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ILLINOIS STATE BAR ASSOCIATION

STANDING COMMITTEE ON GOVERNMENT LAWYERS

The newsletter of the ISBA's Standing Committee on Government Lawyers

Government Lawyers Committee hosts brown-bag luncheon on networking

By Donna Del Principe, Chicago

The Government Lawyers Committee sponsored the brown-bag lunch, "Jobs, Networking, and Why Do I Work for the Government?" on June 22, 2004. As part of the Committee's plan to bring the ISBA to the government lawyers, the program was held in Chicago at the State of Illinois Building at 160 N. LaSalle Street on the 5th floor. Sixty people attended!

Two government attorneys discussed public sector employment opportunities and networking. Jim Reilly, Chief Administrative Law Officer, Department of Administrative Hearings, City of Chicago, offered concrete suggestions on how to get government jobs, such as interning or working part-time for the place where you want to work. Mr. Reilly emphasized talking to *everyone* and said that if the person you speak to does not know of any jobs in the area in which you are looking, ask him or her to give you the names of other people you could contact. He suggested that the key is keeping your name "out there" by participating in bar activities and writing for bar association newsletters, which will help your name stand out when a prospective employer is looking through a stack of resumes.

As for specific positions, Mr. Reilly said the Cook County State's Attorney's office is always looking for good attorneys, especially in Appeals. He said the City of Chicago has a lawyer assigned to the commissioner of each city department, lawyers for administrative hearing units such as the liquor license department, and lawyers for the city's corporation counsel's office. Reilly noted that there is a separate outside hiring committee for the corporation counsel's office.

Also participating in the program was Thomas H. Allen, Administrator, Formal Hearings Division, Department of Administrative Hearings, Office of the Secretary of State, Chicago, and former private criminal lawyer. Mr. Allen amused and enlightened the group with anecdotes about the financial pressures of private practice—having to generate business, not knowing your income from month to month, not having paid holidays, insurance or pension benefits. He clearly enjoys working for the State. In addition to the economic benefits, he noted that his hours are predictable and give him time to be with his family.

Based upon the enthusiastic response to this program, similar programs are being planned for this spring at Cook County Juvenile Court and at the Cook County Criminal Court at 26th and California in Chicago. If there is a location outside of Cook County where you would like to see a similar type of program, please contact Donna Del Principe at 312-996-4572.

IN THIS ISSUE

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Bills on Request

Don't forget that the ISBA Legislative Affairs Department provides copies of pending and enacted Illinois legislation on request.

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Illinois Bar Center,
Springfield, IL 62701

Ethics corner: Discipline of public sector attorneys: some recent dispositions of interest from Illinois and other states

By Rosalyn B. Kaplan (with research assistance from Molly Breckenridge, a third-year student at Loyola University School of Law), Chicago

In re Bourgeois, Ill. Sup. Ct. No. M.R. 19087 (January 20, 2004)

The Illinois Supreme Court ordered a two-month suspension of an associate judge's license to practice law, on the basis of false statements that he made in answering questions on his application for a judgeship. The attorney had denied being in default on an educational loan, although the Student Assistance Commission had an uncollected judgment against him; he had falsely stated that he had never been held in contempt by a court, although he had been held in contempt in the student loan case and in a child support matter; he had denied being the subject of any complaint to the ARDC, although the ARDC had received six complaints against him, two of which were pending on the date that his application was filed; and he had reported that he had been a party to only one litigation matter, his divorce case, although he had been a named defendant in three other lawsuits.

In re Gambino, Ill. Sup. Ct. No. M.R. 18878 (September 24, 2003)

The Illinois Supreme Court ordered this attorney suspended for one year, with the suspension stayed after 90 days by a one-year period of probation. While Gambino was an assistant federal defender, she represented Jorge Ramos-Gonzales in a criminal matter, in which he was convicted of illegal reentry into the United States after conviction of an aggravated felony. After he served his prison time, Gonzalez was deported, and he later reentered the United States illegally. Respondent then began a personal relationship with him, during which she helped him remain in the country illegally.

