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ILLINOIS STATE BAR ASSOCIATION

ADMINISTRATIVE LAW

The newsletter of the Illinois State Bar Association's Section on Administrative Law

Chair's comment page

By Marc C. Loro; Chairman, Administrative Law Section Council

Yes, we're still here and, yes, it got cold and windy down here and, oh yes, the General Assembly adjourned without meeting its self-imposed deadline for passing a budget. I'm shocked, shocked.

Nonetheless, you have to give the politicians who are running this State into the ground a little credit. In my first column as chair of the ALSC, I declared that the hammer was about to fall on government agencies and the people they serve. I was predicting a total breakdown in government operations, but that has not happened. The politicians have managed to stave off the collapse for the time being by borrowing enough money to keep the doors open. While this cannot go on much longer, it is obvious that it will go on until at least the end of the year and after the November elections.

One does not have to look very hard, however, to see that there is something very wrong here. Increasingly, day by day, the agencies and people who rely on government funds and assistance—the service providers and constituents, we call

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Administrative law decision summaries

By Hon. Edward Schoenbaum

Note: These summaries were prepared by Susan Brazas for the ISBA Illinois E-Mail Case Digests, which are free e-mail digests of Illinois Supreme and Appellate Court cases available to members soon after the cases appear on the Internet, with a link to the full text of the slip opinion on the Illinois Reporter of Decision's Web site. These have been downloaded and reorganized according to topic by Ed Schoenbaum for members of the Administrative Law Section, with permission.

Summaries for April-May, 2010

Supreme Court

Zoning; Notice

2d Dist. *Passalino v. The City of Zion*, No. 107429 (April 22, 2010) Lake Co. (FITZGERALD). Circuit court affirmed. (Modified Upon Denial of Rehearing filed 4/22/10).

City had rezoned property from multifamily to single family, and had given notice by publication, in strict compliance with statutory notice requirements of Section 11-13-2 of Illinois Municipal Code. Notice provision was unconstitutional as applied to these plaintiffs, because City failed to give notice which was reasonably calculated to inform them; sending notice via mail would have been possible and inexpensive, as plaintiffs had received assessment notices and property tax bills for 23 years. Holding, which is "as applied to plaintiffs," does not affect continuing validity of use of publication notice under Section 11-13-2. (Dissent filed).

Administrative Review

5th Dist. *Bartlow v. Shannon*, No. 5-10-0123 (April 9, 2010) Franklin Co. (STEWART) Reversed.

Illinois Department of Labor (DOL) notified Plaintiff roofing business that it had made preliminary determination of violation of Illinois

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INSIDE

***(Notice to librarians:** The following issues were published in Volume 39 of this newsletter during the fiscal year ending June 30, 2009: August, No. 1; September, No. 2; October, No. 3; December, No. 4; January, No. 5; February, No. 6; March, No. 7; April, No. 8; May, No. 9).*

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Chair's comment page

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them—are reaching the end of their rope. The *State Journal-Register* published a chilling article in its 14 May 2010 edition ("State's pile of unpaid bills grows—Illinois doesn't even issue IOUs"). See page 11. Programs are shutting down, legislators are being evicted from their rented district offices, etc., etc., and the State simply does not respond. The condemnation of the commentators has been withering, but it just seems to roll off the politicians' backs like water off a duck. See the 13 May 2010 commentary by Rich Miller in the *Illinois Times* ("Both sides to blame for the budget mess"), and no doubt your local public radio station broadcasts a program that originates in Springfield, called "State Week in Review." It is worth a listen. It is taped every Friday morning and broadcast over the weekend.

Regardless, the work of the ALSC goes on. We met in committee on 15 May and discussed several items. Our thanks to board liaison Carl Draper for loaning us his firm's conference room for those of us who attended the meeting in person in Springfield. We had the pleasure of meeting and petting his most trusted companion, Roscoe, a 14-year-old standard poodle. As sweet a gentleman as you will ever meet. (He takes after Carl).

