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ILLINOIS STATE BAR ASSOCIATION

THE PUBLIC SERVANT

The newsletter of the Illinois State Bar Association's Standing Committee on Government Lawyers

Someone you should know: Stephen R. Wigginton, United States Attorney for the Southern District of Illinois

By Matthew S. Dionne

He once chased down a man who attempted to steal his staffer's wallet, took him to the ground, and sat on him until police officers arrived. This was right before the President of the United States nominated him to be United States Attorney. He has prosecuted criminals in both Missouri and Illinois. He has won multi-million dollar jury verdicts and settlements including the first jury verdict in the nation finding a Catholic Diocese liable for covering up childhood sexual abuse claims. While this may sound like a catchphrase for the "Most Interesting Man in the World," it actually refers to Steve Wigginton, United States Attorney for the Southern District of Illinois. And although Wigginton may not be the star of an advertising campaign like the "Most Interesting Man in the World," he is definitely someone you should know.

Steve was born and raised in southern Illinois, growing up in East St. Louis, Cahokia and Troy. He went to undergrad at Southern Illinois University Edwardsville (SIUE) and attended Saint Louis University School of Law (SLU). Upon obtaining his law degree, Steve took a job with the May Department Stores Company's Office of Legal Counsel (May), where he had clerked during law school. With May, Wigginton worked in four substantive legal areas: litigation, real estate, employment, and corporate law. While working in the litigation division, Steve became involved in a very high profile case against May brought by the Colorado Attorney General alleging May

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Military-related FMLA provisions

By Paul Thompson

When we assumed the Soldier, we did not lay aside the Citizen….

- George Washington as Commander-in-Chief of the Continental Army, June 26, 1775.

Governmental attorneys, at times, are consulted on personnel matters concerning public employees who also serve in the military reserve or National Guard. Of particular import for this sector of the workforce, is the federal *Family and Medical Leave Act of 1993* (FMLA) found at 29 U.S.C. § 2601 *et seq.*, as well as the corresponding regulations located under the same designation at 29 CFR Part 825. Given their numerous mobilizations over the last decade or so, more citizen-soldiers have come to invoke the provisions of the law especially as some of the relatively recent amendments enacted in 2008 (Public Law 110-181) and 2009 (Public Law 111-84) address leave for military-related situations. In rough, ever-changing numbers, approximately 700,000 or so "civilians" also serve in the

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deceived the public by utilizing fraudulent comparison price advertising tactics. After being part of the trial team that successfully defended May, he knew that he wanted to focus his career on the court room.

Knowing that he could not accomplish that goal in-house, Wigginton took a 50 percent pay cut and joined the City of St. Louis' Circuit Attorney's Office as an Assistant Attorney-Felony Prosecutor. Steve said this was one of "the best decisions of his life." Wigginton worked as a prosecutor for nearly two years during which time he had over a dozen jury trials. He returned to private practice when an opportunity to do white collar criminal defense and commercial litigation arose at Jenkins Kling & Sauerwein, P.C. in Clayton, Missouri. Steve continued to work in the private sector for approximately the next eight years – returning to Kassly Bone Becker Dix Reagan & Young in Belleville, Illinois, where he had also clerked in law school, and working as an associate for Becker, Paulson, Hoerner & Thompson PC in Belleville, a firm formed by several of the partners at Kassly Bone Becker Dix Reagan & Young after that firm reorganized.

In 1999, Steve fulfilled his desire of getting back to prosecuting when he became a part-time Madison County Assistant State's Attorney for the felony division. Soon after, in November of 2000, Steve partnered with Mike Weilmuenster to form Weilmuenster & Wigginton PC, a general practice firm specializing in litigation, employment/labor, and municipal matters. Here Steve was able to have the "best of both worlds," *i.e.*, by serving in both the public and private sectors. Indeed, as an assistant state's attorney, Wigginton handled roughly 60 to 70 active class three or four felony cases at any given time. At the same time, he was also able to gain the experience of operating and leading his own law firm. Among his important civil cases, he obtained the largest single verdict for an individual who suffered abuse at the hands of a Catholic priest.

