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ILLINOIS STATE BAR ASSOCIATION

FEDERAL CIVIL PRACTICE

The newsletter of the Illinois State Bar Association's Section on Federal Civil Practice

Completing Phase One of the Seventh Circuit Electronic Discovery Pilot Program

By Chief Judge James F. Holderman

The Seventh Circuit Electronic Discovery Pilot Program was initiated in May 2009 as a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule I of the Federal Rules of Civil Procedure.

The Seventh Circuit Electronic Discovery Pilot Program Committee ("Committee") targeted its schedule so it could prepare this Report on Phase One for presentation at the Seventh Circuit Bar Association's Annual Meeting and Judicial Conference on May 3,2010. This Report contains an explanation of the process and reasoning behind the Committee's Principles Relating to the Discovery of Electronically Stored Information ("Principles"). It also provides a preliminary, anecdotal "snapshot" of the information gathered regarding the application of the Principles in cases during Phase One of the Pilot Program. In May 2010, the Committee will review the feedback it receives regarding Phase One and this Report. It will then commence Phase Two of the Pilot Program, which will run from July I, 2010 to May 1, 2011. The Committee intends to present its Report on Phase Two in May 2010, before moving on to Phase Three.

The Committee consists of a diverse and growing group of attorneys, non-attorneys, and judges experienced with the discovery of electronically stored information ("ESP'). The Principles were developed and drafted throughout the summer of 2009. During that time, there were numerous meetings, which included substantial

Continued on page 2

Admissibility of an expert opinion prior to or after class certification?

By John Holevas

The 7th Circuit recently addressed in *Honda Motor Company, Inc. {Honda} v. V. Richard Allen*, No. 09-8051 (decided April 7, 2010) whether the district court must conclusively rule on the admissibility of an expert opinion prior to class certification where the opinion is essential to the certification decision.

In *Honda*, plaintiffs were purchasers of a certain model Honda Gold Wing GL1800 motorcycle, which they allege was designed defectively making the motorcycle prone to side-to-side oscillation of the front steering assembly, with a tendency to "wobble." Plaintiffs moved for class certification pursuant to Rule 23(b)(3). In order to demonstrate the predominance of common issues for class certification, plaintiffs relied heavily on a report prepared by Mark Ezra, a motorcycle engineering expert.

Mr. Ezra's report opined that motorcycles should, by their design and manufacture, exhibit

Continued on page 4

INSIDE

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Continued from page 1

discussion and debate among the members of three subcommittees—the Preservation Subcommittee, the Early Case Assessment Subcommittee, and the Education Subcommittee—to address the key ESI issues identified at the Committee's first meeting on May 20, 2009, and draft proposed principles in response to these issues. In September 2009, the full Committee reviewed and adopted the Principles, which became effective October 1,2009, as a part of Phase One From October 2009 through March 2010, the Principles were tested in practice. Thirteen judges of the U.S. District Court for the Northern District of Illinois, including five district judges and eight magistrate judges, implemented the Principles in 93 civil cases pending on their individual dockets. In March 2010, survey questionnaires were sent to 285 attorneys involved in the Phase One cases as well as to the participating judges. All 13 judges responded to the Judge Survey Questionnaires, and 133 attorneys responded to the Attorney Survey Questionnaires.

The Committee's Survey Subcommittee worked closely with the Institute for Advancement of the American Legal System at the University of Denver, and the Federal Judicial Center in Washington, D.C., which is the educational arm of the U.S. Courts, in designing and administering the Surveys. Data analyses of both Surveys and the Principles are available online at <www.7thcircuitbar.org>.

Because a limited number of judges participated in Phase One, a reader should be cautious in extrapolating the judges' responses to the questions posed on the Phase One Judge Survey Questionnaire to the larger population of judges throughout the Seventh Circuit or the country. It would be best for the reader to treat the responses to the Judge Survey as anecdotal expressions of experienced observers. The particular district judges and magistrate judges participating in Phase One, however, were generally positive about the effectiveness of the Principles.

