

Attorney Mental Health and Substance Abuse: Case Law and Trends

**ICSA** 33<sup>rd</sup> ANNUAL  
ILLINOIS COUNCIL OF  
SCHOOL ATTORNEYS  
Seminar on School Law  
A workshop exclusively for school attorneys  
November 22, 2019 • Hyatt Regency Chicago #IJac19

**The Path to Lawyer Well-Being**  
Professional Responsibility  
at the Intersection of  
Emotional & Ethical Intelligence

Presented by:  
**Melissa A. Smart**, Litigation Manager & Senior Counsel,  
Attorney Registration and Disciplinary Commission of the  
Supreme Court of Illinois  
msmart@iadc.org

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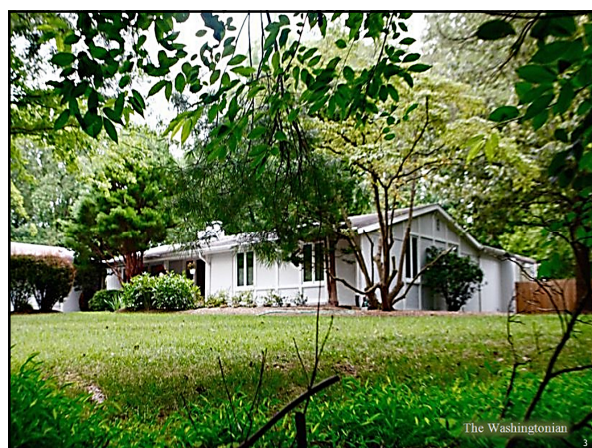
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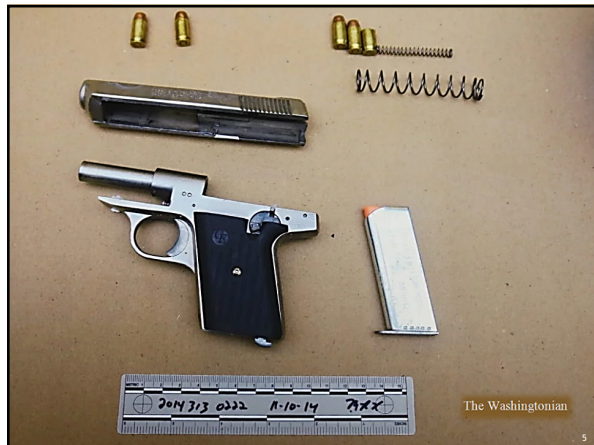
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**Fired lawyer pleads guilty to role in brutal attack on law firm partner, wife**

*After James Schmuhl was fired from a government Virginia law firm in 2014, prosecutors said the lawyer and his husband conspired to kidnap a law firm partner and his wife before settling on a better plan: taking the firm's partner and his wife hostage at their home in McLean.*

The plot unfolded on Nov. 4, 2014, when Andrew Schmuhl barged into the couple's home wearing a fedora and flashing a novelty badge. He bound the pair and began a scolding interrogation that prosecutors said appeared to be directed by Alicia Schmuhl, who remained outside.

These arrest photos provided by the Fairfax County Police Department show Andrew Schmuhl and Alicia Schmuhl. (AP)

**Schmuhl & Schmuhl (Ill. 2017)**  
Two Illinois attorneys, a husband and wife, were convicted for crimes they committed against a partner of Alicia Schmuhl's former law firm, as well as that partner's wife. The husband and wife team kidnaped the partner in his own home with the intention to extort money, and Andrew Schmuhl eventually stabbed both the partner and his wife multiple times. Alicia pled guilty to abduction with the intent to extort money, aggravated maiming, and burglary. She received a 45-year sentence and has been disbarred on consent. Andrew was convicted of abduction with the intent to extort money, aggravated maiming, using a firearm in the commission of a felony, and burglary. He was sentenced to two life terms plus 98 years in prison.

*In re Alicia Marie Schmuhl*, M.R. 28682, 2017PR00021 (Ill. May 18, 2017) and *In re Andrew Gilbert Schmuhl*, M.R. 28661, 2017PR00020 (Ill. May 3, 2017). Alicia, who was licensed in Illinois in 2009, was disbarred on consent. She was suspended on an interim basis on May 3, 2017. Andrew, who was licensed in Illinois in 2009, was suspended on an interim basis and until further order of the Court.

*In re Alicia Schmuhl*, Bar No. 994974 (D.C. Oct. 26, 2017). The D.C. Court of Appeals disbarred Schmuhl by consent, effective immediately. One-half of the infamous husband and wife duo who pled guilty to tasing, beating and stabbing her former boss and his wife in their McLean, Virginia home. See generally, NOBC Current Developments (Nov. 2017).

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**LAWYER WELLNESS IS NOT AN OXYMORON**

WHY TOMORROW'S TOP LAWYERS MUST EMBRACE WELLNESS TODAY...  
AND WHAT YOU NEED TO DO TO BE ONE OF THEM

ANDY CLARK

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**Emotional Intelligence**

**Self Awareness**

**Social Skills**

Emotional intelligence refers to the ability to identify and manage one's own emotions, as well as the emotions of others.

An emotionally intelligent individual is both highly conscious of his or her own emotional states, even negativity—frustration, sadness, or something more subtle—and able to identify and manage them. These people are also especially tuned in to the emotions others experience.

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**Ethics**

Emotionally intelligent people are aware of how they and others feel. Ethically intelligent people know how to use this awareness the right way. Being ethically intelligent doesn't just mean knowing what is right; it also means having the courage to *do* what is right. Ethical intelligence may be the most practical form of intelligence there is — and the most valuable.

