

The Public Servant

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

2017 Roz Kaplan Government Service Award recipient Patrick Driscoll

BY KATE KELLY

Pat Driscoll's service to the bar, to various bar associations (especially the ISBA), and to the public made him this year's choice for this wonderful honor.

Pat's roots are in Chicago, where he attended Loyola Academy. He graduated from Regis College in Denver before enrolling in DePaul College of Law. His law school classmates included Ed Burke, Marty Russo, Howard Carroll, and Richard M. Daley.

Pat has been a practicing attorney since 1967. At various times in his career, he has been with the Cook County State's Attorney's office. First working in the office from 1968 through 1975, Pat returned from 1999 through 2013. During his various stints with the State's Attorney's office, Pat has served in many capacities and in almost all of the divisions of that office. Most recently, he served as Deputy State's

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Stay or go? Ethical public service to elected leadership

BY PETER J. ORLOWICZ

The statements and views expressed in this article are entirely Mr. Orłowicz's own, and do not represent the views of the Railroad Retirement Board or the United States Government.

As government lawyers and public servants, we and the agencies we work for are all ultimately accountable to some form of elected leadership. If we do not work for an agency with an elected official directly

at its head, our agency heads are likely to be appointed by the executive or otherwise selected by someone who is elected and accountable to the public through elections. One of the basic principles of the nonpartisan federal civil service is that federal employees maintain high standards of integrity, conduct, and concern for the public interest.¹ Similarly, the State of

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Save the Date!

**Hello, My Name is PAC:
An Introduction to the
Attorney General's Public
Access Duties**

**Thursday, March 15, 2018
12:00 -1:00 p.m.**

Presenter: Michael J. Luke, Counsel to the Attorney General

Sponsored by: ISBA's Local Government Law Section Council and Committee on Government Lawyers

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Attorney, Chief of the Civil Actions Bureau.

Even while in private practice, Pat has handled criminal and civil cases on behalf of Cook County, serving as Special State's Attorney by appointment of judges of the Circuit Court of Cook County and as Special Assistant State's Attorney by appointment of the State's Attorney. During that time, he also represented clients in State and federal courts and before administrative agencies and boards. Starting in the State's Attorney's office when there were only 200 assistants, there were approximately 900 Assistant State's Attorneys when he left the office years later. He was an active member of the Federal Defender Panel, trying a number of complex federal criminal trials.

Instead of one job, Pat now has six!! He is an administrative law judge hearing general administrative cases such as ordinance violations, revenue matters, building and zoning cases, and public health related matters. Pat serves as an administrative law judge for the Cook County Assessor, and he hears cases for the Electoral Board of Cook County and the Cook County pension fund. He is also an independent arbitrator with the Illinois Workers' Compensation Commission on cases involving its own employees, AND he serves as an arbitrator on the commercial calendar's arbitration program and the municipal calendar arbitrations.

Let's not forget his service to the ISBA. Pat is a 50-year ISBA member. He has chaired the Committee on the Unauthorized Practice of Law, the Criminal Justice Section Council, Federal Civil Practice Section Council, and Government Lawyers Standing Committee. He has served in the ISBA Assembly for four six-year periods. Pat's work on the Continuing Legal Education Committee has helped the ISBA grow in providing quality CLE. He also has been active with the Chicago Bar Association.

Pat has served on several Boards of the Attorney Registration and Disciplinary Commission of the Supreme Court

of Illinois since 1985. He is a frequent speaker and has authored several articles and chapters for various publications. For good measure, Pat is also a member of the Federal Bar Association's Board of Directors.

Perhaps most importantly, Pat is a remarkable mentor to younger lawyers. He worked tirelessly at the State's Attorney's Office (and pretty much everywhere else he finds himself) to teach and encourage young lawyers. His mild-manner and approachability assist him in this endeavor. How wonderful that the ISBA counts him as one of its own!

Lest, dear reader, you think Pat has no life, he is married with four children and 11 grandchildren. He enjoys vacationing to Wisconsin and Mexico – when he can find the time!