We voted on four pieces of pending legislation. We voted to support **HB 5191**, which currently sits in the House, awaiting its concurrence with amendments passed out of the Senate. This bill relates to who prepares (and when) small business impact analyses of proposed rulemakings. We voted to oppose a section/provision in **HB 5007,** which makes confidential the findings of a (newly created) Department of Juvenile Justice mortality review team. The bill, which is awaiting the Governor's signature, provides that team meetings are not subject to the Open Meetings Act and that records and information provided to or maintained by a team are not subject to inspection and copying under the Freedom of Information Act. We believe that the final report should be available to the public.

Also awaiting the Governor's signature is **HB 5154**, which we voted to support. It amends the Personnel Record Review Act and provides that the disclosure of performance evaluations under the Freedom of Information Act shall be prohibited. This bill was the subject of extensive and passionate discussion. While at first blush it would seem that any documents pertaining to a public employee should be available to the public, we came to the conclusion that low-level supervisors and administrators would be reluctant to make a frank assessment of employee performances if what they say can be exposed to public view.

Finally, we voted to support **HB 6239**, also awaiting the Governor's signature, which allows several large counties to create a system of administrative adjudication of violations of certain, specific county ordinances. Large cities can do it; so should the counties.

As always, anyone who has concerns or comments on specific legislation, or ideas for legislation, is welcome to forward those to the ALSC.

The other important item on our agenda was to approve the publication of an administrative review checklist, which you will find in this issue of the newsletter. We trust that you will find this useful. We also expect to post it on the ALSC Web page, along with a sample complaint for administrative review. We also welcome suggestions for other items to be posted on our Web page.

With the new fiscal year that began on July 1, I hand over the responsibilities as chair to the very capable and gifted Ms. Ann Breen-Greco. It has been my privilege to serve as your chair for the past year and I will always be grateful to the ISBA and President O'Brien for giving me this opportunity. It has been quite a year. I submit that it has been a productive and successful year, but a difficult one for all those who practice administrative law. You should know that you are not alone and that the members of the ALSC are available to assist you in any way we can to help get you and your clients through this dark period in Illinois history.

One last thing, it has been an honor and a pleasure to serve with a small, hardcore group of committed and dedicated lawyers who thrive on getting things done. Regardless of the outcome, my satisfaction comes not just from being of service to the bar but, most of all, from being able to serve with you. We are brothers and sisters for evermore. ■

* The views and opinions expressed here are those of the author and are not intended to represent the views and opinions of the Illinois State Bar Association or the Office of the Secretary of State.

Administrative law decision summaries

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Employee Classification Act, and may be fined $1.6 million. Plaintiff filed declaratory judgment action alleging that DOL had not provided them opportunity for hearing, and had not returned their phone calls. The Act and its regulations appear not to provide for hearing, thus Plaintiffs adequately raise preenforcement constitutional challenges to Act. Potential harm to business means Plaintiff has inadequate remedy at law; and TRO is necessary to prevent continuing injury to business, and will preserve status quo with least injury to parties until court can hear merits of request for preliminary injunction.

Administrative Review, Public Utilities

1st Dist. *Sheffler v. Commonwealth Edison Company*, No. 1-09-0849 (February 26, 2010) Cook Co., 6th Div. (GORDON, R.E). Affirmed. (Court opinion corrected 4/19/10).

Class action filed by Chicago residents for damages due to electrical power outages during severe storms, alleging failure to have infrastructure in place to prevent controllable power interruptions and untimely response to power outages, Consumer Fraud Act violations, and breach of contract. Illinois Commerce Commission has original jurisdiction over action, as action implicates rates, and seeks relief that intimately impacts legislature's rate-setting function. Plaintiffs must thus first file complaint with ICC, and may then file for administrative review.

