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# *Top 5 Legal Changes Covid-19 Has Made to the Workplace*

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# *About the Presenter*

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## Laura Balson

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Laura is the managing partner of the firm Constangy, Brooks, Smith & Prophete Chicago office. She has broad experience counseling and advising employers across industries to help them manage and minimize risk. She conducts employment practice audits to identify unknown liabilities and assists in due diligence review during corporate transactions. Laura is also an experienced litigator who zealously represents employers in front of the Equal Employment Opportunity Commission, Illinois Department of Human Rights, Cook County Commission on Human Rights, the Chicago Commission on Human Relations and other state and local administrative agencies. She acts as lead trial counsel on litigation in both state and federal courts and has argued appellate cases before the 7th Circuit Court of Appeals.

Laura excels at translating complex legal concepts into practical recommendations that are actionable by business owners and executives. Her approach is rooted in a commitment to understanding how legal issues impact the client's business.

Laura is a sought-after speaker and writer on new legal developments impacting employers. She also regularly conducts seminars and training sessions for client employees, including mandatory sexual harassment prevention training and diversity, equity and inclusion training.

### Honors & Recognitions

- Emerging Lawyer, Leading Lawyers Magazine (2015-2020)
- Illinois Super Lawyers® Rising Star (2010-2020)
- Illinois Super Lawyers® (2022)

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## Course Description

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### *Course Presentation*

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This course provides a fundamental overview of the legal changes that Covid-19 has made to the workplace.

This course provides practical guidance and a discussion on best practices regarding layoff and furlough policies, as well as any reduction in force that must first be carefully planned to avoid incurring legal liability.

This course explores the complex issues and presents potential solutions to the legal and factual situations that arise in relation to, for example, furloughs and reduced working hours or compensations that could provide necessary cost-saving measures while retaining employees with institutional knowledge and experience.

This course will provide a comprehensive overview of the laws and strategic considerations in the Fair Labor Standards Act of 1938 (FLSA), and state wage and hour laws.

This course examines how to identify and avoid challenges and risks for the employers, including difficulties with onboarding and training remote employees and immigration compliance under the Immigration Reform and Control Act (IRCA).

The course will be interdisciplinary, with its core at the nexus of legal ethics, potential discrimination claims, and the applicability of state laws when the employee and employer are located in different states, as well as engagement with newer disciplines of general challenges associated with remotely managing employee performance and other aspects of the employment relationship.

This course provides a base of skills, knowledge and perspectives regarding wage and hour compliance under the FLSA, questions on whether telecommuting qualifies as a reasonable accommodation under the Americans with Disabilities Act (ADA), and workplace health and safety issues, including recording and providing workers' compensation for on-the-job injuries and occupational illnesses.

This course provides an intellectual foundation and introduces a set of learning skills essential for success in the legal profession and for life beyond. The course will provide opportunities for careful reading, for creative and critical thinking,

for oral and written communication, and for engaging with others in a shared conversation about stimulating material.

### *Course Material*

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This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



## Course Learning Objectives and Outcomes

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This course is designed to provide the following learning objectives:

The ability to understand the relevant state and federal law related to the Occupational Safety and Health Act (OSHA).

The ability to understand the duties, roles and responsibilities of counsel in situations involving remote work performed from a location away from the employer's central workplace and the general duty clause requirement on an employer to keep its workplace free of any recognized hazards that are likely to cause death or serious physical harm to its employees.

The ability to recognize and describe catchall provisions that can be cited in instances when there is no specific OSHA safety standard applicable to the alleged hazard.

The ability to identify and distinguish whether an employer violates the general duty clause and whether an employer may be able to refute allegations by demonstrating that its employees have received safety training.

The ability to understand, discuss and implement practice tips to improve an attorney's practice and provide improved representation to clients.

Participants will develop an understanding of OSHA's issued guidance on recording Covid-19 cases as denied by 29 C.F.R. §1904.5 and its general recording criteria set forth in 29 C.F.R. §1904.7.

Participants will learn to critically evaluate and analyze mental health as a basis for ADA accommodations, whereby covered employers must provide reasonable accommodation to a qualified individual with a disability unless doing so causes an undue hardship.