Pat shares that he “is honored to receive the Roz Kalpan Award. It is wonderful to be recognized by friends and peers with the award named for Roz, who was such a great person and lawyer.” Pat's long service to the government, his dedication to the ISBA, and his example of professionalism led the committee to select him as this year's recipient of the Roz Kaplan Award. ■



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The Public Servant

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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

Stay or go?

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Illinois Code of Personal Conduct provides that state employees hold positions of public trust and have a responsibility to the people of Illinois to act with integrity.² Ordinarily, carrying out that public trust and serving the public interest mean following and implementing the policies and priorities of the elected and appointed officials who run our organizations. But what happens when the way we are directed to carry out our duties seems inconsistent with the public trust and public interest we are charged with maintaining?

As lawyers, we may face this type of dilemma more frequently or more acutely than other government employees. Many of us are more deeply involved in planning or executing policy in our workplaces than the average agency employee. We may become associated with a policy or program as we implement it or suggest modifications to it, and we may be the representative of the agency in court defending the legality of the program or policy. Nevertheless, as civil servants, we rarely make final decisions about which policies to pursue and how best to pursue the public interest. Additionally, as lawyers we always have to consider the Rules of Professional Conduct, as well as any ethics rules or prohibitions applicable to government employees more generally. In some extreme instances, a government lawyer may feel compelled to resign or depart government service because of a conflict of this nature.

Walter Shaub, former director of the U.S. Office of Government Ethics, has publicly suggested a mental checklist of the following three questions as a framework to evaluate how and when a government employee can continue performing official duties when the employee and the elected leadership hold different principles:³

- Can you accomplish your mission effectively?
- Can you perform your work ethically/morally?
- Can you speak the truth?⁴

This article intends to expand upon the

basic principles of these three questions and address some possible considerations in formulating answers in the context of government lawyers generally, without attempting to draw specific conclusions about any particular agency or circumstance.

Can you accomplish your mission effectively?

Whether or not a government agency adopts a formal mission statement or has explanatory language in its enabling statute, agencies are created for a purpose and to accomplish specific missions. Some agencies may have multiple missions, or shift from one mission to another over time. The first question presented here is whether the government lawyer, acting within the scope of authority granted to her or him, can accomplish the assigned mission effectively. Implicit in the question is a recognition that elected leadership has the power and prerogative to define the mission and the means by which the mission should be pursued. In some cases, that definition may be provided by the legislature, with limited discretion for the executive. In other instances, the executive may have broad discretion in implementing statutory directions. In either instance, the government lawyer is charged with accomplishing the mission given by elected or appointed leaders.

There are many possible causes for an inability or failure to accomplish the mission effectively. Lack of funding, training, or resources can be a major cause for failing to accomplish the mission effectively. As an example, a 2014 report by the American Bar Association and RubinBrown LLP found the number of hours public defenders in the Missouri Public Defender System were able to spend on each case fell short of ABA minimal standards for adequate representation.⁵ Since that report was issued, some public defenders in Missouri have begun declining new cases.⁶ Missions that are not clearly defined are more difficult to accomplish effectively, especially when actors within

the agency or outside of it evaluate the agency's activities based on a different mission definition than the definition given to the government lawyer. In some cases, micromanagement or unnecessary interference with work performed by agency staff may decrease effectiveness, while in other cases, lack of guidance or instruction may be the primary culprit.

Also implicit in this question is whether the government lawyer has taken reasonable measures available to him or her to correct or alleviate the causes of ineffectiveness. If the cause is lack of resources, as in the Missouri example above, attempting to reduce workload and improve effectiveness by declining new cases is one possible option. Only if reasonable efforts have been tried and failed, or are unavailable in the first place, should the government lawyer feel it necessary to resign or leave the agency.

Can you perform your work ethically/morally?

Although answering any of these questions requires some subjective judgment on the part of the government lawyer, this second question may be the most open to reasonable disagreement. Performing work effectively can often be measurable or subject to standards in a way that ethical or moral conduct may not. Similarly, individual concepts of morality may vary more widely than concepts of effectiveness of mission. Nevertheless, the scope of this question is not unbounded nor free of definition and context.