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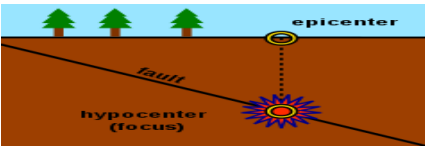
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**ETHICAL INTELLIGENCE**

**EMOTIONAL INTELLIGENCE**



**epicenter**

**fault**

**hypocenter (focus)**

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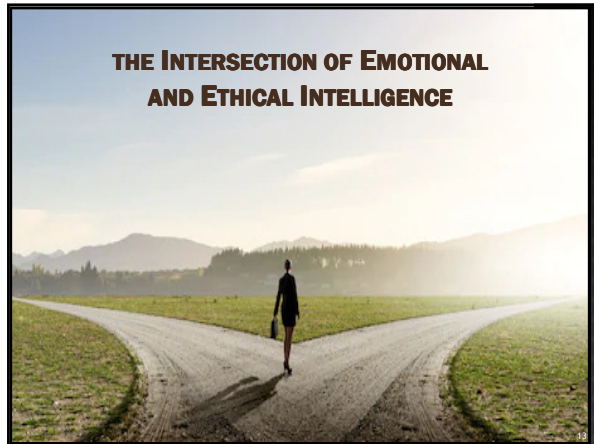
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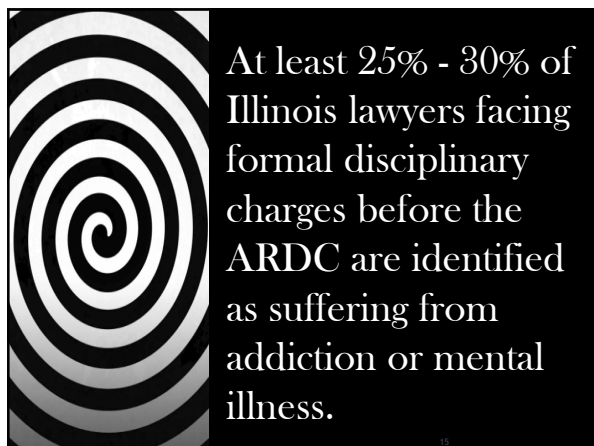
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SOME LAWYERS HAVE MORE THAN ONE IMPAIRMENT IDENTIFIED								
Practice Setting	Solo Firm	Firm 2-10	Firm 11-25	Firm 26+	Gov't/ Judicial	In-House	Academia	No Practice
20 Lawyers* with Impairments	14	3	1	1	0	0	0	1
<b>Impairment</b>								
<b>Substances:</b>								
Alcohol	5			1				1
Cocaine	1							
Cannabis	2							
Amphetamine	1							
Heroin	2							
<b>Mental Illness:</b>								
Depression	6	3		1				
Bipolar	3			1				
Schizophrenia								
Personality Disorder	1							
Gambling				1				
Sexual Disorder								
Cognitive Decline	2							
% of 20 lawyers with impairments	70%	15%	5%	5%	0%	0%	0%	5%

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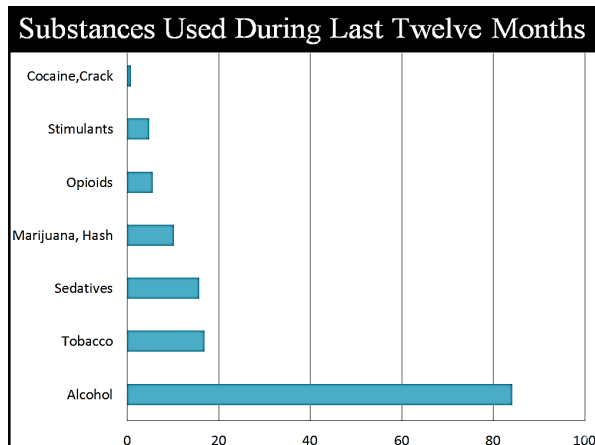
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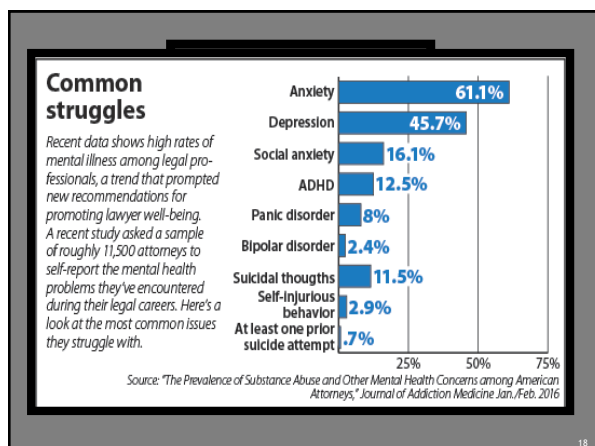
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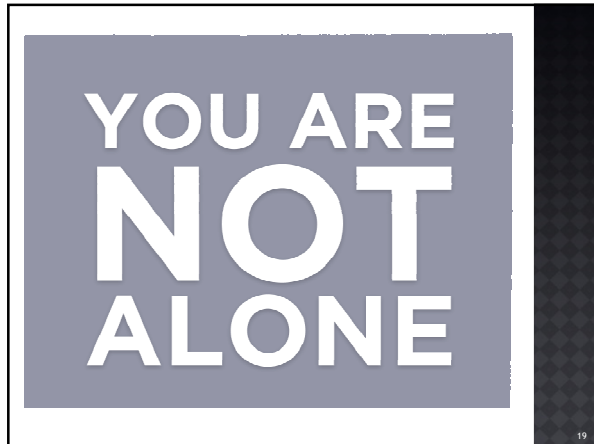
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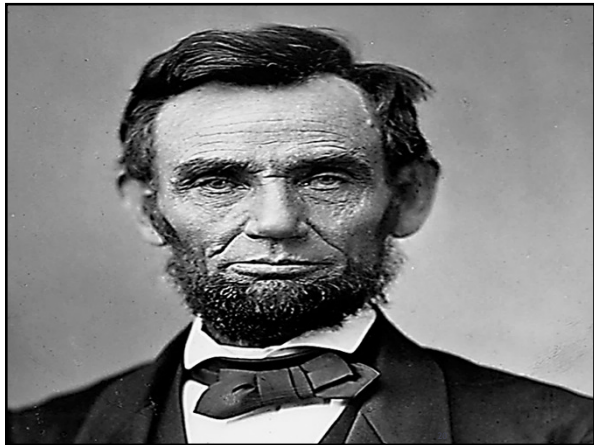
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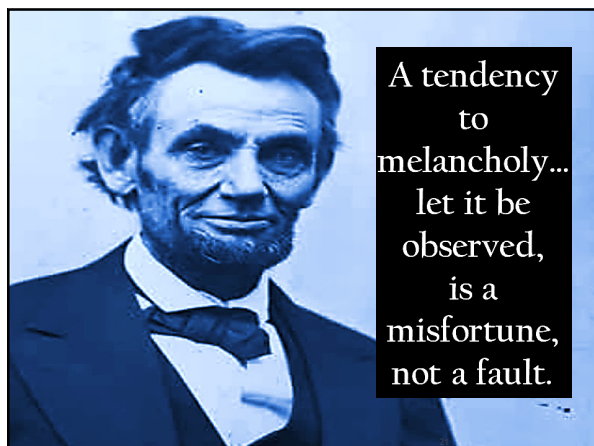
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I am now the most miserable man living. If what I feel were equally distributed to the whole human family, there would not be one cheerful face on the earth. Whether I shall ever be better I can not tell; I awfully forebode I shall not. To remain as I am is impossible; I must die or be better, it appears to me.