Elections 3d Dist. *Goodman v. Ward*, No. 3-09-1031 (April 9, 2010) Will Co. (CARTER) Circuit court affirmed. (Court opinion corrected 4/14/10).

Circuit court judge candidate did not reside in subcircuit for race at date he petitioned to be placed on primary ballot. Electoral Board denied petition filed objecting to his placement on primary ballot; circuit court reversed Board. Article VI, Section 11 of Illinois Constitution, which requires that persons eligible for judge position must be resident of unit which elects them, as well as amended Supreme Court Rule 39 and constitutional history, require that candidate for judicial subcircuit position have residency in that subcircuit at time of petitioning for placement on ballot. (Dissent filed).

Diligence of Service, Workers Compensation

3rd Dist. *Hagemann v. Illinois Workers' Compensation Commission*, No. 3-08-0989WC (January 22, 2010) Knox Co. (HOLDRIDGE). Affirmed in part and reversed in part; remanded. (Court opinion modified 04/30/10).

Court properly denied grain farm business's motion to dismiss circuit court appeal, but court erred in confirming Workers Compensation Commission's dismissal of injured worker's application for adjustment of claim. Worker was injured while driving semi-tractor trailer to haul grain, and genuine issue of material fact exists as to whether agricultural enterprise exemption of Workers Compensation Act applies. Employee did not fail to exercise reasonable diligence in service of summons, where circuit clerk failed to issue summons on improper grounds that county sheriff would not serve process on persons outside the county.

Employment Discrimination

***Swearnigen-El v. Cook County Sheriff's Dept.*, No. 09-2709 (April 22, 2010) N.D. Ill., E. Div. Affirmed**

Dist. Ct. did not err in granting defendant-employer's motion for summary judgment in Title VII action alleging that defendant constructively discharged plaintiff-prison guard by de-deputizing plaintiff and transferring him based on his race and gender after inmate had accused plaintiff of custodial sexual misconduct, which in turn led to initiation of criminal charges, to which plaintiff was eventually acquitted. Plaintiff's allegations that he was forced to quit after defendant had suspended him with pay pending further hearing were insufficiently severe in nature so as to constitute actionable constructive discharge, and plaintiff otherwise did not present evidence showing that others outside his protected classifications were treated more favorably. Fact that plaintiff was eventually cleared of all criminal charges was irrelevant.

Zoning

1st Dist. 1350 *Lake Shore Associates v. Randall*, No. 1-09-1126 (April 20, 2010) Cook Co., 2nd Div. (HOFFMAN) Affirmed.

Court properly characterized Lake Shore

Administrative Law

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Associates as large entity with substantial profits and assets, which allowed it to easily absorb loss of its pre-development expenditures of $272,022.18. Purchase price of property is a factor that may be considered in determining substantiality, but only those expenditures made in good-faith reliance on prior zoning classification are included in this determination. Because property here was bought 26 years before zoning classification was enacted, its purchase was not in reliance on classification, thus purchase price was properly excluded from consideration. Request for writ of mandamus was properly denied, as Lake Shore Associates' pre-development expenditures were not sufficiently substantial, and it thus had no vested right to develop property per zoning classification.

Labor Law

***Sheehy v. Enterprises, Inc. v. N.L.R.B.*, No. 09-1383 & 09-1656 Cons. (April 20, 2010) Petition for Review, Order of NLRB Petition denied**

Record contained sufficient evidence to support Bd.'s order affirming ALJ decision finding that employer committed unfair labor practice under NLRA by repudiating collective bargaining agreement (CBA). Employer's president admitted that he signed CBA in 2004, and ALJ could properly credit testimony indicating that president denied in 2007 that employer was bound by CBA at time when CBA was still in force. Employer waived argument that instant action was untimely even though it had been filed more than 6 months after union learned of employer's repudiation where employer had failed to assert instant statute of limitations affirmative defense in its answer to complaint or at hearing with ALJ.