After the 2008 election of President Barack Obama, Senator Dick Durbin sought to fill the vacancy that existed in the United States Attorney's Office for the Southern District of Illinois, which for several years had no Presidentially appointed and Senate confirmed United States Attorney. Senator Durbin formed a bipartisan committee consisting of labor, business leaders, attorneys and non-attorneys. Competing against a number of very qualified candidates in a multiple-interview process resulted in the committee selecting Steve as their choice for United States Attorney. In July of 2009, Senator Durbin called Steve and told him that his name had been sent to the White House as a candidate for United States Attorney.

This began a grueling nomination process that would last for approximately 14 months, until August of 2010 when Wigginton was unanimously confirmed by the Senate. The process involved interviews with numerous officials from the White House and the Department of Justice including an interview with Attorney General Eric Holder. It also involved an intensive background investigation by the Federal Bureau of Investigation, examining every aspect of his life and, in Steve's case, conducting more than 100 live interviews. But like everything difficult in life, Steve's says that it was well worth the trouble. It was also during this time when Steve chased down the robbery suspect and held him for law enforcement.

It turns out the robber picked the wrong law office to target. When Steve heard his secretary yell that someone had run off with a staffer's wallet, Steve and another lawyer at his firm chased the man down as he ran through backyards, tracking the man like a bounty hunter as the man trampled through the neighborhood. Eventually Steve came face to face to with the man and took him down. He then held him down until police arrived. The wallet was recovered nearby, and the man was charged with two counts of burglary. The man disputed the charges and a jury trial was held. Steve testified against the man at his trial, and he was convicted.

When asked how difficult it was to leave a lucrative law practice to work in the public sector, Steve indicated that being able "to do the right thing every day" and "to make a difference" for the area where he grew up made the decision easy. Steve advised that as United States Attorney he has had experiences, including meeting and working with the President and Attorney General, that more than make up for any loss in income. And Steve is certainly doing his part to make the most of his time as United States Attorney. In his two years in office, he has attended more than 350 community outreach meetings and has given more than one hundred presentations and speeches. In addition, his office is operating at the highest productivity in its history, bringing more cases and obtaining more convictions than ever before. Last year, his office broke all previous conviction records for the district, and the office has already exceeded last year's record-breaking year by late October 2012. When asked about why he seems so urgent to do so much so quickly, Steve said that with this job you are like an NFL coach, the day you accept the job, you know your time is limited. Accordingly, Steve's motto is that he tries to do as much as he can, while he can, every day that he can. Or as he once heard someone say, "You can ride the merry-go-around or a roller coaster." Steve said riding a roller coaster is much more fun.

In addition, the United States Attorney is not the only one hard at work. The office is currently handling more cases than ever, despite having fewer resources. Indeed, Steve noted that this lack of resources, more specifically, the current hiring and wage freeze and the reduction in federal agents that has reduced the manpower needed to investigate, were the biggest challenges facing his office. Part of the reason why his office has been able to increase its caseload despite limited resources is because of the men and women who have accepted appointments as Special Assistant United States Attorneys (SAUSAs). Those SAUSAs have agreed to work for the office for a year without compensation. Steve said he has great admiration and respect for the attorneys who take those jobs and that he treats them the same as a full-time paid Assistant United States Attorneys. Steve indicated that while he cannot pay the SAUSAs, the one thing he can give them is great federal prosecutorial experience, one of the greatest assets a young attorney can acquire.

Steve has also brought private practice strategic planning to the United States Attorney's Office, which involves analyzing the office's strengths, resources and assets and allocating them in a focused manner to meet the challenges and threats in the district. Additionally, Steve believes that attorneys who represent plaintiffs, part of what he used to

do, have a great deal in common with criminal prosecutors in that they are seeking justice for a victim, trying to right a wrong, and have the burden of persuasion.