One hundred percent of the judges either "agreed" or "strongly agreed" that the involvement of e-discovery liaisons required by Principle 2.02 (E-Discovery Liaisons) contributed to a more efficient discovery process.

Over 90 percent of the judges thought the Principles "increased" or "greatly increased" counsels' level of attention to the technologies affecting the discovery process and the demonstrated familiarity counsel had with their clients' electronic data and data systems.

Ninety-two percent of the judges agreed that the Principles had a positive effect on counsels' ability to resolve discovery disputes before requesting court involvement and reach agreements on how to handle the inadvertent disclosure of privileged information or work product.

The 133 attorneys who responded to the Attorney Survey Questionnaire constituted slightly more than 46 percent of the 285 counsel for the parties in the Phase One cases. Each attorney was asked to respond with regard to his or her experience in connection with the single Phase One case in which he or she served as counsel of record. The attorneys responding to the Attorney Survey Questionnaire were fairly evenly divided as to the role of their respective clients regarding e-discovery in their Phase One case. Thirty-three percent identified themselves as representing a party primarily requesting ESI. Thirty-five percent represented a party primarily producing ESI. Twenty-five percent represented a party equally requesting and producing ESI. Seven percent represented a party neither requesting nor producing ESI.

The cases that were selected by the participating judges to be a part of Phase One were at various stages in the litigation process when the Phase One Principles went into effect on October I, 2009. Consequently, because the discovery phase had already commenced in some of the Phase One cases, not all of the questions posed in the Attorney Survey Questionnaire were applicable to all cases.

A substantial portion of the responding attorneys, 43 percent, reported that the Principles "increased" or "greatly increased" the fairness of the discovery process. Fifty-five percent stated they believed the Principles had no effect on the fairness of the discovery process, and just under three percent felt that the Principles decreased the fairness.

In addition, during Phase One of the Pilot Program, the Committee's Education Subcommittee developed an hE-Discovery Program" section on the Seventh Circuit Bar Association's Web site (http://www.7thcircuitbar.org) as a resource to assist lawyers in accessing the case law addressing e-discovery issues. The Education Subcommittee has presented two national broadcast webinars, the first on February 20, 2010, titled "Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program," and the second on April 28, 20 I 0, titled "You and Your Clients: Communicating About Electronic Discovery," Both webinars were free of charge to the more than 1,000 participants. More webinars are planned as the Pilot Program moves to Phase Two.

During Phase Two, the Committee hopes to expand the geographic reach of the Pilot Program and increase the number of cases and participating judges. The Committee also intends to lengthen the implementation period for Phase Two so the Principles will be tested more comprehensively than in Phase One. The Committee may also modify certain of the Principles based on the Phase One feedback. Additionally, the Committee may establish more subcommittees to address other, identified areas related to the discovery of ESI as the Pilot Program continues.

Among possible changes the Committee will be considering for Phase Two are promulgating a proposed protocol guiding the production of ESI that will include uniform definitions as a standard starting point, which individual counsel may modify to fit the unique intricacies of each Phase Two case of the Pilot Program. The proposed protocol will include production format, more specific metadata preservation and production procedures, identification of search criteria formats, de-duplicating procedures, production of redacted documents, TIFF Processing Specifications, "Bates" numbering procedures, and specific "clawback" procedures for inadvertent disclosures.

Additionally, the Committee may consider a modified standard Form 52 of the Federal Rules of Civil Procedure that would better address all pretrial procedures, including ESI discovery procedures, for counsel to use in their Fed. R. Civ. P. 26(f) conference at the initial Fed. R. Civ. P. 16 scheduling conference with the court prior to commencement of discovery.

The Committee remains open to suggestions, which may be posted on the Committee's blog. The blog can be accessed through the "Forum" button on the left-hand side of the Seventh Circuit Bar Association's home page (www.7thcircuitbar.org). General information about the Pilot Program can be found at the "E-Discovery Program" page on the bar association's website.