Administrative Law

***FAL-Meridian, Inc. v. U.S. Dept. of Health and Human Services*, No. 09-3485 (May 6, 2010) Petition for Review, Order of Departmental Appeals Bd. Petition denied**

Record contained sufficient evidence to support Bd.'s imposition of $7,100 civil penalty against nursing home based on finding that home failed to maintain its facility free from accident hazards when one resident with strict order not to eat or drink by mouth was seen eating and drinking prior to her death. While nursing home personnel instructed resident on several occasions not to eat or drink, personnel knew that said directives were ineffective due in part to resident's mental illness. Moreover, nursing home failed to present evidence showing that it had done everything possible to minimize risk that resident would come into contact with food or water in unsupervised setting.

Aliens

***Raghunathan v. Holder,* No. 08-2475 & 08-3147 (April 29, 2010) Petition for Review, Order of Bd. of Immigration Appeals Petition denied**

Record contained sufficient evidence to support Bd.'s denial of alien's asylum request alleging that he had been beaten and imprisoned in Sri Lanka based on his Tamil ethnicity. Bd. could properly deny alien's pattern and practice claim arising out of alien's contention that all Tamils in Sri Lanka were subjected to mistreatment where record failed to show existence of extreme degree of mistreatment imposed on Tamils. Moreover, alien failed to show that family members in Sri Lanka were subjected to same alleged mistreatment that alien had claimed was part of pattern and practice. Alien had also failed to produce or to adequatel y explain absence of corroborating evidence in contravention of IJ order.

Editorial Comment: By: William A. Price. The Board of Immigration Appeals here ignored the US State Department's Report on Human Rights Practices for Sri Lanka (2008), updated Feb. 28, 2009, which stated that "The government's respect for human rights declined as armed conflict escalated. The overwhelming majority of victims of human rights violations, such as killings and disappearances, were young male Tamils, while Tamils were only 16 percent of the overall population. Credible reports cited unlawful killings by paramilitaries and others believed to be working with the awareness of the government, assassinations by unknown perpetrators, politically motivated killings, the continuing use of child soldiers by a paramilitary force associated with the government, disappearances, arbitrary arrests and detention, poor prison conditions, denial of fair public trial, government corruption and lack of transparency, infringement of freedom of movement, and discrimination against minorities. Pro-government paramilitary groups were credibly alleged to have participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity. During the year, no military, police or paramilitary members were convicted of any domestic human rights abuse. The executive failed to appoint the Constitutional Council, which is required under the Constitution, thus obstructing the appointment of independent representatives to important institutions such as the Human Rights Commission, Bribery Commission, Police Commission, and Judicial Service Commission."(See http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119140.htm). The USCIS Adjudicator's Manual, Section 10.5, states that "Initial case review should be thorough. Evidence or information not submitted with the application, but contained in other USCIS records or readily available from external sources should be obtained from those sources first rather than going back to the applicant for information or evidence." (See http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm) State Department Human Rights Reports are routinely used in immigration appeals. The agency clearly failed to follow its own process in either the initial decision or in the appeals process.

***Chen v. Holder*, No. 08-2836 (April 28, 2010) Petition for Review, Order of Bd. of Immunization Appeals Petition granted**

Alien (native of China) was entitled to reconsideration of his asylum petition alleging that he had been or will be persecuted because of his family's resistance to China's one-child policy and because of his membership in social group of children who had been born in violation of said policy. Remand was required since Bd.'s denial was based in part on improper summary rejection of portion of alien's persecution claim involving imputed political-opinion of his family's opposition to China's one-child policy. Bd. also provided incomplete analysis of alien's evidence indicating that Chinese govt. would deprive him of many fundamental rights and benefits based on his status as child born outside of one-child policy.