Participants will learn practical skills in the area of telecommuting as a form of reasonable accommodation, including employers' possible requirement to modify workplace policies for new employees with a disability, vaccine mandate policies and their incentivization, and the vaccine mandate choice as protected by law.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

## Timed Agenda:

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**Presenter Name:** Laura Balson

**CLE Course Title:** Top 5 Legal Changes Covid-19 Has Made to the Workplace

<b>Time Format (00:00:00 - Hours: Minutes: Seconds)</b>	<b>Description</b>
00:00:00	ApexCLE Company Credit Introduction
00:00:20	Top 5 Legal Changes Covid-19 Has Made to the Workplace
00:00:32	CLE Presenter Introduction
00:01:46	Layoff and Furlough Policies
00:03:31	Furlough
00:04:20	Layoff
00:05:12	Layoff or Furlough
00:06:11	Reducing Hours or Pay
00:08:15	FLSA
00:09:09	Exempt Employee
00:10:38	Future Expectations
00:11:38	Possible Rule Changes
00:13:22	Employee Expectations Around Remote Work Flexibility
00:15:23	Some Potential Challenges and Risks for the Employer
00:17:37	Wage and Hour Compliance
00:23:26	Questions on Whether Telecommuting Qualifies as a Reasonable Accommodation
00:25:44	Workplace Health and Safety Issues
00:27:05	Challenges With Remote Employee Management
00:29:01	Workplace Safety Obligations During a Global Pandemic
00:35:11	Occupational Safety and Health Act
00:40:02	Mental Health as a Basis for ADA Accommodations
00:54:52	Work Location Changes
00:59:32	Employer Vaccine Mandate Programs
01:13:19	Vaccine Mandate Choice

01:29:31	Form of Discipline
01:30:40	Presenter Closing
01:31:42	ApexCLE Company Closing Credits
01:31:49	End of Video

# *Top 5 Legal Changes Covid-19 Has Made to the Workplace*

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Prepared by Laura Balson, of Constangy, Brooks, Smith & Prophete

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## **1. Layoff and Furlough Policies**

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Prior to the pandemic, many businesses had never been faced with a mass layoff or furlough of employees and were unsure how to navigate the process if the government shut down or quarantine orders caused a significant business interruption.

As a general rule, employers can unilaterally decide to lay off most employees or reduce their working hours unless prohibited by statute or agreement (for example, an employment contract or [collective bargaining agreement](#)). However, any [reduction in force](#) must be carefully planned to avoid incurring legal liability.

Some less drastic alternatives to laying off employees, include:

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- *Implementing a furlough.*
  - *Reducing employees' hours for a temporary period.*
  - *Reducing employees' pay for a temporary period.*
-

## Furloughs and Reduced Working Hours

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Furloughs and reduced working hours or compensation can provide necessary cost-saving measures while retaining employees with institutional knowledge and experience. Retaining experienced employees reduces the costly and timely process of rehiring and retraining personnel when economic conditions improve and allows the employer to ensure some consistency in tough economic times.

While furloughs and other temporary cost-saving arrangements have many long-term benefits, they must be carefully structured to comply with the [Fair Labor Standards Act](#) (FLSA) ([29 U.S.C. §§ 201-219](#)) and state wage and hour laws. In addition, employers that sponsor foreign workers for a [green card](#) or nonimmigrant [visa](#) status may have additional obligations to notify the USCIS or DOL in the event of a furlough, pay reduction, or hours reduction. (<https://www.dol.gov/agencies/whd/flsa/pandemic>)

### *Theodore G. Robinson, V. Tellabs, Inc.*, 391 Ill.App.3d 60, 907 N.E.2d 501, 329 Ill.Dec. 910 (Ill. App. Ct. 1st Dist. 2009)

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In *Theodore G. Robinson, V. Tellabs, Inc.*, 391 Ill.App.3d 60, 907 N.E.2d 501, 329 Ill.Dec. 910 (Ill. App. Ct. 1st Dist. 2009), an engineer brought a class action lawsuit against the employer entity, alleging that the practice of implementing mandatory days off without pay triggered the loss of overtime exemption under the Illinois Minimum Wage Law for professional employees. The Court ruled that the prospective reductions by the employer entity in future pay of professional employees due to economic hardship and conditions did not trigger the loss of the overtime exemption.

Furthermore, the reductions were not repeated ad hoc impositions of days-off-without-pay that violated the salary basis test adopted by the DOL. The Court agreed with the previous finding of no liability. After the instituted mandatory-days-off-without-pay program, the engineer continued to be a bonafide professional employee paid on a salary basis, as those terms appear in the Fair Labor Standards Act of 1938.

## 2. Employee Expectations Around Remote Work Flexibility

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For office workers in particular, the pandemic has brought an unprecedented interest in remote work, either on a full-time, temporary or hybrid basis. Also referred to as telecommuting, remote work includes any work

performed from a location away from the employer's central workplace, often the employee's home.