You may also e-mail the Committee at E-Discovery.answers@7thcircuitbar.org. ■

Admissibility of an expert opinion prior to or after class certification?

Continued from page 1

decay of any steering oscillation sufficiently and rapidly so that the rider neither reacts to nor is frightened of such oscillations. Mr. Ezra's report stated that assuming human reaction time to wobbling is ½ to ¾ of a second, the wobble should decay or dissipate to 37 percent of its original amplitude within ¼ of a second to ensure that riders do not perceive and react to the oscillation. The standard which Mr. Ezra devised himself and characterized as "reasonable" was published in the June 2004 edition of the Journal of National Academy of Forensic Engineers.

Honda moved to strike the report pursuant to *Dahlberg v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), arguing that Mr. Ezra's wobble decay standard was unreliable because it was not supported by empirical evidence, was not developed through a recognized standard-setting procedure, was not generally accepted in the scientific, technical, or professional community, and was not the product of independent research.

The district court concluded that it was proper to decide whether the report was admissible prior to certification because "most of the plaintiff's predominant arguments rests upon the theories advanced by Mr. Ezra."

The court then addressed Honda's *Dahlberg* arguments and noted that it had reservations as to whether Ezra's wobble de cay standard was supported by empirical evidence and whether the standard had been generally accepted by the engineering community, and ultimately concluded "viewing all of the arguments together, the court has definite reservations about the reliability of Mr. Ezra's wobble decay standard." The district court, however, refused to exclude the report in its entirety. . . at this early stage of the proceedings."

The 7th Circuit earlier ruled in *Szabo v. Bridgeport Machs, Inc.*, 249 F.3d 672 (2001) that a district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations overlap the merits of the case. However, what the 7th Circuit had yet to decide was whether a district court must resolve a *Dahlberg* challenge prior to ruling on class certification if the testimony challenged is integral to the plaintiff's satisfaction of Rule 23's requirements.

The 7th Circuit ultimately concluded that when an expert's report or testimony is critical to class certification and forms the basis of plaintiff's theory, a district court must conclusively rule on any challenge to the expert's qualification or submissions prior to ruling on a class certification motion. In essence, the district court must perform a full *Dahlberg* analysis before certifying the class if the situation warrants.

If the challenge is direct to the individual's qualifications, the court must make the determination "by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness' testimony.

In *Honda*, while the 7th Circuit acknowledged that the district court began to undertake what might have become a fairly extensive *Dahlberg* analysis, the district court never actually reached a conclusion about whether Mr. Ezra's report was reliable enough to support plaintiff's class certification request.

In granting Honda's petition for leave to appeal, the court vacated the district court's denial of Honda's motion to strike and its order certifying the class and remanded the case for a full *Dahlberg* analysis. ■

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Courts dismiss complaints for failure to state a claim

By Michael R. Lied; Howard & Howard Attorneys PLLC; Peoria, IL

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court concluded, in an antitrust case, that a complaint which provides only "fair notice" of a claim is insufficient. In addition to providing notice, the complaint must state a claim to relief that is plausible on its face. The plaintiff's factual allegations must be enough to demonstrate a right to relief above the speculative level. The Court reasoned that the need at the pleading stage for allegations plausibly suggesting (not merely consistent with) success on the claim reflects the threshold requirement of F. R. Civ. P. Rule 8(a)(2) that the "plain statement" possess enough heft to show that the pleader is entitled to relief. In a later case, *Ashcroft v. Iqbal*, _ U.S. _ , 129 S. Ct. 1937 (2009), the Supreme Court held that the "plausibility" standard applies to all civil actions.

Courts in the Seventh Circuit are now regularly being asked to dismiss complaints under the new pleading standards. Three examples follow.

In the first case, Khem Bissessur was expelled from the Indiana University School of Optometry after receiving several poor grades and failing a clinical rotation.

Bissessur's complaint alleged that his professors arbitrarily assigned his grades, that he did not receive proper feedback from his professors or the University regarding his academic progress, and that the University dismissed him without proper notice or a hearing. The complaint contained claims for violations of Bissessur's rights to substantive due process, procedural due process, and equal protection, as well as a claim for breach of implied contract.