A. Lincoln to  
John T. Stuart (1841)

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**THE PATH TO  
LAWYER WELL-BEING:**  
Practical Recommendations  
For Positive Change

THE REPORT OF THE  
NATIONAL TASK FORCE ON  
LAWYER WELL-BEING

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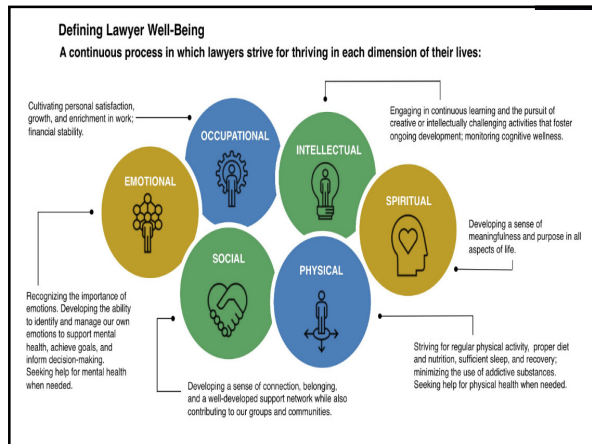
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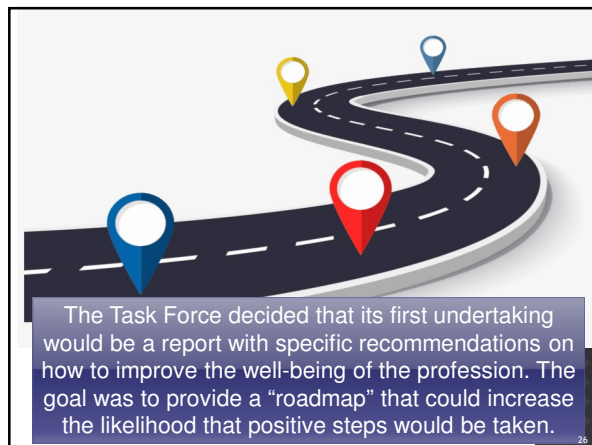
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**Acknowledge the Problems and Take Responsibility**  
Use this Report as a Launch Pad for a Profession-Wide Action Plan

**Take Actions to Meaningfully Communicate That Lawyer Well-Being Is A Priority**

- ☐ Adopt Regulatory Objectives That Prioritize Lawyer Well-Being
- ☐ Modify the Rules of Professional Conduct to Endorse Well-Being As Part of a Lawyer's Duty of Competence
- ☐ Expand Continuing Education Requirements to Include Well-Being Topics
- ☐ Require Law Schools to Create Well-Being Education for Students as An Accreditation Requirement

Utilize Monitoring to Support Recovery from Substance Use Disorders  
Begin a Dialogue About Suicide Prevention

Supp **PART I – RECOMMENDATIONS FOR ALL STAKEHOLDERS**

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20. Take Actions to Meaningfully Communicate That Lawyer Well-Being is a Priority.

20.1 Adopt Regulatory Objectives That Prioritize Lawyer Well-Being.

20.2 Modify the Rules of Professional Responsibility to Endorse Well-Being as Part of a Lawyer's Duty of Competence.

20.3 Expand Continuing Education Requirements to Include Well-Being Topics.

20.4 Require Law Schools to Create Well-Being Education for Students as an Accreditation Requirement.

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RECOMMENDATION

22. Adjust Lawyer Regulations to Support Well-Being.

22.1 Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components.

22.2 Adopt a Centralized Grievance Intake System to Promptly Identify Well-Being Concerns.

RS / p. 25

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**CLE REQUIREMENT OF DIVERSITY/INCLUSION AND MENTAL HEALTH/SUBSTANCE ABUSE**  
**Supreme Court Rule 794(d)**

Supreme Court Rule 794(d) requires all Illinois lawyers subject to the MCLE requirements complete one hour of diversity and inclusion CLE and one hour of mental health and substance abuse CLE as part of the professional responsibility CLE requirement.

-The amendment does not affect the total number of hours required to fulfill the professional responsibility requirement, which remains at six, or the total number of CLE credits required in each two-year reporting period, which remains at 30.

-Lawyers may alternatively continue to fulfill the required six hours of professional responsibility CLE by completing the Illinois Supreme Court Commission on Professionalism's Lawyer-to-Lawyer Mentoring Program, as set forth in Illinois Supreme Court Rule 795(d)(11).