## Challenges and Risks for the Employer

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Some potential challenges and risks for the employer:

- Difficulties with onboarding and training remote employees, including immigration compliance under the IRCA.

### FLSA

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- Wage and hour compliance under the FLSA, including ensuring employees' hours are accurately tracked and compensated.

### Americans with Disabilities

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- Questions on whether telecommuting qualifies as a [reasonable accommodation](#) under the [Americans with Disabilities Act](#) (ADA).
- Less control over where a remote employee stores confidential information and [trade secrets](#) and other information security issues.
- Workplace health and safety issues, including recording and providing [workers' compensation](#) for on-the-job injuries and occupational illnesses. *Adams v. United States*, 151 Fed.Cl. 522, 2020 WL 7334354 (Federal Bureau of Prisons employees sufficiently alleged claim against federal government for hazardous duty pay based on their exposure to COVID-19)
- Potential [discrimination](#) claims if employers do not treat all employees' telecommuting requests the same.
- Determining which state laws apply when the employee and employer are located in different states.

### General Challenges Associated with Remotely Managing Employee

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- General challenges associated with remotely managing employee performance and other aspects of the employment relationship, including productivity levels. New York see *Rouviere v. DePuy Orthopaedics, Inc.*, 471 F.Supp.3d 571 2020 WL 3967665 (Despite the risk of COVID-19 infection via in-person deposition posed significant hardship, the District Court declined to either order in-person depositions of manufacturer's corporate representatives or extend discovery deadline)

### 3. Workplace Safety Obligations During a Global Pandemic

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#### OSHA

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Many businesses who work around hazardous areas or items are highly attuned to their obligations under the Occupational Safety and Health Act, but for others, the pandemic was the first time that serious illness or death was a real risk in the workplace.

The general duty clause, codified at Section 5(a)(1) of OSHA, imposes a general requirement on an employer to keep its workplace free of any recognized hazards that are likely to cause death or serious physical harm to its employees ([29 U.S.C. § 654\(a\)\(1\)](#)).

The clause is a catchall provision that can be cited in instances when there is no specific OSHA safety standard applicable to the alleged hazard. *Wicker v. Walmart, Inc.*, 2021 WL 3486123 (Employee failed to allege special injury, as required to state public nuisance claim against employer for failure to comply with COVID-19 protocols); New York see *Palmer v. Amazon.com, Inc.*, 498 F.Supp.3d 359, 2020 WL 6388599 (OSHA, not the court, had to first address whether the employer's policies and practices created an unsafe workplace that allowed COVID-19 transmission).

An employer violates the general duty clause if:

- The employer failed to keep the workplace free of a hazard to which employees were exposed.
- The hazard was recognized.
- The hazard was likely to cause death or serious physical harm.
- There was a feasible and economically viable way to correct the hazard.

An employer may be able to rebut allegations that its employees are exposed or have access to a hazard by demonstrating that employees have received safety training, are well supervised during any allegedly dangerous operations, or both. It is also helpful to an employer's defense to present evidence of work practices and procedures that mitigate or eliminate the potential for employees' exposure to a hazardous condition during their work.

#### OSHA Guidance

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In May 2020, OSHA issued guidance on recording COVID-19 cases. According to this guidance, COVID-19 is a recordable illness (and employers are responsible for recording cases of COVID-19) if:

- The case is a confirmed case of COVID-19 (meaning an individual from whom at least one sample tested positive for SARS-CoV-2).
- The case is work-related as defined by [29 C.F.R. § 1904.5](#).
- The case involves one or more of the general recording criteria set forth in [29 C.F.R. § 1904.7](#)

OSHA acknowledges that "[g]iven the nature of the disease and ubiquity of community spread, however, in many instances it remains difficult to determine whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace"

OSHA announced in May 2020 that it is exercising enforcement discretion to assess employers' efforts in making work-related determinations for COVID-19. The employer must make a reasonable and good faith inquiry to make this determination. If an employer cannot determine that it is more likely than not that workplace exposure played a causal role in a COVID-19 case, the employer does not need to record that COVID-19 illness.

OSHA applies the following considerations in determining whether an employer complied with its obligations to record COVID-19 cases:

- The reasonableness of the employer's investigation.
- The evidence available to the employer.
- The evidence that a worker contracted COVID-19 at work.

For most employers, a reasonable investigation to determine work-relatedness should normally be:

- Asking the employee how they believe they contracted the COVID-19 illness.
- While respecting employee privacy, discussing with the employee the employee's work and out-of-work activities that may have led to the COVID-19 illness.
- Reviewing the employee's work environment for potential SARS-CoV-2 exposure.