***Estrada v. Holder*, No. 08-1226 & 08-2218 Cons. (May 3, 2010) Petition for Review, Order of Bd. of Immigration Appeals Petition granted**

In action by alien seeking cancellation of removal (which was ultimately denied), IJ erred in refusing to consider alien's request to examine validity of 1996 order rescinding

alien's status as lawful permanent resident, where basis of refusal was IJ's belief that he was prohibited from reviewing permanent-resident rescission orders under Rodriguez-Esteban. IJ could have properly reviewed alien's request where alien argued that 1996 rescission order was invalid because he did not receive proper notice of INS's intent to rescind. Ct. further observed that on remand Bd. could still deny alien's ultimate request for cancellation of removal even if it first concludes that 1996 rescission order is invalid.

***Kucana v. Holder*, No. 07-1002 (May 4, 2010) Petition for Review, Order of Bd. of Immigration Appeals Petition denied**

Bd. did not err in denying alien's second motion to reopen asylum proceedings where alien argued that as individual who favored democracy, he feared future persecution if forced to return to Albania. Alien failed to show material change of conditions in Albania between first motion to reopen that had been filed in 2002 and second motion to reopen that had been filed in 2006.

Section 1983 Actions

***Egonmwan v. Cook County Sheriff's Dept.*, No. 09-2764 (April 22, 2010) N.D. Ill., E. Div. Affirmed Dist.**

Ct. did not err in granting defendant-employer's motion for summary judgment in section 1983 action alleging that defendant engaged in race and gender discrimination when it conducted internal investigation of sexual misconduct accusation made by inmate that led to plaintiff-prison guard's suspension, as well as initiation of criminal charges to which plaintiff was eventually acquitted. Plaintiff failed to show that any prison official was decision-maker with respect to initiation of criminal charges, or that any co-worker in non-protected classification was treated more favorably when accused of similar misconduct. Plaintiff also failed to show that defendant's explanation for initiation of internal investigation and for imposition of suspension (i.e., belief that plaintiff had committed sexual misconduct) was pretext for discrimination.

Social Security

***Schaaf v. Astrue*, No. 09-2820 (April 26, 2010) W.D. Wisc. Affirmed.**

Dist. Ct. did not err in affirming ALJ's denial of claimant's application for Social Security disability benefits based on claimant's loss of partial use of one arm. ALJ could properly find that claimant's injury was not severe enough to prevent him from performing light duty work and was not required to give controlling weight to treating physician's contrary opinion since said opinion was not supported by medically acceptable clinical and laboratory diagnostic techniques to document any of claimant' s symptoms that would prevent him from working. Moreover, ALJ could discount claimant's contention that he suffered from extreme pain where medical records did not show that claimant made similar claim.

Summaries for May-June 2010

Illinois Supreme Court PLAs

The Illinois Supreme Court granted petitions for leave to appeal in the following cases on May 26, 2010:

Employee Benefits

***Gaffney v. Bd. of Trustees of the Orland Fire Department; Lemmons v. Orland Fire Protection Dist*. <http://eservices.isba.org/12all/lt/t_go.php?i=3923&e=MTAwNzg5MTg=&l=-http--www.state.il.us/court/Opinions/AppellateCourt/2009/1stDistrict/December/1090046.pdf>, No. 101198 & 110012 Cons., 1st Dist.**

These cases present question as to whether plaintiffs-firefighters, who were injured during live-fire training exercises, were entitled to payment of health coverage benefits under section 10 of Public Safety Employee Benefits Act. Appellate Ct. in Gaffney affirmed trial court's denial of firefighter's application for benefits after finding that said firefighter did not have reasonable belief that he was responding to emergency at time of exercise. Appellate Court in Lemmenes, in affirming trial court's grant of application, found that firefighter's injury occurred in response to reasonable belief of emergency at time of exercise. Lemmenes case: <http://www.state.il.us/court/Opinions/AppellateCourt/2010/1stDistrict/March/1091133.pdf>.

Due Process, Court of Claims

5th Dist. *Lake v. State of Illinois*, No.5-08-0179 (May 19, 2010) Clinton Co. (SPOMER) Reversed and remanded with directions.