(amended April 3, 2017, eff. July 1, 2017 & begins with attorneys with the two-year reporting period ending June 30, 2019)

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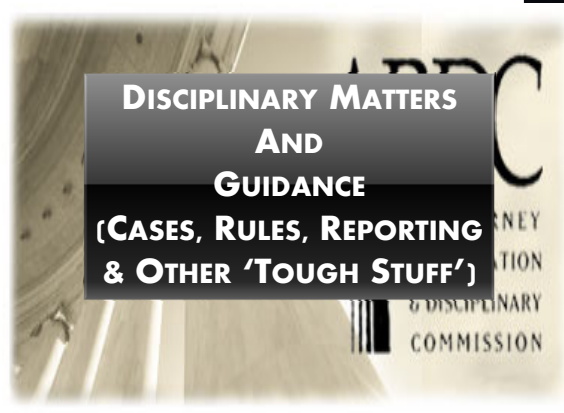
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**Still No Sign Of A.J. Freund, Four Days After He Was Reported Missing; Police Say Mom Not Cooperating**

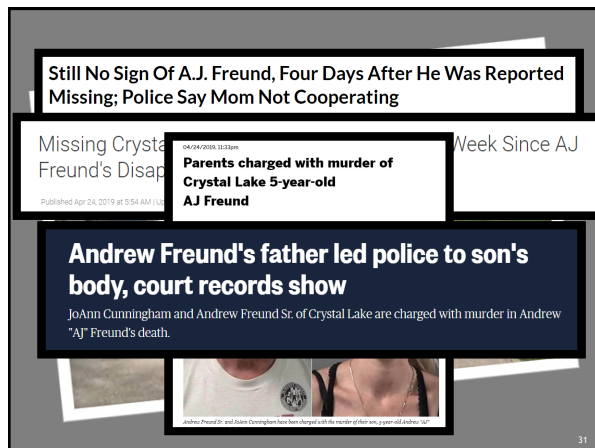
Missing Crystal Lake 5-year-old AJ Freund's Disappearance Still No Sign After 4 Days

Published Apr 24, 2019 at 5:54 AM CDT

**Parents charged with murder of Crystal Lake 5-year-old AJ Freund**

**Andrew Freund's father led police to son's body, court records show**

JoAnn Cunningham and Andrew Freund Sr. of Crystal Lake are charged with murder in Andrew "AJ" Freund's death.



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**NEWS**

04/25/2019, 09:42am

**State suspends law license of AJ Freund's dad**



Andrew Freund Sr.

Andrew Freund Sr. walks near his home on Dole Avenue in Crystal Lake Friday afternoon. | John Stanku/Daily Herald

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**In re Donald Fredrick Franz,**

M.R. 28993, 2014PR00161 (Ill. Sept. 22, 2017)

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"I shall never forget the kindness you and your filthy government comrades have shown me in these matters. 'The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants...to the last I grapple with thee; from hell's heart I stab at thee; for hate's sake I spit my last breath at thee.'"

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"Mr. Larkin, Don Franz again...The day you suspend me, I'm going to attack you and Scott, whoever I can get my hands, and you guys started this, I'm going to finish it...I'm trying to get paid...for my services, which are always reasonable. You filthy bastards started this fight, I'm going to finish it. And by the way, I had a certain change in my family situation; I have nothing, nothing but my dog, to bind me to this planet. Other than your destruction...I'm going to destroy you...you're a fuckin' dead man!"

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### Crystal Lake Patch

Wednesday, October 4th, 2017

## 36 Rifles, 20 Handguns Found in Home of Crystal Lake Attorney After DUI Arrest: Police

Donald F. Franz did not have a valid gun license.

A Crystal Lake attorney who did not have a valid gun license got in trouble. Charges include improper business transaction and failure to reduce contingent agreement to writing, abusive behavior. Respondent, Donald Fredrick Franz, is suspended from the practice of law for two (2) years and until further order of the Court. Order entered by the Court. In re Donald Frederick Franz, 2014PR00161, M.R. 28933 (September 22, 2017).

The Crystal Lake Police Department began to investigate Donald F. Franz, 50, of 358 Dartmoor Court in Crystal Lake, after receiving a report of an intoxicated driver in the 1 to 100 block of North Williams

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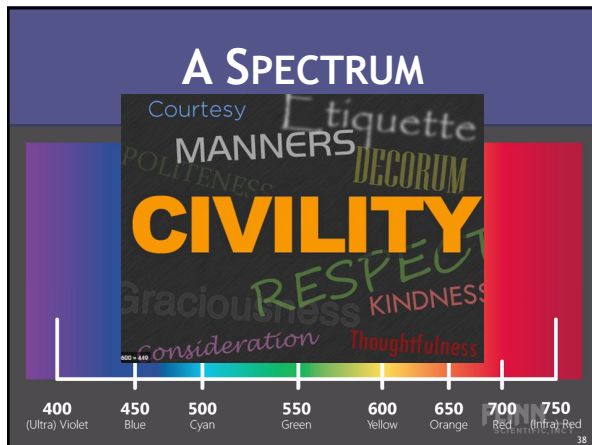
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A Number of Recent Decisions Involve Theft of Client Funds from No Lawyer Employees

*Matter of Cantor; Matter of Miller; Matter of Gomel; Matter of ...; Matter of Rojas*

~ No. 2 ~

**Regulators are Spending an Inordinate Amount of Time and Resources Dealing with Behavioral Misconduct Issues**

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**In the Matter of Michael E. Rychel**

New Jersey

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Hi Scott: Given my spare time I went through my evidence files. I had discovered something that I did not share with you but may have some relevance if it is the event you're looking to investigate. I have hereto you'll find a file that has circulated and is alleged to be a copy of a letter I made.

**THIS S\*\*T!!!!!! TELL CHARLES CENTINARO THAT I SAID TO GO F\*\*K HIM SELF [sic]!!!!!!**

I really am concerned. THIS IS AN HONEST LAW ABIDE HAVE TO GO THROUGH THIS TELL CHARLES CENTINARO THAT I SAID TO GO F\*\*K HIM SELF [sic]!!!!!! QUOTE THIS IN YOUR REPORT!!!!!! NO OFFENSE AGAINST YOU, I KNOW YOU'RE A DECENT HONEST GUY.

MIKE RYCHEL

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Q. And you don't feel bad about telling  
Director Centinaro to go f\*\*k himself?

A. No, I don't.

Q. Okay. There's -- there's no remorse that  
you feel for this?

A. None whatsoever. In fact, I'm proud.

Q. You're proud of it?

A. Yes.

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**A Recently Filed ARDC Complaint...**

BEFORE THE HEARING BOARD

KH: Will you answer the question?

Green: No.

KH: Certify the question.