In re Guzman, Ill. Sup. Ct. No. M.R. 18943 (November 14, 2003)

An Assistant State's Attorney in Rock Island County was censured for sending a letter, on official letterhead, to two residents involved in a neighborhood dispute about excessive noise, when the letter contained statements of fact or law that she knew or reasonably should have known were false; she told the letter's recipients that if further complaints were received against them, criminal charges would be filed, DCFS would take away their children, and the Immigration and Naturalization Service would be contacted regarding their right to remain in the country.

In re Cain, Ill. A.R.D.C. Hearing Board, No. 02 SH 19 (reprimand administered, September 26, 2002).

While he was an Assistant State's Attorney for Macoupin County, the attorney left a bar, after drinking about six beers on a Friday night, drove off in his SUV, hit an 18-year-old woman who was walking on the road, and left the scene without providing assistance. He pleaded guilty to leaving the scene of an accident involving personal injury, a Class A misdemeanor.

Attorney Grievance Commission of Maryland v. Gansler, 835 A.2d 548 (Md. 2003)

The Maryland Court of Appeals, in what it described as a case of first impression construing that state's ethical rule regarding trial publicity, reprimanded the State's Attorney for Montgomery County, Maryland, for making certain extra-judicial statements regarding a confession, a plea offer, and his opinion of certain defendants' guilt of charged crimes.

Attorney Grievance Commission of Maryland v. Goodman, 850 A.2d 1157 (Md. 2004)

The Maryland Court of Appeals ordered the disbarment of an assistant public defender who used another attorney's name, without permission, under which he filed and attempted to settle a private civil lawsuit on behalf of a charitable enterprise that he ran and financed; the attorney had believed that he would not be allowed to engage in the civil litigation due to his position with the public defender's office and that the civil matter would be settled without a court appearance.

People v. Mucklow, 35 P.3d 527 (Colo. 2000)

A relatively inexperienced deputy district attorney was censured for failing to disclose exculpatory evidence in two cases; she withheld evidence in one case that the alleged victim of a domestic assault had recanted her story, and she failed to disclose, in the other case, that the 11-year-old victim in a sexual abuse case had changed her version of the sexual contact that she had previously described.

News you can use

By Marc Loro

Department of Children and Family Services required to use attorneys in administrative hearings

A Sangamon County judge has entered an order that enjoins the Illinois Department of Children and Family Services (DCFS) from using lay persons to represent it at its administrative hearings. The order, entered by Judge Leslie Graves on June 22, 2004, in the case of *Keiser v. Samuels*, Docket No. 04 CH 353 (Circuit Court, Sangamon County), indicates that the plaintiffs in the lawsuit had "suffered an injury" from the controversial practice. The plaintiffs were represented by the law firms of Feldman, Wasser, Draper and Benson, and Donald M. Craven, both of Springfield.

The order further provides that the plaintiff and the public are protected by the use of attorneys in administrative hearings, that the Illinois Supreme Court has issued rules that govern the practice of law, that conducting hearings as the "Department Representative" is the practice of law, that the practice of law by non-lawyers causes irreparable harm to the plaintiff and the public at large and, finally, that the plaintiff had met the requirements for a preliminary injunction.

The order concluded that DCFS is prohibited from conducting administrative hearings unless it is represented by an attorney authorized to practice law in the State of Illinois. The matter was scheduled for another hearing on July 12, 2004, but as of November 5, 2004, a final order had not been entered.

At an appearance before the Government Bar Association in Springfield on August 18, 2004, Mr. Bryan Samuels, Director of DCFS, acknowledged entry of the order and confirmed that DCFS was in the process of hiring additional attorneys in order to comply with the court's order.