OSHA provides examples of the type of evidence that may be relevant. An employee's COVID-19 illness is likely to be work-related if:

- Several cases develop among workers who work closely together with no alternative explanation.
- The illness is contracted shortly after lengthy and close exposure to a particular customer or coworker with a confirmed case of COVID-19 and with no alternative explanation.



- The employee's job duties include having frequent and close exposure to the general public in a locality with ongoing community transmission and with no alternative explanation.

#### **4. Mental health as a basis for ADA accommodations**

No matter how much the pandemic impacted their daily lives, for many workers, the stress associated with covid-19 caused or exacerbated mental health issues in a way that brought them to the forefront of workplace conversations for the first time. Some essential workers refused to come to work due to anxiety or depression, others requested reduced schedules, leaves or absence or permission to work remotely, and still others have asked for other changes to their work expectations or environments to alleviate their mental health concerns.

Under the ADA, covered employers must provide reasonable accommodation to a qualified individual with a disability unless doing so causes an undue hardship ([42 U.S.C. §§ 12101-12213](#)). Employers are often faced with telecommuting and related arrangements as requests for accommodations. Employers must understand how to respond to these requests and when they are deemed reasonable to avoid an ADA violation.

#### **Telecommuting Is a Form of Reasonable Accommodation**

The EEOC has recognized that telecommuting is a form of reasonable accommodation and has provided guidance for employers. According to the EEOC:

- The ADA does not require an employer to offer a telecommuting program to all employees, but:
  - employers that do must allow employees with disabilities an equal opportunity to participate;
  - changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telecommute; and
  - employers may be required to modify workplace policies (for example, by waiving a one-year eligibility requirement) for a new employee with a disability seeking to work at home where the job can be performed at home.

## Work Location Changes

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- An employer should determine whether working at home is a reasonable accommodation by engaging in an [interactive process](#) with the employee, considering things like:
- limitations of the disability that make it difficult to do the job in the workplace;
- how the job can be performed from the employee's home; and
- other types of accommodations that allow the person to remain full-time in the workplace.

## 5. Vaccine Mandate Policies

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Initially vaccines were difficult for many to obtain. Then, as they became more readily available, employers incentivized employees to get them. And now, it is becoming more common for employers to mandate that employees receive the covid-19 vaccine as a condition of their return to work in person or of their employment. And the question employers everywhere are asking is, what are we allowed to do regarding vaccines?

The EEOC has issued specific guidance to employers indicating that it is not in violation of employees' rights to ask them to identify whether they have been vaccinated or to mandate that being fully vaccinated is a condition of employment.

The ADA specifically allows an employer to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace."

Employers have also been encouraged by the public health authorities to provide time off to enable employees to get vaccinated and to assist in making vaccine appointments where an employee is willing to receive the vaccine but has been unable to obtain it.

If an employee is informed of the mandate and then refuses to comply, the employer should then inquire why the employee is refusing. If the reason is due to a medical condition which qualifies as a disability, you should discuss whether a reasonable accommodation is possible (in many instances, working 100% remotely, for example, could be an accommodation). If the reason is due to a sincerely held religious belief which prohibits vaccination, you should also discuss whether an accommodation is possible. If the reason is anything else, no further inquiry is necessary.

*Glass v. Illinois Department of Corrections, 2022 IL App (4th) 210740, 2022 WL 71965 (Ill. App. Ct. 4th Dist. 2022)*

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In *Glass v. Illinois Department of Corrections*, 2022 IL App (4th) 210740, 2022 WL 71965, the employees of congregate-care facilities operated by the State agencies brought an action seeking declaratory judgments that the agencies lacked legal authority to implement a compulsory vaccination or a testing program due to the COVID-19 pandemic, that the mandate violated the Health Care Right of Conscience Act, and that terminating their employment or discriminating against them for refusing to comply with the mandates would violate the Illinois public policy, and the employees sought injunctive relief. The Circuit Court denied the agencies' motion to dismiss for lack of subject matter jurisdiction in part, issued temporary restraining order (TRO) in aid of arbitration as to the two employees of the Illinois Department of Corrections (DOC) and the Illinois Department of Juvenile Justice preventing those agencies from enforcing the mandate as to their employees, and transferred the case.