Circuit court dismissed inmate's pro se petition for common-law certiorari relief from Court of Claims order dismissing his medical malpractice claim against DOC. Circuit court erred in sua sponte dismissing petition without examining record, as Plaintiff alleged that Court of Claims failed to protect his rights to trial on merits and denied his due process right to be heard. Examination of record is a condition precedent to dismissal of petition, in order to determine whether Plaintiff's due process rights were violated.

Employment, Mental Health

5th Dist. *Department of Central Management Services v. American Federation of State, County & Municipal Employees*, No. 5-08-0663 (June 4, 2010) Randolph Co. (GOLDENHERSH) Affirmed.

Mental health facility employee was discharged for striking a resident during altercation initiated by resident. Circuit court properly upheld arbitrator's reinstatement of employee, reducing his punishment to disciplinary suspension without backpay and final warning; employee had exemplary record and was acting out of surprise in altercation with resident who had propensity for violence. Court properly ordered employee's name removed from health care worker registry, given the circumstances, even though arbitrator had found that employee had abused resident; otherwise, worker would not be employable, as facilities are prohibited from employing persons who are listed on registry due to finding of abuse of resident.

Employment, Due Process

1st Dist. *Matos v. Cook County Sheriff's Merit Board*, No. 1-09-2042 (May 13, 2010) Cook Co., 4th Div. (GALLAGHER) Affirmed.

Correctional officer was discharged for making physical contact of an insulting or provoking nature with a correctional rehabilitation worker, by touching her inappropriately. Merit Board did not abuse its discretion in barring Plaintiff from presenting medical evidence that he limped and frequently lost his balance from car accident injuries, in his defense that contact was unintentional, as Plaintiff did not disclose evidence prior to date of hearing and as he was allowed to testify as to his medical condition at hearing. Termination was not unduly harsh sanction, given evidence of Plaintiff's conduct and his prior disciplinary record.

Minimum Wage Act

3d Dist. *People ex rel. Department of Labor v. Sackville Construction, Inc.*, No. 3-09-0006 (June 9, 2010) Rock Island Co. (LYTTON) Reversed and remanded with instructions.

Prevailing Wage Act applies to laborers

hired by private developer to build industrial complex on vacant downtown lot, because developer is a "public body" as its project was supported in part by public funds, and the project was a "public work" even though not financed through certain statutes, and notice to subcontractor of applicability of Prevailing Wage Act was not essential to find it liable for back wages.

Premises Liability, Workers' Compensation

1st Dist. *Keating v. 68th and Paxton* <http://eservices.isba.org/12all/lt/t_go.php?i=3927&e=MTAwNzg5MTg=&l=-http--www.state.il.us/court/Opinions/AppellateCourt/2010/1stDistrict/April/1091759.pdf>, No. 1-09-1759 (April 27, 2010) Cook Co., 2nd Div. (THEIS) Affirmed. (Court opinion corrected 5/20/10).

Plaintiff sued building owner and manager for injuries he sustained while repairing a porch at an apartment building, alleging premises liability and failure to provide him with workers compensation insurance. Workers Compensation Commission, and not circuit court, had jurisdiction to determine whether Plaintiff could seek relief under Section 4(d) of Workers Compensation Act. Court properly granted summary judgment against Plaintiff on premises liability count, because Plaintiff came forth with no evidence on element of causation. Plaintiff's attempted inference that a rail detached from its support post, causing it to give way and failing to protect him from falling because it was improperly fastened, was speculative.

Property Taxes

1st Dist. *Calumet Transfer, LLC v. Property Tax Appeal Board*, No. 1-08-3291 & 1-08-3292 Cons. (May 14, 2010) Cook Co., 6th Div. (CAHILL) Affirmed.

Property Tax Appeal Board properly allowed Chicago Board of Education to challenge the arm's length nature of a property sale through bankruptcy, by offering evidence of comparable property sales. PTAB's findings as to fair cash value of properties formerly used for coke production facility and blast furnace facility were supported by the evidence, including evidence of comparable properties.