Secretary of State's Office announces new procedures for administrative hearings

Effective February 1, 2005, the Secretary of State's Department of Administrative Hearings implemented a new policy regarding the form in which documents are to be submitted at administrative hearings held pursuant to the provisions of the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.*) and the rules promulgated thereunder (92 Ill. Adm. Code Part 1001). Under the new standards, which are intended to implement the provisions of 92 Ill. Adm. Code §1001.90, any document admitted into evidence at a hearing must be an "original document," except as otherwise specified. An "original document" is defined to include "a document which bears the original signature of the petitioner and/or author of the document, as applicable." The new standards are intended to apply to uniform reports, updated evaluations, treatment verification information, individualized treatment plans and discharge summaries, continuing care plans, driver risk education forms, faxed documents and other documents which are composed or created for the purpose of being submitted to the Secretary of State. To obtain copies of the new policy or if you have questions regarding the new policy, contact the Secretary of State's Office, Department of Administrative Hearings at 217/782-7065.

In-sites

By Rosalyn B. Kaplan, Chicago

In the November 2003 edition of this newsletter, I introduced you to the ARDC's Web site and told you that portions of the site were still under construction. Recently, an important new feature was added, and the site is now a means for performing research on ethics issues and decisions in Illinois.

Go to and click on the Rules and Decision box in the left-hand column, to reach the screen for "Disciplinary Reports and Decisions Search." Here, you will have the choice of doing a word search, by typing your entries in the box, and you can modify your search by selecting fields as you scroll down the page (or you may perform a field search without entering specific words to search).

The field search choices allow you to find documents by selecting various criteria, separately or together: disciplinary case number; attorney name and/or registration number; disposition (the result ordered or recommended, such as "censure," "disbarment," etc.); suspension length; document type; proceeding type (disciplinary, disability, reinstatement, or disability restoration); procedure (either a consented or an adjudicated case); the authoring judge or Board member (the results can include reports and recommendations of the Hearing Board and the Review Board); the Administrator's or the Respondent's counsel; and date.

After you make your choices and "submit" your search, you will find a results page listing the matches for your search criteria, sorted by "Attorney," "Date," "Document Type" and "Disposition." Click on the attorney's name to retrieve the document, with your search terms highlighted, and you will also find, at the bottom of the screen, a navigation bar that allows you to access other documents regarding the attorney or the particular disciplinary case, to progress through your search results according to "hits" or cases, to edit your search, to print a document, or to verify the status of the attorney whose document is displayed by clicking on "Lawyer Search."

The searchable database includes all Illinois Supreme Court published decisions; Supreme Court miscella-

neous record (M.R.) orders of discipline, Hearing Board and Review Board reports and recommendations dating back to January 1, 1990; disciplinary complaints filed dating back to December 27, 2000; and petitions for discipline on consent, petitions for reciprocal discipline, and motions for disbarment on consent dating back to January 1, 1990. New filings will be available within one business day of their issuance or filing.

Case law update

By Lee Ann Schoeffel, Springfield

Criminal law

***City of Urbana v. Andrew N.B.*, No. 95408, 95803 cons. (June 24, 2004)**

Appellate court erred when it approved of trial court's use of contempt petition to order detention of minor defendants in response to violation of terms of court supervision imposed as result of guilty plea to municipal ordinance. Court improperly used contempt petition to avoid protections of Juvenile Court Act of 1987 and expanded potential disposition beyond that which was available for original offense.

***People v. Arndt*, No. 2-03-0660 (2nd Dist., August 18, 2004)**

Evidence, consisting of contents of chat room conversations between defendant and police officer posing as a 16-year-old child, was sufficient to convict defendant of indecent solicitation. Further, other Internet conversations with persons claiming to be under age by defendant established that defendant was not entrapped by police officer. Section 11-6 of the Criminal Code of 1961 (720 ILCS 5/11-6 (West 2002)) is not unconstitutionally overbroad and did not infringe on defendant's 1st amendment rights. Moreover, the variance between the indictment and the evidence presented at trial did not mislead defendant in presenting his defense.