Respondent: Motions for sanctions; indicate that on the record, I'm going to get sanctions against your firm like you wouldn't believe, bitch.

alleges that Respondent has engaged in the following conduct, which subjects him to pursuant to Supreme Court Rule 770:

**COUNT 1**  
(Using means with no substantial purpose other than to embarrass, delay, or burden a third person in the course of pending litigation)

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**A Recently Concluded ARDC Hearing**

BEFORE THE HEARING BOARD  
OF THE  
ILLINOIS ATTORNEY REGISTRATION  
AND  
DISCIPLINARY COMMISSION

In the Matter of:  
JASON ROBERT CRADDOCK, }  
Attorney-Respondent, } Commission No. 2017PR00115  
No. 6242722. } FILED-December 1, 2017

COMPLAINT

Respondent filed various...  
Respondent began his correspondence by addressing Lindbert as "Courtney Lindberich."

Respondent (if Respondent heard her, say: "Lindbert responded "Excuse me," to which Respondent said, "Courtney.")

5. On December 3, 2016, while both the Wyman and Knapp cases were pending, Respondent sent an email from his law firm email address to Lindbert at her law firm email address at approximately 10:46 p.m. regarding the parties' ongoing litigation. In his email, Respondent began his correspondence by addressing Lindbert as "Courtney Lindberich."

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The attorney allegedly launched a series of abusive voicemails, telling his client's father:

- You are a piece of garbage. All black people are alike. You're slovenly, ignorant.
- You better give me my money or your son's case is going to be delayed.

I'm sick of you, you piece of s---.

- I don't know who's the biggest bitch. You or me.

**I'm Supposed to Allow Him**

In re Michael Jerome Moore, Commission No. 2015PR00076 (August 2015)

\*<http://patch.com/illinois/orlandpark/embattled-attorney-im-supposed-allow-him-disrespect-me-impunity-bulls>


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**MEGAN CORONA V. DAY KIMBLE  
HEALTHCARE, INC.**




**John J. Migliaro, Jr. v. Robert J. Weber, III**  
**Connecticut**



## AN ATTORNEY'S PERSONAL MISCONDUCT CAN RESULT IN DISCIPLINE

(even if unrelated to the practice of law)




**RULE 8.4: MISCONDUCT**  
It is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

**Rule 761. Conviction of Crime**  
(a) It is the duty of an attorney admitted in this State who is convicted in any court of a felony or misdemeanor to notify the Administrator of the conviction in writing within 30 days of the entry of the judgment of conviction...

(b) If an attorney is convicted of a crime involving fraud or moral turpitude, the Administrator shall file a petition with the court alleging the fact of such conviction and praying that the attorney be suspended from the practice of law until further order of the court.



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## RULES GOVERNING OTHER CONDUCT



**RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**  
(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

**RULE 8.4: MISCONDUCT**  
It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (d) engage in conduct that is prejudicial to the administration of justice.



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## RULES GOVERNING "OTHER" CONDUCT




**ABA Rule 8.4(g)**  
It is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

**ISBA Assembly Opposes Adoption of 8.4(g) in Illinois**  
The Illinois State Bar Association Assembly also weighed the arguments of those in favor and opposition, and formally announced at its December Midyear meeting that it would recommend Illinois oppose the adoption of the ABA Model Rule 8.4(g).

The ISBA Assembly believed the rule does not properly define "discrimination" and "harassment" to properly apply the Rule to achieve its intent. Model Rule 8.4(g) also raised a number of concerns about subjecting lawyers to unfounded disciplinary complaints. It was further discussed that Illinois Rules of Professional Conduct [1-4](#) and [8.4\(d\)](#) and [11](#) already address discrimination and harassment associated with the practice of law here in Illinois.

Ultimately, it will be up to the Illinois Supreme Court to decide if adoption will occur in Illinois



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### THE AGING BAR POPULATION IS ANOTHER COMPONENT OF THE WELL-BEING DIALOGUE

[ THE REPORT OF THE NATIONAL TASK FORCE ON LAWYER WELL-BEING ]

We make the following recommendations to address these issues:

...judges, legal employers, bar associations, and regulators should develop succession plans, or provide education on how to do so, to guide the transition of aging legal professionals.

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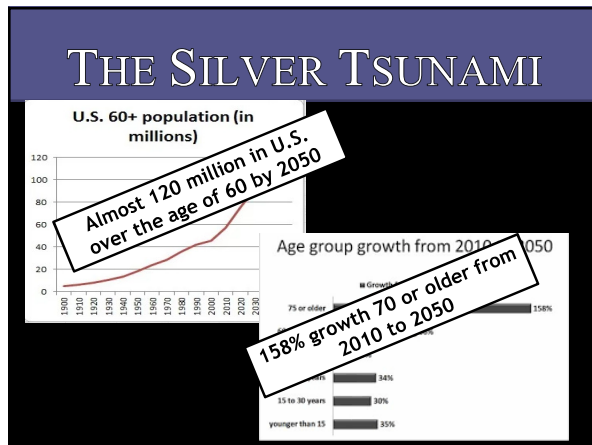
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## THE SILVER TSUNAMI

How to prepare for the addition of millions of seniors into the population?

Long-term Planning presents many challenges to Legal Professionals from every area of law;

Healthcare professionals and commercial real estate executives are bracing for the impact baby boomers will have on the future of U.S. healthcare and the housing industry.

<https://www.bisnow.com/national/news/healthcare/healthcare-commercial-real-estate-exec-prepare-for-a-silver-tsunami-872672.htm> source: kopydharforum, medium-browser (June 10, 2018)

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## THE ABA: SENIOR TSUNAMI

**Preparing for the Senior Tsunami: Cognitive Decline**

**Guess What?**

**The Bar Population is Aging, Too!**

Is knowledge of the aging process in the profession and their clients? This Note addresses the issue of mental decline in aging lawyers, the relevant *Model Rules of Professional Conduct* and American Bar Association ("ABA") authorities on the issue, the ways some states are currently dealing with this issue, and why the current system may need national reform to respond to the aging of the "baby boomer" generation. The aging of the "baby boomers" generation is widely discussed in terms of the effect it will have on Social Security and Medicare, yet the ABA and several state lawyer assistance

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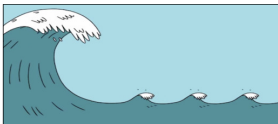
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- Like the general population, the lawyer community is aging and lawyers are practicing longer.
- In law firms, one estimate indicates that nearly 65 percent of equity partners will retire over the next decade.
- Senior lawyers can bring much to the table, including their wealth of experience, valuable public service, and mentoring of new lawyers.
- At the same time, however, aging lawyers have an increasing risk for declining physical and mental capacity.
- Yet few lawyers and legal organizations have sufficiently prepared to manage transitions away from the practice of law before a crisis occurs. The result is a rise in regulatory and other issues relating to the impairment of senior lawyers.

