, you had a greater opportunity to prepare things if you were going to be deported.

Q. What would you like the public to know about immigration?

A. Immigration is a civil matter, not a criminal matter. Hence, undocumented immigrants are not "criminals" for being undocumented in this country as their violations are not a criminal matter. In other words, immigrants might be called "illegals" for breaking laws, but those laws are not criminal laws.

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1. <http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days>

2. *Id.*

3. *Id.*

4. Attorney Diana Mendoza Pacheco is an immigration attorney from Chicago with offices in Chicago and Naperville. Diana is the daughter of immigrant parents. After receiving her Bachelor's degree in Political Science in 2005, she attended Northern Illinois University College of Law. She obtained her Juris Doctor degree in 2008, and was admitted into the Illinois Bar that same year.

5. <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>

6. <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>

7.Examples of "significant" misdemeanors include burglary, domestic violence, sexual abuse or exploitation, unlawful possession of firearms, driving under the influence or drug distribution or trafficking).

8. <www.immigrationequality.org/get-legal-help/our-legal-resources/path-to-status-in-the-u-s/daca-deferred-action-for-childhood-arrivals/>

9. *Id.*

10. <http://www.huffingtonpost.com/entry/why-undocumented-immigrants-are-sharing-their-accomplishments-after-trumps-win_us_582a1b24e4b02d21bbca10e2>

Legal aid should lead in the pursuit of racial justice

BY BEVERLY ALLEN

Legal aid programs have been at the forefront of the war on poverty and the fight for equal access to justice for all since its inception. Historically, legal aid funding played a crucial role in ensuring equal protections under the law involving social security, housing, health care, education, employment, and anti-discrimination issues for those who could not afford legal representation. In 1965, the federal legal aid programs focused efforts on what was coined, "The War on Poverty."[1] In 1975, the Legal Services Corporation Act refocused the purpose of the programs from addressing poverty to achieving equal access to justice.[2]

Today, legal aid programs continue to focus on issues affecting the poor. People of color are three times as likely as whites to be poor, according to the 2000 Census.[3] People of color are more likely to experience substandard housing conditions; poor medical care; inferior education; a higher unemployment rate; and discrimination in the welfare system.[4] These conditions are the consequences of long-standing institutional racism.

Institutional racism is any system of inequality based on race. It is the differential access to the goods, services and opportunities of society.[5] Traditionally, policies were put in place to

promote racial segregation and disparities in wealth between white and black people. For example, the Social Security Act of 1935 excluded agricultural workers and domestic servants, mostly blacks.[6] In the Wagner Act of 1935, "blacks were blocked by law from challenging the barriers to entry into newly protected labor unions and securing the right to collective bargaining."[7] Similarly, the National Housing Act of 1939 tied property value and eligibility for government loans to race.[8] These are only a few illustrations of policies enacted depriving people of color the common liberties that were afforded whites. Subsequent laws passed to eliminate these resultant injustices have been unsuccessful.

Race and poverty issues go hand in hand and underlie the mission of legal aid programs today. Therefore, legal aid organizations must revamp their approach to poverty issues and their programming in order to achieve success in the war on poverty and in providing access to justice to those minority populations that have been sidelined for decades. The fight must go where it is needed the most and would be most effective. Thus, race based advocacy must be a priority.[9] Using the same tools utilized historically to fight racial discrimination and poverty, the staff of legal aid programs must learn to evaluate cases with a racial lens, looking beyond the individual problem to examine the systemic effect the problem has had on the entire community.[10]

If the action limits equal access to resources and advancement or causes a negative disparate effect on people of color, then legal aid lawyers should consider the use of anti-discrimination laws or civil rights laws to address the problem.[11] The effects of institutional racism can no longer be ignored but must be abolished if equal access to justice for all is ever to be truly achieved-and not just espoused as a worthy goal. ■

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1. Alan W. Houseman, *Racial Justice: The Role of Civil Legal Assistance*, CLEARING HOUSE REV. 5-14 (2002)
2. See Houseman, *supra* note 1, at 8.
3. See Houseman, *supra* note 1, at 5.
4. See Camille D. Holmes, Linda E. Perle &Alan W. Houseman, *Race-Based Advocacy: The Role and Responsibility of LSC Funded Programs*, 36 CLEARING HOUSE REV. 61, 63-64. (2002).
5. Donald J. McCormack (1973). Stokely Carmichael and Pan-Africanism: Back to Black Power. The Journal of Politics, 35, pp 386-409. doi:10.2307/2129075. (http://www.jstor.org/stable/2129075)
6. "Race - The Power of an Illusion". *The Age* (Melbourne). 2006-01-23. Retrieved 2008-04-10. (http://newsreel.org/video/race-the-power-of-an-illusion)
7. Supra, note 8.
8. Supra, note 8.
9. See Holmes, *supra*, note 6 at 62.
10. See Holmes, *supra*, note 6 at 61.
11. Paul E. Lee and Mary M. Lee, *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, 27 CLEARINGHOUSE REV. 311 (Special Edition 1993).

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February

Wednesday, 02-01-17—Chicago, ISBA Regional Office—Cybersecurity: Protecting Your Clients and Your Firm. Presented by Business Advice and Financial Planning Section; co-sponsored by IP (tentative). 9:00 a.m. – 5:00 p.m.

Thursday, 2-2-17 – Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

Friday, 02-03-17- Springfield, Illinois Department of Agriculture—Hot Topics in Agricultural Law- 2017. Sponsored by Agriculture Law Section.