***People v. Ceja*, No. 3-03-0950 (3rd Dist., July 30, 2004)**

Recording of field sobriety test taken by malfunctioning videotape recorder resulting in only audio portion on tape was properly suppressed pursuant to the eavesdropping article of the Criminal Code of 1961 (Code) because recording requires accompanying video in order to qualify for exception contained in section 14-3(h) of the Code (720 ILCS 5/14-3(h) (West 2002)), and recording did not fit within the emergency communication exception of section 14-3(d) of the Code (720 ILCS 5/14-3(d) (West 2002)).

***People v. Taylor*, No. 2-03-0138 (2nd Dist., June 30, 2004).**

The use of vulgar or indecent language in a telephone call is insufficient to infer an intent to harass. Therefore, evidence was insufficient to convict defendant of violating the Harassing and Obscene Communications Act (720 ILCS 135/1-1(2) (West 2002)).

Criminal counsel

***People v. Spooner-Tye*, No. 2-02-0522, 2-02-0523, 2-02-0524, 2-02-0525 cons. (2nd Dist., June 30, 2004)**

Supreme Court Rule 604(d) certification filed by defense counsel, prior to filing amended motion to withdraw guilty plea to misdemeanor charges, is adequate despite counsel's inability to review guilty plea transcripts or an equivalent. Supreme Court Rule 402(e) and Rule 604(d), when read together, do not require that a transcript be prepared at the expense of the State, in order to satisfy effective assistance of counsel requirement for motion to withdraw guilty plea.

***People v. Junior*, No. 4-02-0334 (4th Dist., June 25, 2004).**

In defendant's trial for burglary, trial court committed reversible error when it allowed State's witness to testify that the only reason he was testifying was because he was subpoenaed, when in fact, witness was required to cooperate with the State as a condition of the plea agreement in which the State agreed not to seek consecutive sentencing. Further, State's Attorney, in closing argument, compounded error by claiming witness had "no reason to lie."

Criminal sentencing

***People v. Dryden*, No. 2-02-0999 (2nd Dist., June 8, 2004)**

Although evidence of intent was sufficient to convict defendant of home invasion (720 ILCS 5/12-11(a)(3) (West 2000)), 15-year enhancement because of possession of firearm (720 ILCS 5/12-11(c) (West 2000)) violates proportionate penalties clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, sec. 11) because it punishes more severely than aggravated battery with a firearm. In addition, count of home invasion based on accountability for accomplices must be vacated because of one-act, one-crime rule.

***In re M.T.*, No. 1-01-2314 (1st Dist., August 27, 2004)**

Because it treats nonviolent crime as seriously as violent crime, indecent-solicitation-of-an-adult statute (720 ILCS 5/11-6.5(a)(1)(ii) (West 2000)) violates proportionate penalties clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, sec. 11). The sentencing provisions of the indecent-solicitation-of-an-adult statute is so pervasive that it renders entire statute unconstitutional in its entirety.

***People v. Collins*, No. 1-03-0685, 1-03-0686 cons. (1st Dist., August 25, 2004)**

Pursuant to clemency order issued by Governor commuting death penalty from defendant's sentence and authorizing court to impose maximum sentence for offense other than death, trial court was not required to conduct new sentencing hearing, but was authorized to order defendant remanded to Department of Corrections to serve term of natural life sentence.

Freedom of Information Act

***The Southern Illinoisan v. Department of Public Health*, No. 5-02-0836 (5th Dist., June 9, 2004)**

Trial court's determination that requested records of the Illinois Department of Public Health from cancer registry do not present substantial

risk of disclosure of individual identity and order of disclosure is proper. Testimony of expert witness in data anonymity of her ability to correctly identify the subjects of 18 of 20 sets of data provided by defendant reveals unique knowledge and expertise and is insufficient to conclude that the release of the data reasonably tends to lead to the identify of the specific individuals. Further, because refusal to release data was not unreasonable, court properly declined to award attorney fees.