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### Demographic Issue



Age	Percentage
21-29 years old	4%
30-49 years old	49%
50-74 years old	44%
75 years old or older	3%




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### AGING LAWYER POPULATION

2012 - ABA Market Research Department  
Lawyer Demographics national survey:

- 2005 - 34% of practicing lawyers were age 55 or over compared to 25% in 1980
- 2005 - median age of practicing lawyer was 49 compared to 39 in 1980

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### AGING LAWYER POPULATION

By Jurisdiction - "Senior Tsunami"

- Illinois - 2016
  - 48% of lawyers are 50 or older
- Washington - 2012
  - 71% are 50 or older
- Florida - 2012
  - 65% are 55 or older (33% are 55 or older, 21% are 60 or older and 11% are 65 and older)
- California - 2013
  - 42% of lawyers are 55 or older

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### DUTY OF IMPAIRED ATTORNEY

**Rule 1.16: DECLINING OR TERMINATING  
REPRESENTATION**

- (a) . . . a lawyer shall not represent a client, or . . . shall withdraw . . . if:
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

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REGULATORY PROCEDURES  
REGARDING ELDER ATTORNEY ISSUES

- Call lawyer in for a statement
- Voluntary or court-ordered evaluation
- Determine if lawyer is incapacitated (judgment impaired)
- Referral to Lawyers Assistance Program

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NEW APPROACHES

- Alternatives to Discipline Models
  - Inactive and Emeritus Status vs. Disability
  - Permanent Retirement Status vs. Discipline
  - Succession Planning vs. Receiverships
  - Education/LAP vs. Motions to Compel

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### ARDC CLE Seminars

An Accredited CLE Provider in Illinois

ARDC recorded webcasts are approved for general and professional responsibility credit in Illinois.

**NEW** Diversity & Inclusion: A Blueprint for 2017 and Beyond (August 2017) 1 Hr. MCLE/PR CLE incl. Diversity & Inclusion Credit

**NEW** and CLE

Illino (Apr)

Natio (Apr)

Recent Lawye MCLE

The Eth Funds MCLE/P

How to Maintain a Trustworthy Trust Account: The Accounting Requirements (Feb. 2015) 0.5 Hr. MCLE/PR CLE

... and Billing (Feb. 2016) 1 Hr. MCLE/PR CLE

ARDC CLE Seminars Portal  
CLICK HERE

See Next Page for Instructions

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**RECOGNIZING, UNDERSTANDING, AND  
REFERRING COLLEAGUES IN NEED**



Illinois Lawyers' Assistance Program  
20 S. Clark Street, Suite 450, Chicago, IL  
1-800-LAP-1233  
Email: [gethelp@illinoislap.org](mailto:gethelp@illinoislap.org)  
FREE

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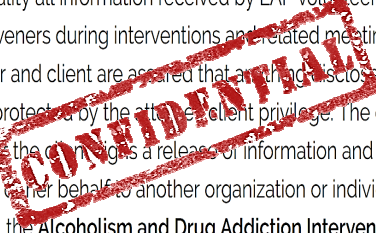
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**Confidentiality is the Cornerstone of LAP**

Confidentiality is guaranteed. Illinois Supreme Court Rule 1.6 cloaks in confidentiality all information received by LAP volunteers and trained interveners during interventions and related meetings. Both the volunteer and client are assured that anything disclosed is specifically protected by the attorney-client privilege. The only exception is if the client grants a release of information and asks LAP to report on his/her behalf to another organization or individual. Additionally, the Alcoholism and Drug Addiction Intervenors and Reporter Immunity Law guarantees immunity for LAP Volunteers and those who participate in its work.



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**IRPC 1.6**

**RULE 1.6 Confidentiality of Information**

(d) Information received by a lawyer participating in a meeting or proceedings with a trained intervener, or panel of interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

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## SUPREME COURT RULE 766

### Referrals from ARDC to LAP

Since 2006, authorizes ARDC to refer a lawyer to LAP despite an otherwise confidential investigation when there is reasonable cause to believe that a lawyer is, or may be, addicted or abusing alcohol or other chemicals or is, or may be, experiencing a mental health condition or other problem that is impairing the lawyer's ability to practice law.

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### 2016 ARDC MONITORING

Over 100 lawyers are being monitored by the ARDC Probation Unit for substance abuse and mental health concerns, law office management issues, or restitution conditions.

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### THE PATH TO LAWYER WELL-BEING: Practical Recommendations For Positive Change