Steve explained that one of the most difficult aspects of being United States Attorney is learning how to balance priorities among competing demands. For example, Steve has substantial violent crime-related cases, as well as fraud and corruption cases. He must determine which cases he wants to emphasize. Currently, Steve's four highest initiatives are violent crime, public corruption, a heroin initiative, and protecting children. Specifically, with regard to violent crime, the United States Attorney said his office has focused on the East St. Louis/Washington Park areas through programs such as Project Safe Neighborhoods, a comprehensive, strategic approach to reducing gun violence in America. Steve's heroin initiative, on the other hand, is one of the most aggressive in the nation, prosecuting drug dealers who illegally distribute drugs resulting in death. With regard to protecting children, his office is involved with Project Safe Childhood initiative, designed to reduce the number of children victimized by sex crimes. Steve believes that his office has the reputation of being aggressive and engages in real-time prosecution, meaning he does not file a 24-count indictment when a four-count indictment will do. And while he is known to be aggressive, Steve indicated that he would rather have the title of the most admired United States Attorney's office than the toughest or most aggressive. This does not mean being soft on crime, just that he would rather his office be admired by all in the civil and criminal justice system, from court staff to the public, than known for simply prosecuting a large number of cases.

In sum, although Steve currently does not have a campaign like the "Most Interesting Man in the World"; if he did, perhaps it would read something like, "While he cannot stop all wrongs, when he sees one, he tries to right it." One thing that appears true is Wigginton will reach his goal of leaving a legacy as someone who made a difference in the Southern District of Illinois while he had the opportunity to do so. Stay thirsty, Steve. ■

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Military-related FMLA provisions

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National or Air Guard or in the Reserves of the U.S. Army, Navy, Marine Corps, Air Force or Coast Guard.

As a very brief backdrop, certain employees can, under the FMLA, take unpaid leave for specified family and medical reasons with no effect on their job status or group health insurance coverage. FMLA applies to all public agencies, including state, local and federal employers (as well as private employers generally with 50 or more employees during at least 20 workweeks). Further, for an employee to be eligible to use benefits under FMLA, the worker generally must have worked at least 1,250 hours over the previous 12 months for that employer at a particular job site where at least 50 other co-employees are within 75 miles.[1]

Within these family/medical leave provisions are benefits framed specifically for members of the armed forces in order for family members: (i) to care for a seriously injured or ill service-member; and (ii) to assist with the civil affairs of a mobilizing, deployed or returning service-member. While the policy intent of the first rationale is readily apparent to enable an immediate relative to care for the returning veteran who is injured or ill, the second rationale's underpinnings in civil relief may not be as easily intuitive.

Under the first mentioned instance of authorized leave, an employee who is a spouse, son, daughter, parent, or next of kin of a seriously injured/ill service-member qualifies for up to 26 workweeks of unpaid leave during a 12-month period to care for a returning member of the armed forces. The seriously injured/ill service-member must currently be a veteran or in a branch of the military, including as a guardsperson or reservist, who is undergoing some type of medical treatment or is otherwise on a disability-retired status. For these situations, a "serious injury or illness" is considered to be one that was received in the line of duty while in active military service, which injury/illness could make the service-member medically unfit to perform certain duties. In addition, the definition applies to the aggravation of a serious injury/illness that pre-existed the member's active duty.

Under the second identified leave option, an employer must grant an eligible employee up to 12 (intermittently) of the authorized 26 weeks of unpaid leave during a 12-month period to assist in taking care of exigencies brought on by the fact that the employee's spouse, son, daughter, or parent is returning, already deployed or about to be mobilized in support of a military campaign as a reservist or guardsperson. Qualifying exigencies include: (i) issues arising from being mobilized on seven or less days of notice; (ii) pre-deployment and post-deployment military activities related to the mobilization; (iii) certain childcare responsibilities arising from the mobilization; (iv) executing financial, business and legal matters due to a service-member's absence; (v) attending counseling necessitated by the mobilization; (vi) spending time with a military member who is on short-term leave during deployment; and (vii) any other event that the parties mutually agree is a qualifying exigency. As these qualifying events may be short in duration or short on notice, the law allows for an intermittent approach in leave days in lieu of taking the entire entitlement all at once. The assistance by family members with any of these items allows mobilized reservists or guard-members to focus more attention on their military preparations and operations and also to ensure that their military colleagues do the same.