As an initial point, government lawyers are bound by the Rules of Professional Conduct for their state of licensure, just as any other lawyer is.⁷ Federal law also provides that Department of Justice attorneys are subject to state and local rules in any state in which the attorney performs official duties, to the same extent as lawyers in that state.⁸ But performing your work ethically and morally must mean something beyond merely staying within the bounds of the law and the Rules of Professional Conduct. Many lawyers pursue

public service exactly to seek work with a higher sense of purpose and responsibility, to work on behalf of the people as a whole, rather than private clients.

With that in mind, it may be helpful to think of this question as a way of asking, “Can you sleep comfortably at night?” Different individuals in different circumstances will of course have different answers for that question. If elected leadership tolerates or encourages acts that an individual attorney views as unethical or improper, some factors to consider might be how serious the ethical breach is, how personally involved the attorney is, and how much the breach affects the rest of the attorney’s work. Unethical conduct by office leadership that affects a single case or situation may be easier to justify or forgive than a continuing pattern or practice. For example, if an attorney was concerned about particular decisions made regarding executive clemency in Illinois, that attorney’s work is more likely to be negatively affected if the attorney directly advises Prisoner Review Board members on recommendations for clemency than if the attorney processes FOIA requests for the Board.⁹

The amount of discretion built into the lawyer’s role (or the elected leadership’s role) may also play a significant part. A county State’s Attorney has an enormous amount of discretion when deciding which cases to prosecute, but he or she may choose not to delegate that discretion to subordinates. At the federal level, the discretion available to individual United States Attorneys for many types of administrative decisions is limited by the Attorney General through the U.S. Attorneys’ Manual¹⁰ and other guidance documents. At other agencies, such as the Social Security Administration, payment or non-payment of benefits to a category of beneficiaries such as incarcerated individuals may be prohibited by statute,¹¹ thereby leaving no discretion in the hands of the agency. In the author’s view, decisions which are exercises of discretion will generally have heavier moral or ethical implications than decisions which are mandated by law, but this is a point on which reasonable readers may disagree.

Can you speak the truth?

Finally, the third question addresses the ability to be honest in our work. Formulation and implementation of public policy requires reliable and truthful information to function effectively. Otherwise, the likelihood of public policy achieving its stated goals efficiently or accurately informing the public of the effects of public policy is impaired.¹² Much like the second question, the requirements of the law and the Rules of Professional Conduct must be merely a starting place. It may be helpful to look at our responsibilities to speak the truth in both an internal context (speaking to our coworkers, supervisors, and agency heads) and an external context (speaking to other agencies, courts, and the public).

Internally, candor and honesty allow the agency’s work to be thoroughly vetted before it is exposed to outside criticism. In preparing for an appellate argument, for example, many of us may engage in a moot argument to allow our colleagues to help identify weak points in the agency’s brief and strategize the best response. Both the federal¹³ and Illinois Freedom of Information Acts¹⁴ recognize the importance of honest opinions and recommendations by providing a “deliberative process” exception to public disclosure requirements. These functions tend to break down when leaders imply by word or action that they only want positive feedback, or information supporting only one side of a debated issue. An attorney who asks his questioners at a moot argument to only ask friendly questions is missing the point of the exercise.

The importance of internal honesty can be seen in a variety of formal rules designed to protect employees from adverse consequences when they speak with candor. For example, federal ethics regulations protect employees from disciplinary action if the employee seeks ethics advice from an agency ethics official, discloses all relevant circumstances to the ethics official in seeking the advice, and acts on the ethics official’s advice in good faith.¹⁵ This rule encourages both honesty and proactive disclosure by employees. Similarly, federal Inspectors General are required to keep the identity

of complaining employees confidential under most circumstances.¹⁶ Of course, the existence of these formal rules (and the difficulties faced by watchdog agencies more generally) also demonstrates that candor and honesty are not always valued highly in government service.

Externally, the obligation of candor and honesty has different contours; information, recommendations, and analyses that are shared openly and freely within an agency may be protected from public disclosure, or outright prohibited. Nevertheless, an agency attorney has an obligation not to make material misrepresentations when speaking on behalf of the agency.¹⁷ Agency attorneys also have an obligation to act consistent with agency policy when speaking in their official capacity. When agency management is hostile toward being truthful to the public or other outside sources, it may create tension between these obligations.