Tax Deeds

3d Dist. *Strong v. City of Peoria*, No. 3-09-0709 (June 9, 2010) Peoria Co. (LYTTON) Affirmed.

Plaintiff paid delinquent taxes on property and obtained a tax certificate, but tax deed had not yet been issued at time of demolition of property. Plaintiff did not acquire title until county clerk issued tax deed, thus was not entitled to damages equal to difference in market value of property before and after demolition, but instead to compensatory damages that would restore him to position he was in before loss, which was amount of taxes he paid on property. City should have given Plaintiff prior notice of demolition per Municipal Code requirement of notice to holder of tax lien certificate.

Unemployment Compensation

1st Dist. *Kilpatrick v. Illinois Department of Employment Security*, No. 1-09-0708 (April 27, 2010) Cook Co., 2nd Div. (KARNEZIS) Affirmed.

College chemistry and math teacher was not entitled to unemployment benefits for summer school session for which his weekly adult education teaching hours were reduced from 24 to 7, as teacher had reasonable assurance of employment for subsequent fall semester. Summer session is not part of "academic term" as defined in Section 612 of Unemployment Insurance Act, which provides that teachers are not to be paid unemployment benefits in between academic terms.

Workers' Compensation

1st Dist. *Skzubel v. Illinois Workers' Compensation Comm'n Division*, No. 1-09-0442WC (May 4, 2010) Cook Co. (HUDSON) Reversed in part, vacated in part; remanded.

Commission's finding that newspaper courier was not an employee was against manifest weight of evidence, given key factors that newspaper distributing company controlled actions of courier, designating when, how, and to whom newspapers were to be delivered, and controlled nature of work. Label of "independent contractor" in parties' written agreement was a minor factor to consider.

Workers' Compensation, Jurisdiction

2d Dist. *Esquivel v. Illinois Workers' Compensation Comm'n*, No.2-09-0122WC (June 3, 2010) Winnebago Co. (HUDSON) Affirmed.

Circuit court properly found that it lacked subject-matter jurisdiction to consider petition for administrative review of workers compensation decision because claimant failed to establish that he timely exhibited to circuit clerk any documentation showing proof of payment of probable cost of record on appeal. Strict compliance with Section 19(f)(1) of Workers' Compensation Act is essential to circuit court's subject-matter jurisdiction.

Personal Jurisdiction

1st Dist. *Morgan, Lewis & Bockius LLP v. City of East Chicago*, No.1-09-2549 (May 28, 2010) Cook Co., 6th Div. (McBRIDE) Affirmed.

Circuit court properly denied motion to dismiss of City of East Chicago, Indiana, claiming lack of personal jurisdiction as to complaint by law firm for unpaid legal fees for representing City in Indiana and federal courts. Court appearances were only in Indiana, but documents were passed between states for review, and depositions and some meetings were in Illinois. The Illinois long-arm statute applies, as City intentionally sought legal representation with Illinois firm and continued that relationship across state lines.

7th Circuit

Administrative Law

***CE Design, Limited v. Prism Business Media, Inc*. <http://eservices.isba.org/12all/lt/t_go.php?i=3927&e=MTAwNzg5MTg=&l=-http--www.ca7.uscourts.gov/fdocs/docs.fwx--Q-submit--E-showbr--A-shofile--E-09-3172_002.pdf>, No. 09-3172 (May 27, 2010) N.D. Ill., E. Div. Affirmed.**

Dist. Ct. did not err in granting defendant's motion for summary judgment in action under Telephone Consumer Protection Act alleging that defendant improperly faxed unsolicited advertisement for trade show after Dist. Ct. found, pursuant to FCC Order, that defendant had established business relationship (EBR) (in form of magazine subscription) that exempted defendant from liability under Act. While plaintiff contended that FCC Order establishing said exemption was invalid, Ct. of Appeals found that Dist. Ct.. lacked jurisdiction pursuant to Hobbs Act to rule on said contention, and that defendant's business relationship with plaintiff otherwise fell within EBR exception.