By enabling an immediate relative to use his or her benefit time to help the military member make advanced arrangements for taking care of civilian obligations while deployed, the service-members may then focus on the ramped-up demands of their military command. For example, military members during their extended absence have to address, among a multitude of other items, the recurring payment of non-electronic bills, the care of children or other dependents, the storage of large or expensive personal-property items, home/rental security and the winding-up or transfer of business affairs.

Federal and state statutes do indeed provide protection to members of the military against later unlawful takings, foreclosures, liens, repossessions, garnishments and property-auctions. The military member and his or her family, however, are much better served in avoiding these future time-consuming remedies by granting their relatives this type leave beforehand to help set up contingencies in advance of any misappropriation. As a caveat to this benefit-leave, spouses employed by the same employer are limited to a "combined" total of 26 workweeks in a 12-month period, if the leave is to care for a service-member with a serious injury/illness, for the birth and care of a newborn child, for placement of a child for adoption or foster care, or to care for a parent who has a serious health condition.

Additionally, employees seeking to use military caregiver leave must provide 30 days advance notice, if possible. If the 30-day notice is not possible, then the employee must provide notice as soon as may be practicable under the circumstances of the particular case, which is normally the same or next business day, especially in the case of leave for a qualifying exigency. For example, if a United States Army Reservist only receives seven days notice that his or her unit will be mobilized, then the citizen-soldier's family member should try to notify the employer that day or the next if leave is to be requested. An employee does not need, however, to specifically assert the term "FMLA" when providing the initial notice; the employee need only provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated start and end of the leave (more details may be required if a repetitive exigency). In this light, depending on the situation, the proffered information may include that: (i) the leave is for a family member who is an eligible service-member with a serious injury/illness or with a particular qualifying-exigency; and (ii) the anticipated length of the necessitated leave is for the stated amount of time. Employers then may of course require that an employee's request for military family leave be supported by appropriate documentation verifying the need for the time spent on behalf of the military relative. The federal law also allows for public employees to substitute accrued, paid benefit-leave concurrently with FMLA leave, if their particular employer authorizes this option. State law governing the respective public or private employer may also address the use of paid leave as a concurrent option.

Illinois has codified its version of the *Family Military Leave Act* (820 ILCS 151/1 *et seq.)*, which generally mirrors most of the federal provisions. For example, the state law includes relatively similar definitions of the

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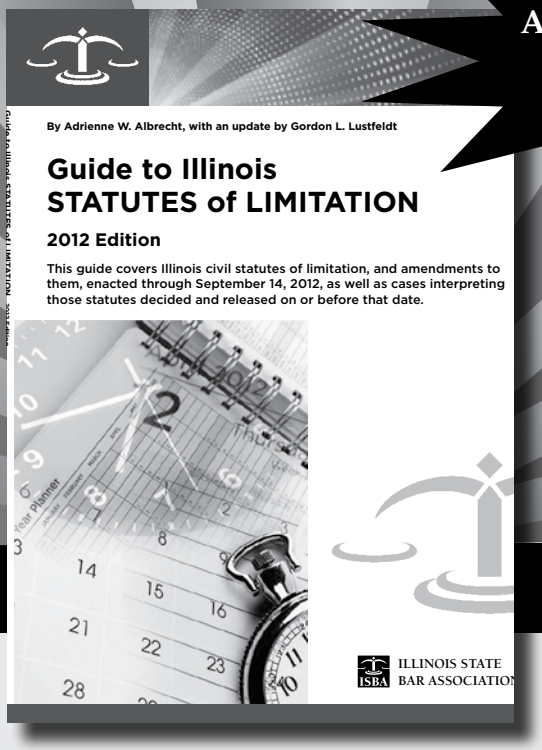