The district court dismissed the complaint for failure to state a claim pursuant to F. R. Civ. P. 12(b)(6). Bissessur appealed.

According to the appeals court, the district court correctly concluded that Bissessur failed to identify any specific promise by the University which established that Bissessur had an entitlement to a continuing education, or a similar entitlement. Bissessur nevertheless argued that the district COUlt erred by dismissing his claims at the motion to dismiss stage.

Bissessur alleged that the following allegations were enough to allow his claims to survive a motion to dismiss:

- An implied contract existed between Bissessur and IU.
- IU breached the implied contract that existed between Bissessur and IU.
- IU's actions were arbitrary, capricious, and undertaken in bad faith.

According to the Seventh Circuit, under the standard set forth in *Twombly*, Bissessur's complaint fell short The complaint must contain enough facts to state a claim to relief that is plausible on its face and also must state sufficient facts to raise a plaintiff's right to relief above the speculative level. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Under *Twombly*, a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail to indicate that the plaintiff has a substantial case. Bissessur's complaint did nothing more than state that an implied contract existed and was breached. The complaint contained no mention of any entitlements Bissessur had as a result of his relation ship with the University, or any promises that the University or its officials made to him that might have formed the basis of a contract. Nor did the complaint state what entitlement Bissessur had as a result of purported contract. Because Bissessur's constitutional claims were derivative of the rights he alleged were promised to him as part of this implied contract, the necessary facts to support these claims were also absent from the complaint. Bissessur's argument that the details of the contract would become clear during discovery was foreclosed by *Twombly*, which says that the complaint itself must contain sufficient factual detail before discovery may commence.

Dismissal of Bissessur's complaint was affirmed. *Bissessur v. Indiana Univ. Bd. of Trustees. et al*., 581 F.3d 599 (7th Cir. 2009).

In the next case, a businessman named Jack Smith sold a controlling interest in his company to Dade Behring, Inc., a closely held corporation. Smith received options, valid for 10 years, to purchase 20,000 shares of Dade Behring's common stock at $60 a share. In 2002, Smith signed an agreement which ended his employment. He received $1.4 million in cash and retained stock options with their $60 exercise price, although the appraised value of the stock was only $11. Three months later Dade Behring, Inc. declared bankruptcy. Smith sued for fraud.

Smith's complaint alleged that the defendants fraudulently failed to tell him that the company would be declaring bankruptcy. The district court dismissed for failure to state a claim.

Smith appealed.

The appellate court stated it was at first reluctant to endorse the district court's citation of *Twombly*, "fast becoming the citation du jour in Rule 12(b)(6) cases," as authority for the dismissal of Smith's suit. This was the case because in *Twombly*, the Supreme Court held that in complex litigation, the defendant should not to be put to the cost of pretrial discovery, which can be so steep as to coerce a settlement even when plaintiff's claim is very weak—unless the complaint says enough to allow an inference that the case may have merit. In comparison, Smith's case was not complex.

However, the appellate court noted that in *Iqbal, Twombly* was extended to all cases, and *Iqbal* was a case in which the court of appeals had promised minimally intrusive discovery.

Judge Posner mused that perhaps neither *Twombly* nor *Iqbal* governed the outcome. It was apparent from Smith's complaint and arguments, without reference to anything else, that his case had no merit. Dismissal was affirmed. *Smith v. Duffey, et al*., 576 F.3d 336 (7th Cir. 2009).

A district court fleshed out some details in our third case. In *Riley v. Vilsack et al.,* 665 F. Supp. 2d 994 (W.O. Wis. 2009), a former employee sued the Department of Agriculture and two individual defendants. Robert Riley had been employed by defendant U.S. Department of Agriculture for approximately 27 years, most recently as an information technology specialist with the National Forest Agency. He was terminated from employment. The defendants filed a motion to dismiss that relied heavily on *Twombly* and *Iqbal*. In particular, defendants argued that Riley's allegations of age discrimination, disability discrimination and retaliation were too "vague and conclusory" to satisfy F. R. Civ. P. 8.