The State agencies petitioned for review of TRO, and the Appellate Court held that the circuit court lacked jurisdiction over the employees' action, vacating the judgment. The Court noted that the temporary restraining order in this case prohibited the defendants from enforcing a workplace policy requiring their employees to undergo vaccination or testing for COVID-19. At the same time, the circuit court granted the motion for a temporary restraining order, the same court granted a motion by the defendants to transfer this case to the circuit court of Sangamon County.

The Court reviewed the petition which raised three theories against the defendants' vaccination and testing mandate. Count I of the petition sought a declaratory judgment that the defendants lack legal authority to implement a compulsory vaccination or testing program for COVID-19. Count II sought a declaratory judgment that the vaccination and testing mandate violate the Health Care Right of Conscience Act (745 ILCS 70/1 et seq. (West 2020)). Count III sought a declaratory judgment that terminating the plaintiffs' employment, or otherwise discriminating against them, because of their refusal to be vaccinated or tested would violate Illinois public policy.

The Court looked to the Illinois Constitution, which stated that “[c]ircuit courts shall have such power to review administrative action as provided by law.” Ill. Const. 1970, art. VI, § 9. In their petition for declaratory and injunctive relief, the plaintiffs requested the circuit court to review the defendants' administrative action of requiring state employees in state-owned or -operated

congregate facilities to (1) be fully vaccinated against COVID-19 or (2) alternatively, if for medical or religious reasons the employees are exempt from the vaccination requirement, to undergo additional testing to make sure they are not infected with the virus. However, this Court pointed out that the circuit court had subject-matter jurisdiction to review this administrative action only if the Illinois statutory law so provided. With the exception of the circuit court's power to review administrative action, which is conferred by the statute, a circuit court's subject matter jurisdiction is conferred entirely by the state constitution. Because review of a final administrative decision may only be obtained as provided by statute, a court is said to exercise 'special statutory jurisdiction' when it reviews an administration decision. Only in the area of administrative review is the court's power to adjudicate controlled by the legislature.

Similarly, the Court stated that the General Assembly had conferred subject-matter jurisdiction on circuit courts to review an arbitration order issued under section 14—but only to determine if the arbitration order suffers from any of the shortcomings listed in section 14(k). The General Assembly, however, has not conferred subject-matter jurisdiction on circuit courts to review an administrative action that is the subject of interest arbitration. Because the plaintiffs were not a public employer or an exclusive bargaining representative that seeks judicial review of an interest arbitration order, the circuit court lacked subject-matter jurisdiction over their action.

Additionally, the plaintiffs' argument that even if the vaccination or test requirement could be properly considered a 'term or condition of employment,' the State's unilateral change to it, by way of the governor's executive order, constituted a prima facie unfair labor practice. The Court ruled that this argument only confirmed the circuit court's lack of jurisdiction. The Court explained that the Act vested the Illinois Labor Relations Board with exclusive jurisdiction over unfair labor practice charges, including claims that a union has breached its duty of fair representation.

### Vaccine Mandate Choice

EEOC guidance provides that social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by law. Personal anti-vaccination positions generally will not support the legal requirement for establishing a sincerely held religious belief in order to justify an exemption from a mandatory vaccination policy.

# Resources

## Resources Specific to this Course

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In addition, please see the resources cited within the material.

Wages and the Fair Labor Standards Act  
<https://www.dol.gov/agencies/whd/flsa>

COVID-19 and the Fair Labor Standards Act Questions and Answers <https://www.dol.gov/agencies/whd/flsa/pandemic>

*Theodore G. Robinson, V. Tellabs, Inc.*, 391 Ill.App.3d 60, 907 N.E.2d 501, 329 Ill.Dec. 910 (Ill. App. Ct. 1st Dist. 2009),  

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## Resources for the Legal Professional

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ABA Center for Professional Responsibility - [www.abanet.org/cpr](http://www.abanet.org/cpr)

Chicago Bar Association - [www.chicagobar.org](http://www.chicagobar.org)

Commission on Professionalism - [www.2civility.org](http://www.2civility.org)

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - [www.ilbaradmissions.org](http://www.ilbaradmissions.org)

Illinois Department of Financial and Professional Regulation -  
[www.idfpr.com/default.asp](http://www.idfpr.com/default.asp)

Illinois Lawyers' Assistance Program, Inc - [www.illinoislap.org](http://www.illinoislap.org)

Illinois State Bar Association - [www.isba.org](http://www.isba.org)

Illinois Supreme Court - [www.state.il.us/court](http://www.state.il.us/court)

Lawyers Trust Fund of Illinois - [www.ltf.org](http://www.ltf.org)

MCLE Program - [www.mcleboard.org](http://www.mcleboard.org)