Conclusion

As in most matters of conscience, broad rules and guidance can only go so far. One of the chief virtues of Mr. Shaub’s three questions may in fact be their open-ended nature and simplicity of the structure; if this is so, the expansion and discussion above may obfuscate more than clarify the core dilemma. Nor are these three questions the only possible approach to evaluating one’s ability to continue in public service. Ideally, elected leadership and career civil service work as interlocking gears, each with different functions but working toward the same overall goal and the efforts of one complementing the other. When that ideal is not achieved, we each have an individual responsibility toward the public we serve to act in a manner consistent with our standards for integrity and our obligations to elected leadership and to the public, in order to bring the components back into harmony with each other. Regardless of how we reach our decisions, the choice to stay and continue the work, or to depart public service and pursue other routes, will almost always be a difficult one. ■

— About Mr. Orłowicz: General Attorney, United States Railroad Retirement Board, Office of General Counsel.

1. 5 U.S.C. §2301(b)(4).
2. State of Illinois Code of Personal Conduct, effective July 1, 2016.
3. Lydia Polgreen, *Four Quitters Walk Into a Bar...*, Huffington Post Highline, Oct. 25, 2017, <http://highline.huffingtonpost.com/articles/en/trump-quitters/>. See also <https://twitter.com/waltshaub/status/901050534114807809>.
4. I thank Mr. Shaub for his permission to adopt and discuss his questions.
5. American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *The Missouri Project: A Study of the*

- Missouri Public Defender System and Attorney Workload Standards* (June 2014).
6. Dan Margolis, *Many Missouri Public Defenders Decline New Cases After State Supreme Court Disciplines Lawyer*, St. Louis Public Radio, Oct. 6, 2017, available at <http://news.stlpublicradio.org/post/many-missouri-public-defenders-decline-new-cases-after-state-supreme-court-disciplines-lawyer#stream/0>.
 7. See Rule 1.11, Comment [1], Illinois Rules of Professional Conduct of 2010.
 8. 28 U.S.C. § 530B; 28 CFR Part 77.
 9. <https://www.illinois.gov/prb/Pages/default.aspx>

10. <https://www.justice.gov/usam/united-states-attorneys-manual>
11. 42 U.S.C. § 402(x).
12. See generally Orin S. Kerr, *A Theory of Law*, 16 Green Bag 2d 111 (2012).
13. 5 U.S.C. § 552(b)(5).
14. 5 Ill. Comp. Stat. 140/7(1)(f).
15. 5 CFR §2635.107(b).
16. Inspector General Act of 1978, 5 U.S.C. app. 3, § 7(b).
17. Rule 4.1, Illinois Rules of Professional Conduct of 2010.

What constitutes being a “public body” subject to the provisions of FOIA – *Better Government Association v. Illinois High School Association, et al.*

BY PATRICK T. DRISCOLL, JR.

The Illinois Supreme Court, in *Better Government Association v. Illinois High School Association, et al.*, 2017 IL 121124, determined that the Illinois High School Association (the IHSA) was not a “public body” as defined by the Freedom Information Act (FOIA or the Act), 5 ILCS 140/2 (West 2014).

Background

The Better Government Association (the BGA) submitted a FOIA request to the IHSA in 2014 seeking various records of the IHSA for the 2012-2013 and 2013-2014 fiscal years. The BGA requested copies of contracts from the IHSA involving contractors such as Nike and Gatorade. The IHSA refused to produce any records, claiming it is a not-for-profit charitable organization, and thus, not subject to the provisions of FOIA.

The BGA then requested the same records from School District 230 (District 230), which is a member of the IHSA. School District 230 responded that it did not have any responsive documents and

that the records were not subject to FOIA. The BGA then filed suit in the Circuit Court of Cook County, which court ultimately held that the IHSA was not a public body and that District 230 had no duty to obtain and disclose the IHSA records. The Appellate Court affirmed the Circuit Court. 2016 IL App. (1st) 151356.

The Facts

The IHSA is a private, not-for-profit, unincorporated association. Over 800 high schools in Illinois are members. The IHSA establishes bylaws and rules for sports competitions and enforces its rules. The IHSA also sponsors and coordinates tournaments in sports in which member schools choose to participate. ¶3.