The district court agreed that Riley's bare assertions that defendants failed to accommodate his disability and engaged m a "campaign of retaliation" against him were insufficient to satisfy Rule 8.

However, Riley's allegations of age discrimination were more than conclusions. He alleged that defendants targeted for outsourcing the job responsibilities of older workers while making comments about their preference for younger workers.

The district court observed that in *Iqbal,* the Supreme Court analyzed the sufficiency of the complaint using a two-step process. First, the Court identified the allegations in the complaint that are not entitled to the assumption of truth. In the second step, the Court looked at the remaining allegations to determine whether they plausibly suggested an entitlement to relief. As mentioned above, the Supreme Court's interpretation of Rule 8 applied to all civil actions, including discrimination claims.

The Court in *Iqbal* stated that a plaintiff may not allege discriminatory intent in a conclusory fashion. While the Supreme Court did not identify what level of specificity is required, it concluded that it was not enough for the plaintiff to allege that the defendants "knew of, condoned, and willfully and maliciously agreed to subject the plaintiff to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest."

The problem noted by the district court is that *Iqbal* and *Twombly* contain few guidelines to help the lower courts discern the difference between a "plausible" and an implausible claim and a "conclusion" from a "detailed fact."

According to the district court, the Seventh Circuit is proceeding cautiously. It has continued to emphasize that *Twombly* and *Iqbal* have not changed the fundamentals of pleading, citing to Bissessur ("Our system operates on a notice pleading standard; *Twombly* and its progeny do not change this fact.").

According to the district court, the bottom line seems to be that "the height of the pleading requirement is relative to circumstances." *Cooney v. Rossiter*, 583 F .3d 967, 971 (7th Cir.2009). More specifically, the plausibility standard has greatest force when special concerns exist about the burden of litigation on the defendant or when the theory of the plaintiff seems particularly unlikely. However, in the ordinary case, the burden remains low. So long as the plaintiff avoids using legal or factual conclusions, any allegations that raise the complaint above sheer speculation are sufficient.

A complaint is implausible under *Iqbal* and *Twombly* not because the allegations are "fanciful," but because they are too conclusory or because they fail to include facts about the elements of a claim. For example, a plaintiff in a race discrimination case could allege, "My boss at Big Corporation X fired me right after be told me that I am the best employee he ever had, but that be cannot overcome the animosity he feels toward me because of my race." Such an allegation may be *unlikely*, but it is not implausible under *Iqbal* or *Twombly* because it is specific and addresses the critical elements of the claim.

The district court stated that after *Iqbal* and *Twombly*, a court assessing the sufficiency of the complaint should ask: if all the facts the plaintiff alleges in his complaint are accepted as true, but all the conclusions are rejected, is it still plausible (that is, more than speculative) to believe that additional discovery will fill in whatever gaps are left in the complaint?

At the same time, *Iqbal* requires courts to consider the context of a particular case. When an element of a claim involves the intent of the defendant, the plaintiff is limited in the facts that be can provide at the pleading stage. Of course, only the defendant knows why he took a particular action and generally the plaintiff will not have access to a significant amount of circumstantial evidence proving his claim without discovery. According to the district court, F. R. Civ. P. 8 should not be construed in such a way that it provides immunity to all but the most brazen violators of the law. Thus, in the ordinary discrimination case, the required "factual context" for the plaintiffs claim should be minimal.

It is evident that the federal courts will continue to refine the pleading requirements established in *Twombly* and *Iqbal*, and that motions to dismiss will predictably become more and more common. ■

Upcoming CLE programs

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June

Friday, 6/18/10– Quincy, Stoney Creek Inn—Legal Writing: Improving What You Do Every Day. Presented by the Illinois State Bar Association. 8:30-12:45.

Monday, 6/21/10- Webinar—Advanced Legal Research on Fastcase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <https://www1.gotomeeting.com/register/863461769>. 12-1.