Labor law

***Garrido v. Cook County Sheriff's Merit Board*, No. 1-03-1128 (1st Dist., June 9, 2004)**

Because drug-free workplace policy of the sheriff's office, when applied to employee who consumed tea recommended by physician in Peru and who did not realize that it contained coca leaves, bears no rational relationship to legitimate goals of employer, discharge of plaintiff for testing positive for cocaine in random urine test violates her substantive due process rights.

***County of Cook v. Illinois Labor Relations Board*, No. 1-03-1622 (1st Dist., July 28, 2004)**

Findings of the Local Panel of the Illinois Labor Relations Board that attending rehabilitation physicians qualify for collective bargaining because they are not managerial employees within meaning of section 3(j) of the Illinois Labor Relations Act (5 ILCS 315/3(j) (West 2002)) is not clearly erroneous. Evidence established that the attending rehabilitation physicians' roles in committee meetings was neither final nor independent and did not comprise a predominant part of their activity and that their authority to direct and recommend discipline of residents does not qualify them as supervisors.

Municipal law

***West Belmont, L.L.C. v. City of Chicago*, No. 1-03-1199 (1st Dist., June 1, 2004)**

Purchaser of property, formerly used as furniture store, who intended to construct townhomes, was not entitled to exemption from municipal transfer tax provided in city ordinance for real property "used primarily for commercial or industrial purposes." A residential real estate development does not fall within the provisions of the city's ordinance.

***People v. Suburban Cook County Tuberculosis Sanitarium District*, No. 1-03-2815 (1st Dist., June 30, 2004)**

Because tuberculosis sanitarium district is not closing its entire facility, and because the provisions of Tuberculosis Sanitarium District Act (70 ILCS 920/3, 5 (West 2000)) give the district the authority to dispose of unneeded real property, the district's authority to dispose of 24½ acres of a 36-acre parcel owned by it in Hinsdale is necessarily incidental to its express powers. Therefore, the district is not required to obtain the approval of the Board of Commissioners of Cook County before selling its property.

School law

***Bill v. Board of Education of Cicero School District 99*, No. 1-03-2079 (1st Dist., June 28, 2004)**

Trial court erred when it granted plaintiff's motion for summary judgment awarding her damages and attorney fees for wrongful discharge by school district because there is material question of fact whether her complaint is barred by *laches*, having been filed more than six months after her discharge. However, she did establish that provision in contract declaring it null and void at the end of one year violates provisions of section 24-11 of School Code (105 ILCS 5/24-11 (West 20000)), which require the provision of written notice to a full-time teacher who will not be re-employed. In addition, award of attorney fees was improper because Attorneys Fees in Wage Actions Act (705 ILCS 225/0.01 *et seq.* (West 2002)) does not apply to discharge actions where no work was performed by employee during disputed period.

***Board of Education of Dolton School District 149 v. Miller*, No. 1-03-3513 (1st Dist., June 30, 2004)**

Absent an agreement or a duty to build walkways or sidewalks, the trial court abused its discretion when it ordered school district to construct sidewalks on land owned by a township road district and adjacent to school property.

Tort immunity and liability

***Prostran v. City of Chicago*, No. 1-03-0656 (1st Dist., June 11, 2004)**

City owed no duty to protect visually impaired pedestrian from open and obvious construction site along her path caused by torn up sidewalk across alley with neither distraction nor deliberate encounter exceptions applying. Further, city was immune from charge of failure to provide barricades or warning signs by virtue of section 3-104 of Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-104 (West 2000)).

***Cross v. City of Chicago*, No. 1-03-0408 (1st Dist., August 30, 2004).**

Because sections 2-201 and 2-209 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201, 2-209 (West 2002)) immunize municipal employer from claim for retaliatory discharge by employee who filed Workers' Compensation claim, plaintiff's complaint was properly dismissed by the circuit court.