The IHSA is governed by a 10 member board. Each board member is a principal of a member school. ¶5. The IHSA employs an Executive Director and staff. ¶7. Its revenue comes from events it runs and from sponsorships it receives. ¶12. The employees of IHSA are not public employees, not paid from public funds

and not subject to government pension or insurance programs. ¶14.

After the IHSA refused to produce any records, the BGA sued District 230 to get the same records that had been requested of the IHSA, claiming that the IHSA performs governmental functions for District 230.

¶9. District 230 moved to dismiss the claim, arguing that the records sought were not “public records” of the District and not related to any claimed governmental functions the IHSA may perform for District 230. ¶15.

The Appellate Court found that IHSA did not perform any public, governmental function, and the IHSA was not controlled by a governmental entity and did not receive any public funds. District 230 did not have any “public records” as defined by FOIA. ¶17.

The Supreme Court’s Analysis

The Court first considered whether the IHSA was a “public body” as defined by FOIA. The Act defines a “public body.” 5 ILCS 140/2(a). A plain reading of the

Act shows that the IHSA is not one of the specifically named bodies of state or local government. ¶23.

The Court next had to determine if the IHSA was a “subsidiary” body of a governmental unit. The Act provides that “committees and subcommittees” of a public body are within the control of a public body and thus subordinate to that public body. ¶23.

FOIA requires that each organization’s argument must be reviewed on a case by case basis. ¶24. The Court looked to the Open Meetings Act (OMA) (5 ILCS 120/1.02 West 2014) for guidance on what constitutes a public body and determined that there was no reason to distinguish between FOIA and OMA to determine whether the IHSA was a “subsidiary” body under FOIA. ¶25.

The BGA also claimed that federal civil rights legislation, 42 USC §1983, allows private entities to enforce rights against defendants who act under color of state law. ¶27. The BGA’s argument was not persuasive. The Court refused to expand the definition of a subsidiary body to an organization that was a state actor for purposes of §1983. ¶31.

The BGA also argued that the IHSA was a “local public entity” for purposes of the Tort Immunity Act. The Court determined that to have tort immunity, the not-for-profit organization must be subject to operational control by the unit of local government. ¶32. IHSA is not a “local public entity” under the Tort Immunity Act. ¶33.

The Court reviewed the organizational structure of the IHSA noting the following: (1) it has had a separate legal existence for over 100 years, (2) it is a voluntary unincorporated association that can sue or be sued, and (3) it has its own constitution and board of directors. ¶37. The IHSA was not created by any public body and is not part of or housed within a public body. ¶38.

The degree of any governmental control over the IHSA was discussed by the Court. The IHSA board is not controlled by any government, including any school districts. Membership in the IHSA by school districts is not mandatory. ¶40. No actions taken by the IHSA board need approval

by any unit of government. ¶41. The IHSA employees and executive director are not government employees and are not paid from government funds and are not part of government retirement or insurance programs. ¶43.

The IHSA does not receive any direct government funding and does not charge any dues from its member schools. ¶49. Any revenue it generates comes from its own organizational efforts. ¶53. The Circuit Court of Cook County properly found that the IHSA is not a public body as defined by FOIA. ¶55.

The BGA also claimed that District 230 had a duty to disclose the requested records of the IHSA because the IHSA performed as a governmental function for District 230, which is a public body defined by FOIA. ¶59. Sec. 7(2) of FOIA prohibits public bodies from avoiding disclosure by

delegating by contract, responsibilities to a private entity. ¶62.

District 230’s responsibilities are governed by the School Code. 10 5 ILCS 5/1-1 et seq. (West 2014). Governing and coordinating athletic competitions is not a statutory requirement of District 230. While District 230 can form or join associations, such as the IHSA, the IHSA is not acting on behalf of District 230 and does not perform any of the District’s responsibilities. District 230 did not delegate any of its statutory functions to the IHSA. ¶64.