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basic terms of "employee" and "employer." Illinois law places, however, a lesser mandate on smaller employers with a workforce of 15 to 50 people. In so doing, Illinois requires an employer with between 15 and 50 employees to grant up to 15 days of unpaid family leave time to an employee during qualifying time of the family member's deployment. Employers with 51 or more workers must provide up to 30 days of the unpaid family leave. Illinois law does provide that an employee may not take leave under its provisions, unless the employee has exhausted all other accrued benefit time, except for sick or disability leave. Further, the number of days of leave provided to an employee is reduced by the number of days of leave provided to the employee under the federal FMLA provisions if for a qualifying exigency. In another minor difference under Illinois law, the employee must provide at least 14 days notice of the start-date for the leave; but if the leave is for less than five consecutive days, then the employee must of course give as much advanced notice as is practicable in the situation. Just as under the federal provisions, the employer may require some type of verification to confirm the validity of the leave request.

Local governmental ordinances as well as private company directives may also address military-related provisions stemming from FMLA. The cited federal and state provisions mentioned in this short overview should be the baseline from which these entities derive the public-policy fundamentals exhibited in the referenced statutes. In regard to enforcement of these provisions, both federal and Illinois law authorize the pursuit of civil actions. Again, please consult the subject law and rules as well as the United States Department of Labor for further details on the law's requirements and obligations as this article merely seeks to briefly summarize those provisions generally affecting eligible employees with immediate family members who are in military service with a reserve or guard component. ■

1. Please consult the cited law and rules for further details on the law's requirements and obligations on both the public and private sector as this brief article merely seeks to summarize a few of the respective military-related provisions.

Condemnation actions—*In rem* or *quasi in rem*?

By Marylou L. Kent

State and local authorities with the power of eminent domain routinely condemn land necessary for public purposes, such as roads and bridges. In acquiring land for public purposes, it is vitally important for the governmental authority to obtain clean title to such land so that it does not face some competing claim to the property at some point in the future, perhaps even after the public project has been completed.

Until fairly recently, an Illinois condemnation proceeding was thought to be *in rem* in nature. In such a proceeding the condemnation is brought against the property itself as opposed to the persons having an interest in the property. The advantage to this type of proceeding to the condemning authority is that a judgment is binding on "the world" and not just on those who were named as parties in the lawsuit. Therefore, the condemning authority would obtain title free and clear of any previously existing encumbrances.

In addition, an *in rem* action cannot be collaterally attacked, even by a person who was not named as a party but should have been. The proper course of action for such an aggrieved party would be to seek that person's appropriate share, if any, from the condemnation proceeds.

However, unlike *in rem* jurisdiction, *quasi in rem* jurisdiction is only binding upon the parties properly before the court. If someone with an interest in the property being condemned is not properly brought before the court in a condemnation proceeding considered *quasi in rem*, then any judgment granting title and possession to the condemning authority could be attacked by such person after the judgment has been entered.

In reality, there have been very few Illinois cases concerning how an eminent domain action should be viewed. One of the few cases to address this issue was *City of Crystal Lake v. LaSalle National Bank,* 121 Ill.App.3d 346 (2d Dist. 1984), in which two different municipalities filed condemnation actions involving the same land. Because there were no cases directly on point, the trial court relied on a California case holding that, because a condemnation case was an *in rem* proceeding, the first authority to obtain jurisdiction over the property by the filing of a condemnation action would have priority. The 2nd District appellate court found this reasoning persuasive and so ruled. (It should be noted that, at the time the California case was decided, the California eminent domain statute provided that a condemnation judgment "shall have the force and effect of a judgment *in rem*.")

Over 25 years after the *Crystal Lake* decision, the 2nd District appellate court (again) issued its decision in *Village of Algonquin v. Lowe,* 2011 IL App (2d) 2100603. The Village had filed a condemnation action to acquire some platted streets and parkways, some of which had never been built. In its pleadings, the Village alleged that there might be unknown persons existing with assorted interests in the property and named those persons as defendants under the designations of "unknown owners" and "non-record claimants "(claimants). The Village sought to provide sufficient service of process over these claimants by having notice of its condemnation action published. The trial court then entered a default judgment against all parties who had not appeared, including these claimants, and entered a final judgment for the Village.