#### 22. Adjust Lawyer Regulations to Support Well-Being.

##### 22.1 Implement Proactive Management- Based Programs (PMBP) That Include Lawyer Well-Being Components.

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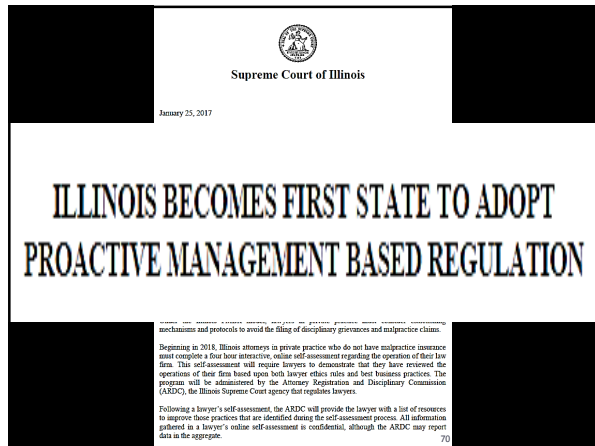
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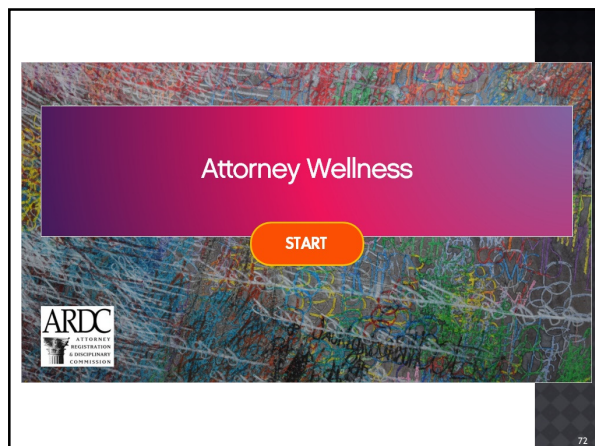
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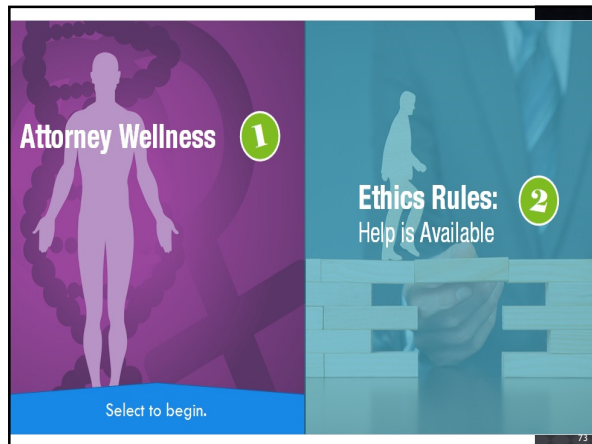
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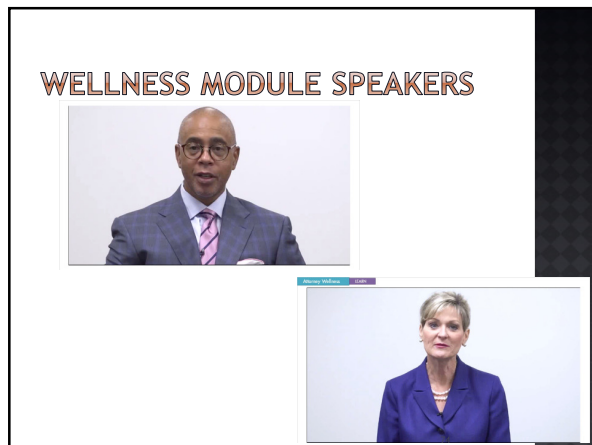
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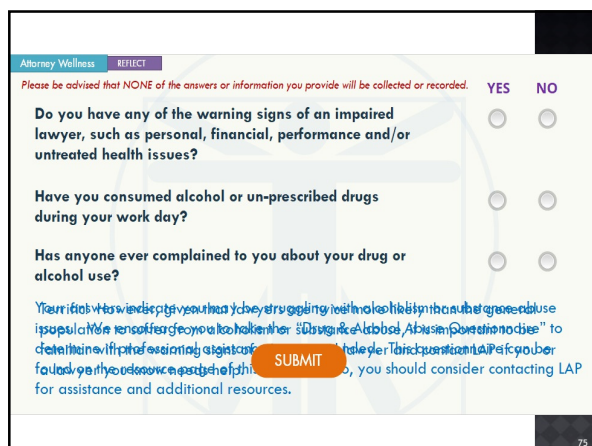
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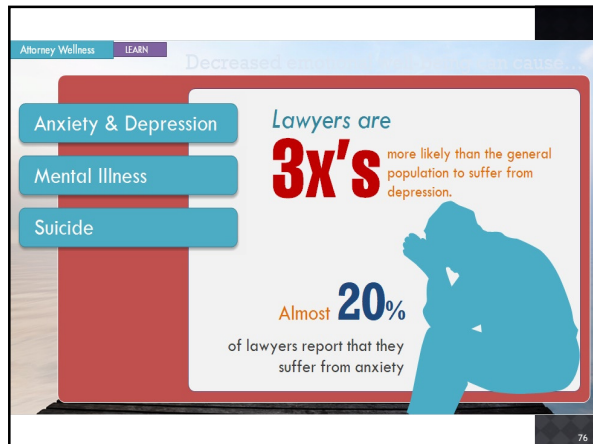
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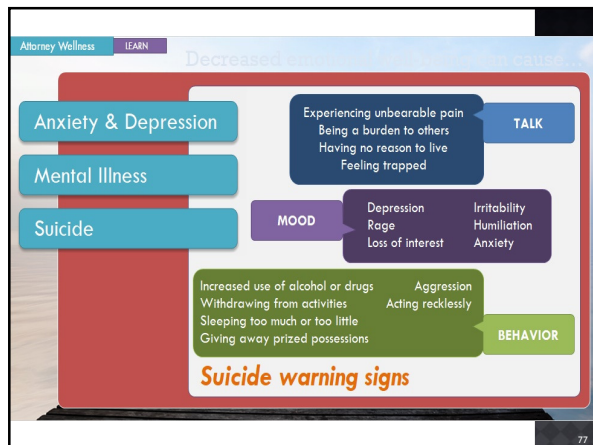
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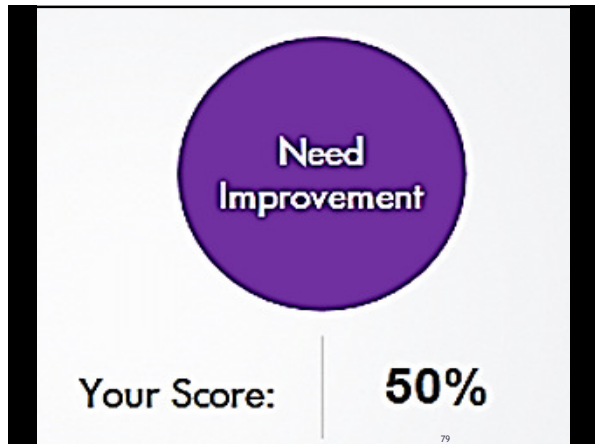
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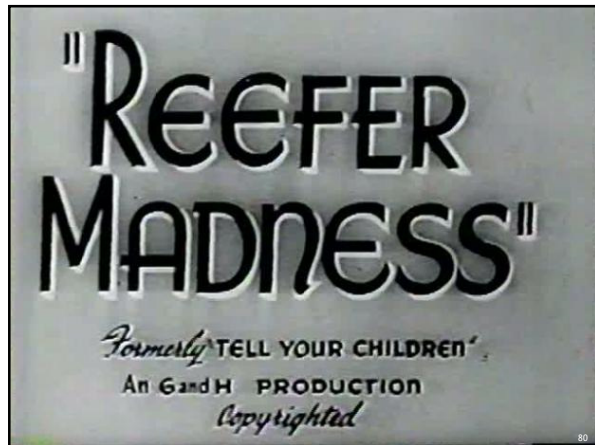
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**THE CONTROLLED SUBSTANCE ACT**  
**21 USC §811**