Conclusion

Because the IHSA did not contract to perform any governmental function on behalf of District 230, it is not a public body as defined by FOIA, and the requested records of the District are not public records under FOIA. ■



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January

Tuesday, 01-09-18 Webinar—Fight the Paper. Practice Toolbox Series. 12:00-1:00 PM.

Wednesday, 01-10-18 – LIVE Webcast—On My Own: Starting Your Solo Practice as a Female Attorney. Presented by WATL. 12-2 PM.

Thursday, 01-11-18 – ISBA Chicago Regional Office—Six Months to GDPR – Ready or Not? Presented by Intellectual Property. 8:45 AM – 12:30 PM.

Friday, 01-12-18, Chicago, ISBA Regional Office—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section. 8:30 am – 5:00 pm.

Friday, 01-12-18, Chicago, Live Webcast—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section. 8:30 am – 5:00 pm.

Tuesday, 01-16-18 – LIVE Webcast—Proper Pleadings: Complaints, Answers, Affirmative Defenses, Motions for a More Definite Statement, Motions to Strike, and Motions for Judgement on the Pleadings. Presented by Labor and Employment. 1:30-3 PM.

Wednesday, 01-17-18 – LIVE Webcast—Clearing the Skies: How to Fly with the Mandatory Initial Pilot Program. Presented by Intellectual Property. 12-1 PM.

Thursday, 01-18-18 – ISBA Chicago Regional Office—Closely Held Business Owner Separations, Marital and Non-Marital. Presented by Business and Securities. 9AM - 12:30 PM.

Tuesday, 01-23-18 Webinar—Before the Technology Buy, Understand the Why. Practice Toolbox Series. 12:00-1:00 PM.

Thursday, 01-25-18 – ISBA Chicago Regional Office—Starting Your Law Practice. Presented by General Practice. 8:50 AM – 4:45 PM.

Tuesday, 01-30-18 LIVE Webcast—Concerted Activity in the Age of Social Media and Online Systems: Employee Rights, Employer Pitfalls, Remedies and Penalties. Presented by Labor and Employment. 2-4 PM.

Wednesday, 01-31-18 ISBA Chicago Regional Office—Recent Developments in State and Local Taxation - Explosive Issues and the Steady Drip, Drip, Drips. Presented by SALT. 9AM – 1PM.

Wednesday, 01-31-18 LIVE Webcast—Recent Developments in State and Local Taxation - Explosive Issues and the Steady Drip, Drip, Drips. Presented by SALT. 9AM – 1PM.

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Wednesday, 01-31-18 LIVE Webcast—Recent Developments in State and Local Taxation - Explosive Issues and the Steady Drip, Drip, Drips. Presented by SALT. 9AM – 1PM.

February

Thursday, 02-01-18 – LIVE Webcast—Storm Water Regulation Under the National Pollutant Discharge Elimination System (NPDES). Presented by Environmental Law. 11AM – 12PM.

Thursday, 02-01-18 – LIVE Webcast—The Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) Permit Program. Presented by Business Advice and Financial Planning. 1:30PM – 2:30PM.

Friday, 02-02-18 – Normal, IL—Hot Topics in Agriculture Law – 2018. Presented by Agriculture Law. All-day.

Friday, 02-02-18 – ISBA Chicago Regional Office—2018 Federal Tax Conference. Presented by Federal tax. All Day.

Friday, 02-02-18 – LIVE Webcast—2018 Federal Tax Conference. Presented by Federal tax. All Day.

Feb 6 - June 26—Fred Lane's ISBA Trial Technique Institute.

Wednesday, 02-07-18 – Webinar—TITLE INSURANCE 101: HOW TO HANDLE COMMON TITLE INSURANCE AND COVERAGE ISSUES IN RESIDENTIAL REAL ESTATE TRANSACTIONS—A Primer for New Attorneys and Those 'New' to Real Estate Law Practice. Presented by Real Estate. Time: 2-3 PM.

Friday, 02-09-18 – SIU Carbondale—Central and Southern Illinois Animal Law Conference. Presented by Animal Law. 8:00AM to 5:30PM.

Monday, 02-12 to Friday, 02-16—ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

Tuesday, 02-13-18 Webinar—Cloud Services. Practice Toolbox Series. 12:00-1:00 PM. ■

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