About two and a half years later, the Nagels, claiming that they had a driveway that existed in part on the land taken by the Village, filed a petition to vacate the judgment claiming that they had not been properly served. They also argued that the Village knew, or should have known, about their use of the driveway based on letters written to the Village. The trial court granted the Nagels' petition, thereby finding that the judgment was not binding on them, and the Village appealed.

In affirming the trial court's decision, the appellate court found that condemnation actions do not "bear formal markers of being *in rem*" (such as the property itself being named as the defendant) and that the Illinois Eminent Domain Act did not contain the specific language stating that condemnations should be treated as *in rem* actions, as the California statute did. Therefore, the court did not consider the case an *in rem* proceeding. As a result, because the Village provided no evidence of any specific attempts to locate non-record owners, the requirements of the statute providing for service by publication had not been met, service by publication was not effective against the Nagels and they were not bound by the judgment.

While the Illinois Supreme Court or another appellate court could reach a different conclusion, it appears that current Illinois law views condemnations as *quasi in rem* proceedings that will only be binding against parties properly named and served in the case.

The Illinois Code of Civil Procedure contains provisions under which a condemning authority can make "unknown owners" and "non-record claimants" party defendants. In view of the *Lowe* decision, it now appears that condemning authorities will need to specifically demonstrate what steps were taken to identify both "unknown owners" and "non-record claimants" prior to attempting to serve those parties by publication. However, the *Lowe* case seems to indicate that if a condemning authority knew or should have known that a party had an unrecorded interest in the property, service by publication may not be sufficient and any judgment rendered in the condemnation action would not be binding on any party not properly before the court. ■

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Friday, January 4, 2013- Teleseminar—Ethics and Client Confidences: An Advanced Guide. Presented by the Illinois State Bar Association. 12-1.

Monday, January 7-Friday, January 11, 2013- Chicago, ISBA Regional Office—40 Hour Mediation/ Arbitration Training. Presented by the Illinois State Bar Association. 8:30-5:45 daily.

Tuesday, January 8, 2013- Teleseminar—Estate Planning in 2013, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, January 9, 2013- Teleseminar—Estate Planning in 2013, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, January 11, 2013- Teleseminar—Drafting Effective Employee Handbooks. Presented by the Illinois State Bar Association. 12-1.

Monday, January 14, 2013- Teleseminar—Planning and Drafting for Single Member LLCs, Part 1. Presented by the Illinois State Bar Association. 12-1.

Tuesday, January 15, 2013- Teleseminar—Planning and Drafting for Single Member LLCs, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, January 17, 2013- Chicago, ISBA Chicago Regional Office—Illinois Post Conviction Practice. Presented by the Illinois State Bar Association. 1-5.

Tuesday, January 22, 2013- Teleseminar—Tax Planning for Maximum Benefit in Real Estate Transactions, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, January 23, 2013- Teleseminar—Tax Planning for Maximum Benefit in Real Estate Transactions, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, January 23, 2013- Chicago, ISBA Regional Office (DNP)—Mentoring Orientation. Presented by the ISBA Mentoring Committee. 12-1.

Friday, January 25, 2013- Teleseminar—Attorney Ethics in Digital and Wireless World. Presented by the Illinois State Bar Association. 12-1.

Friday, January 25, 2013-Chicago, ISBA Regional Office—Succession Planning : Managing the Transition. Presented by the ISBA Business Advice and Financial Planning Section Council. 9-5.

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Tuesday, January 29, 2013- Teleseminar—Estate and Gift Tax Audits. Presented by the Illinois State Bar Association. 12-1.

Thursday, January 31, 2013- Chicago, ISBA Regional Office—Child Custody Litigation. Presented by the ISBA Family Law Section. 8:30-5:00.

February

Friday, February 1, 2013- Bloomington, Holiday Inn and Suites—Hot Topics in Agriculture Law- 2013. Presented by the ISBA Agricultural Law Committee. All Day.

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