- The Federal Government regulates drugs through the Controlled Substance Act ("CSA");
- The CSA was signed into law by Richard M. Nixon;
- The CSA does not distinguish between medical and recreational use of marijuana;
- Marijuana and its Cannabinoids are treated under the CSA like any other controlled substance such as heroin and LSD; and
- Under the CSA, marijuana is a Schedule I drug, thus viewed as being highly addictive and having no medical value; No prescriptions can be written for Schedule I substances.

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**IRPC 1.2(D)**

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...

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**THE COLE MEMORANDUM**




**U.S. Department of Justice**  
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole   
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

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### **COLE ON FEDERAL RESOURCES**

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

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### **COLE WARNINGS**

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the

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### **IRPC 1.2(D) SAFE HARBOR**

**...a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law.**

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## IRPC RULE 1.2, COMMENT 9

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud.....There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

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## BAR ASSOCIATION OPINIONS

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Opinion No. 14-07  
October 2014

**...AN ILLINOIS  
LAWYER MAY  
PROVIDE SERVICES  
TO A CLIENT ON  
LEGAL MATTERS  
GENERATED BY  
THE  
COMPASSIONATE  
USE OF MEDICAL  
CANNABIS PILOT  
PROGRAM ACT...**



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## ISBA OP. 14-07 CON'T.

Given the conflict between federal and state law on the subject of marijuana as well as the accommodation provided by the Department of Justice, the provision of legal advice to those engaged in nascent medical marijuana businesses is far better than forcing such businesses to proceed by guesswork.

The Committee agrees: when a new statutory and regulatory system is promulgated by the State of Illinois, Illinois lawyers must be permitted to advise clients on how to conform their conduct to the law.

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# MAINE

Opinion #199. Advising clients concerning Maine's Medical Marijuana Act  
Issued by the Professional Ethics Commission  
Date Issued: July 7, 2010

...the proposed client conduct is known to be a violation of federal criminal law. In those circumstances, the role of the attorney is limited. While attorneys may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law, the Rule forbids attorneys from counseling a client to engage in the business or to assist a client in doing so.

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## THE COLORADO FIX

### Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

#### Comment

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Amended and Adopted by the Court, En Banc, March 24, 2014, effective immediately.  
Justice Coats and Justice Eid would not approve Comment [14].

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**STATE BAR ASSOCIATION OF NORTH DAKOTA  
ETHICS COMMITTEE  
OPINION NO. 14-02**

*THIS OPINION IS ADVISORY ONLY*

**QUESTION PRESENTED**

The Ethics Committee has been asked to render its opinion on whether Attorney may live and use medical marijuana prescribed by a physician in Minnesota and be licensed to practice law in North Dakota.

**OPINION**

Based on the facts presented below, Attorney would not be able to live and use medical marijuana prescribed by a physician in Minnesota while being licensed to practice law in North Dakota. The conduct would be a violation of N.D.R. Prof. Conduct 8.4(b).

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*Effective 11/1/14*

OTHER KIND OF THE SOURCE:  
(Source: P.A. 98-122, eff. 1-1-14.)

(410 ILCS 130/25)  
(Section scheduled to be repealed on January 1, 2018)

Sec. 25. Immunities and presumptions related to the medical use of cannabis.

(a) A registered qualifying patient is not subject to arrest, prosecution, or denial of any right or privilege, including but not limited to civil penalty or disciplinary action by an occupational or professional licensing board, for the medical use of cannabis in accordance with this Act, if the registered qualifying patient possesses an amount of cannabis that does not exceed an adequate supply as defined in subsection (a) of Section 10 of this Act of usable cannabis and, where the registered qualifying patient is a licensed professional, the use of cannabis does not impair that licensed professional when he or she is engaged in the practice of the profession for which he or she is licensed.

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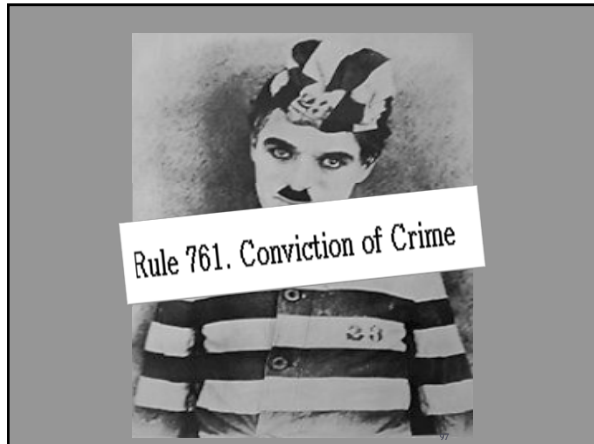
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RECOGNIZING, UNDERSTANDING, AND  
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1-800-LAP-1233  
Email: [gethelp@illinoislap.org](mailto:gethelp@illinoislap.org)  
FREE

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# QUESTIONS?



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## RESOURCES

- Full-Text of Illinois Ethics Rules, Client Trust Account Handbook & Free MCLE webinars – [www.iardc.org](http://www.iardc.org)
- Questions about IOLTA & Enrollment Forms – Lawyers Trust Fund: [www.ltf.org](http://www.ltf.org)
- ARDC Ethics Inquiry Hotline for Guidance on Rules:  
Chicago office – (312) 565-2600 or (800) 826-8625  
Springfield office – (217) 522-6838 or (800) 252-8048

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