Friday, 02-03-17- Chicago, ISBA Regional Office—2017 Federal Tax Conference. Presented by Federal Tax Section. 8:20 a.m. – 4:45 p.m.

Thursday, 02-09-2017 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm

Monday, 02-13 to Friday, 02-17—Chicago, ISBA Regional Office—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

Tuesday, 02-14-17- Webinar—Hardware & Software: You Bought It, You've Got It… Now Use It! Practice Toolbox Series. 12:00 -1:00 p.m.

Thursday, 2-16-17 – Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

Monday, 02-20-17- Chicago, ISBA Regional Office & Fairview Heights—Workers' Compensation Update – Spring 2017. Presented by Workers' Compensation. 9:00 a.m. – 4:00 p.m.

Wednesday, 02-22-17- Live Webcast—Housing Justice v. Housing Injustice: How Unfair Housing Practices Keep Segregation Intact. Part 2: Landlord Privileges/Defenses and Tenant Rights/Remedies. Presented by the Committee on Racial and Ethnic Minorities; multiple cosponsors (see agenda). 1:00 – 3:00 p.m.

Thursday, 02-23-17—Live Webcast—Preservation Makes Perfect: Appellate Tips for Trial Lawyers. Presented by the Illinois State Bar Association. 11:00 a.m. – 12:00 p.m.

Thursday, 02-23-17—Live Webcast—Written Discovery Part 2: Electronic Discovery – How to Seek, Locate, and Secure. Presented by Labor & Employment. 1:00 – 3:00 p.m.

Friday, 02-24-17- Chicago, ISBA Regional Office—Wrongful Death, Survival, and Catastrophic Injury Cases. Presented by Tort Law. 8:45 a.m. – 1:00 p.m.

Tuesday, 02-28-17- Webinar—Introduction to Microsoft Excel for Lawyers. Practice Toolbox Series. 12:00 -1:00 p.m.

March

Wednesday, 3-1-27 – Webcast—A New Summary Judgmeent Standard for Discrimination Cases: Ortiz v Werner Enterprises, Inc. Presented by the Labor & Employment Section. 1:00 – 2:00 pm.

Thursday, 3-2-17 – Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

Thursday, 03-02-17—Chicago, ISBA Regional Office—Family Law Table Clinic Series—Session 4. Presented by Family Law.

Friday, 03-03-17- Chicago, ISBA Regional Office & Webcast—8th Annual Animal Law Conference. Presented by Animal Law. 9:00 a.m. – 5:00 p.m.

Wednesday, 03-08 – Live Webcast—Life After High School: Post-Secondary Transition Options and Education Protections for Young Adults with Disabilities. Presented by the Standing Committee for Disability Law; Co-sponsored by the Education Law Section. 10:00 am – 12:00 pm.

Wednesday, 03-08 – Webinar—Engagement Letters, Timesheets & Billing Tips. Presented by the Committee on Law Office Management and Economics. 12:00 pm – 1:00 pm.

Thursday, 03-09-17 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm

Thursday, 03-09 and Friday, 03-10—New Orleans—Family Law Update 2017: A French Quarter Festival. Presented by Family Law. Thursday: 12:00 pm – 5:45 pm; Reception 5:45- 7:00 pm. Friday: 9:00 am – 5:00 pm.

Tuesday, 03-14-17- Webinar—Matter Management Software- Why Outlook Isn't Good Enough. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 03-15-17- Live Webcast—Economic Development in Your Community: Learn from the Leaders.

Presented by Local Government Law Section. 1:00 pm – 3:00 pm.

Thursday, 3-16-17 – Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

Wednesday, 03-22-17- Live Webcast—Housing Justice v. Housing Injustice: How Unfair Housing Practices Keep Segregation Intact. Part 3: Mortgage Fraud, Subprime Lenders, and Foreclosure Crisis. Presented by Committee on Racial and Ethnic Minorities; multiple cosponsors (see agenda). 1:00 – 3:00 p.m.

Thursday, 03-23-17 – Live Webcast—Immigration Hearings: How to Get the Job Done. Presented by the Administrative Law Section; Co-sponsored by the International and Immigration Law Section. 1:00 – 2:00 pm.

Friday, 03-24-17- Chicago, ISBA Regional Office—Jury Selection Techniques and the Use of Jury Focus Groups. Presented by Labor and Employment. TIME TBD—full day.

Tuesday, 03-28-17- Webinar—Access Your Documents from Anywhere and Share Them with Others. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 03-29-17- Chicago, ISBA Regional Office & Live Webcast—Professional Responsibility and Ethics—Spring 2017. Presented by General Practice. 12:50 p.m. – 5:00 p.m.

Friday, 03-31-2016 – iWireless Center, Moline—Solo and Small Firm Practice Institute Series: A Balancing Act: Technology Tips and Maximizing Your Profit. ALL DAY.

April

Thursday, 04-06-17- Chicago, ISBA Regional Office—Housing Justice v. Housing Injustice: How Unfair Housing Practices Keep Segregation Intact. Part 4: Resources for Rebuilding. Presented by REM; multiple cosponsors (see agenda). 1:00 – 5:00 p.m. (program). 5:00 – 6:00 p.m. (reception).

Friday, 04-07-17—NIU, Hoffman Estates—DUI and Traffic Law Updates—Spring 2017. Presented by Traffic Law and Courts. 8:55 – 4:00.

Tuesday, 04-11-17- Webinar—TBD. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 04-12-17 – Chicago Regional Office—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

Wednesday, 04-12-17 – Live Webcast—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm. ■