Tuesday, 6/22/10- Teleseminar—Buying and Selling Distressed Real Estate, Part 1

Tuesday, 6/22/10- Webcast—Women in the Criminal Justice System. Presented by the ISBA Women in the Law Committee. 12-1.

Wednesday, 6/23/10- Teleseminar—Buying and Selling Distressed Real Estate, Part 2.

Wednesday, 6/23/10- Teleseminar—Health Care Reform 2010- How it Will Impact Employers, Part 2.

Thursday, 6/24/10- Friday 6/25/10- St. Louis, Hyatt Regency St. Louis at the Arch—CLE Fest Classic St. Louis- 2010. Presented by the Illinois State Bar Association. 11:00-4:40; 8:30-4:10.

Thursday, 6/24/10- Teleseminar—Business Exit and Succession Planning for closely Held Businesses. 12-1.

Tuesday, 6/29/10– Springfield, INB Conference Center, 431 S. 4th St—Legal Writing: Improving What You Do Every Day. Presented by the Illinois State Bar Association. 8:30-12:45.

Tuesday, 6/29/10- Teleseminar—Negligent Hiring. 12-1.

July

Tuesday, 6/6/10- Teleseminar—Like-Kind Exchange of Business and Business Internals.

Thursday, 7/8/10- Webinar—Conducting Legal Research on FastCase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <https://www1.gotomeeting.com/register/906864752>. 12-1.

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Wednesday, 6/14/10- Teleseminar—Business Torts, Part 2.

Thursday, 7/22/10- Webinar—Advanced Legal Research on Fastcase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <https://www1.gotomeeting.com/register/403171688>. 12-1.

Thursday, 7/22/10- Teleseminar—Construction Contracts.

Tuesday, 7/27/10- Teleseminar—Goodwill in Business Transactions.

September

Thursday, 9/16/10- Chicago, Chicago History Museum—GAIN THE EDGE!® Negotiation Strategies for Lawyers. Master Series Presented by the Illinois State Bar Association. 8:30-4:00.

Friday, 9/17/10- Chicago, ISBA Regional Office—Hot Topics in Tort Law- 2010. Presented by the ISBA Tort Law Section. 1-4:15

Thursday, 9/23/10- Chicago, ISBA Regional Office—Experts and Litigators on Issues Impacting Children & Custody in Family Law. Presented by the ISBA Family Law Section. 8-6.

Friday, 9/24/10- Springfield, Illinois Primary Healthcare Association—Don't Make My Green Acres Brown: Environmental Issues Affecting Rural Illinois. Presented by the ISBA Environmental Law Section. 9-5.

October

Friday, 10/1/10 – Chicago, ISBA Regional Office—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5.

Friday, 10/1/10 – Webcast—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5.

Friday, 10/8/10- Carbondale, Southern Illinois University, Courtroom 108—Divorce Basics for Pro Bono Attorneys. Presented by the ISBA Committee on Delivery of Legal Services. 1-4:45.

Friday, 10/15/10- Bloomington, Double Tree—Real Estate Update 2010. Presented by the ISBA Real Estate Section. 9-4:45.

Monday, 10/18-Friday, 10/22/10- Chicago, ISBA Regional Office—40 Hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

Thursday - Saturday, 10/21/09 - 10/23/09 – Springfield, Hilton Hotel—6th Annual Solo & Small Firm Conference. Presented by the Illinois State Bar Association.

Thursday, 10/28/10- Springfield, Statehouse Inn—Experts and Litigators on Issues Impacting Children & Custody in Family Law. Presented by the ISBA Family Law Section. 8-6.

November

Thursday, 11/4/10- Lombard, Lindner Learning Center—Real Estate Update 2010. Presented by the ISBA Real Estate Section. 9-4:45.

Spring Semester 2011

Friday, 3/4/11 – Chicago, ISBA Regional Office—Dynamic Presentation Skills For Lawyers. Master Series Presented by the Illinois State Bar Association. 12:30-5. ■

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