***Kevin's Towing, Inc. v. Thomas*, No. 2-03-1118 (2nd Dist., August 18, 2004)**

Complaint against mayor of city alleging that she was guilty of tortious interference with contract and abuse of government power when she urged lumber company to hire local towing company in retaliation for incident in which cars were towed during fireworks display was subject to summary dismissal because conduct was discretionary act protected by section 2-201 of Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-2-01 (West 2000)).

***Peters v. Board of Trustees of Southern Illinois University*, No. 5-03-0025 (5th Dist., September 1, 2004)**

Because defendant is an arm of the State and because there is no statutory authority for review under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2000)), the circuit court lacked subject matter jurisdiction to transfer venue to a different county or to transfer case to Court of Claims, where review properly belongs, of university's decision to require all freshman under age 21 who are not living with parents or married to live in university-owned housing. Therefore, the order transferring venue is vacated, and case is dismissed pursuant to Supreme Court Rule 366.

Zoning

***Village of Chatham, Illinois v. County of Sangamon, Illinois*, No. 4-03-0878 (4th Dist., August 11, 2004)**

Standing Committee on Government Lawyers

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OFFICE
Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760 OR 800-252-8908

Web site: www.isba.org

Co-Editors
Kathryn Ann Kelly
219 S. Dearborn, Suite 500
Chicago, 60606

Lynn Patton
500 S. Second St.
Springfield, 62706

Managing Editor/Production
Katie Underwood
kunderwood@isba.org

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Trial court's declaration that a municipality had authority to exercise zoning and building-code jurisdiction over unincorporated tract within the statutory zoning authority of the county is correct, because Division 15.1 of the Illinois Municipal Code (65 ILCS 5/11-15.1-1 through 11-15.1-5 (West 2002)) specifically gives a municipality zoning authority over property that is subject to annexation agreement, to the exclusion of the county. Even though property that is subject to the agreement is not adjacent to the municipality, because the Municipal Code enactment is more recent than directly contradictory provision of equally specific provisions of the Counties Code (55 ILCS 5/5-1063 (West 2002)) and other Municipal Code provisions (65 ILCS 5/11-13-1 (West 2002)), the provisions of Division 15.1 of the Municipal Code control. Further, ordinance is not impermissible special legislation and is legitimate exercise of police power.

Correction

In the November 2004 issue of the Standing Committee on Government Lawyers newsletter, Lynn Patton was mistakenly listed as the author of the article entitled, "Legislative update." The article was co-authored by Cynthia Ervin and Lynn Patton. The ISBA apologizes for the error.

Communications and confidentiality issues: A cautionary tale

The walls have ears, ears that hear each little sound you make...
Elvis Presley

The ISBA Legal Department recently received a phone call from an agitated lay person who had overhead a lawyer on a commuter train discussing meetings with clients, naming clients, talking about billing practices and then dictating a memorandum to a client file that synopsized a case and case strategy, naming other lawyers and witnesses in the case. The listener was quite sure that the lawyer in question had no idea that half the train car had heard what he was discussing. The caller indicated that she intended to contact her own lawyer and ask that the lawyer sign a confidentiality agreement prohibiting such actions.

Rule 1.6(a) of the Illinois Rules of Professional Conduct states that "Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure." Even if a client does consent after disclosure, it is imperative that lawyers take great care not to break privilege through inadvertently ignoring his or her surroundings and possible listeners.

As conversations over mobile communications are often not conducted in private areas, lawyers should refrain from using such forms of communication when discussing confidential client matters, unless they are confident that the general public cannot overhear the conversation. It would be wise to assume that the walls have ears. If the walls don't, then the person standing next to you most certainly does.

ISBA Members may contact an ISBA Ethics Attorney Monday through Friday, between 9:00 a.m. and 4:00 p.m.: Springfield 800.252-8908 or 217.525.1760; Chicago 800.678.4009 or 312.726.8775. Membership status will be checked and the ethics counsel on duty for the day will respond in as timely a manner as possible.

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Presented by the ISBA Committee on Government Lawyers

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