***Aliens Chen v. Holder*, No. 09-2619 (June 10, 2010) Petition for Review, Order of Bd. of Immigration Appeals Petition granted.**

Record did not support Bd.'s finding that negative reaction by Chinese officials to alien's filing of lawsuit challenging Chinese policy of failing to promptly compensate individuals for land seized to build military building did not constitute persecution based on alien's political position so as to support alien's asylum claim. Remand was required because Bd. failed to address issue as to whether: (1) alien's lawsuit against local Chinese unit of govt. was legitimate means to express political opinion; (2) harsh response by Chinese officials to alien's lawsuit (i.e., arrest warrant) was attempt to muzzle political opponent; and/or (3) alien was credible in her allegations of persecution.

***Khan v. Holder*, Nos. 09-3825 & 09-3882 Cons. (June 11, 2010) Petitions for Review, Order of Dept. of Homeland Security Petition dismissed.**

Ct. of Appeals lacked jurisdiction to review decision by Customs and Border Protection officer to process aliens for expedited removal under 8 USC section 1225(b)(1)(A)(i) after finding that aliens were attempting to immigrate to U.S. without immigrant visas. Statute provides that no reviewing court has jurisdiction to review instant decision, and Ct. rejected aliens' claim that Ct. of appeals has jurisdiction to review instant decision under safety valve provisions established for resolution of substantial constitutional questions.

***Immigration Rama v. Holder*, No. 09-2156 (May 28, 2010) Petition for Review, Order of Bd. of Immigration Appeals Petition denied.**

Record contained sufficient evidence to support IJ's denial of asylum request from alien (native of Albania) who asserted that she and her family were victims of violence and threats on account of her husband's political views. IJ could properly find that alien's claims were not credible in light of variance between alien's testimony and her statements given at airport interview, as well as fact that alien could not produce any documents to support her claim that her husband was leader in political party.

***Taxation Lantz v. Commissioner of Internal Revenue*, No. 09-3345 (June 8, 2010) U.S. Tax Court Reversed and remanded.**

Tax Ct. erred in invalidating two-year limitation period established by Dept. of Treasury for section 6015(f) claims, which had effect of preventing instant taxpayer from seeking innocent spouse treatment to avoid joint and several liability for understatement of taxes on joint tax return. While Tax Court found that limitations period established by Treasury Dept. was improper where no limitations period was contained in section 6015(f), Treasury Department could properly borrow two-year limitation period contained in sections 6015(b) and (c) when establishing instant two-year limitation period for section 6015(f) claims in order to obtain consistency in treatment for taxpayers asserting similar equitable claims. However, taxpayer can still seek hardship relief under section 6343(a)(1)(D) to extent she can show that continued attempt to collect $1.3 million assessment would render her unable to pay for reasonable basic living expenses. ■

A checklist for judicial review of an administrative agency decision

By J.A. Sebastian. Comments & Assistance by Carl Draper and Jewel Klein. Additional editing by William A. Price

In the May 2010 *Illinois Bar Journal*, Judge Ron Spears suggested that it would seem a worthwhile project for legal associations to allocate space on their Web sites for checklists by practice areas. 98 IBJ 268-269 (2010). In response to "The Judge's Corner" the following checklist may assist if seeking to review an Illinois administrative agency decision.

The governing statute for judicial review of an administrative agency decision is the Illinois Administrative Review Law ("ARL"). 735 ILCS 5/3-101 through 3/113 (West 2008). Begin by reading this statute and review the statute of the agency, whether Illinois Department of Revenue (IDOR) or Illinois Department of Employment Security (IDES) or Illinois Department of Children and Family Services (DCFS), Illinois Labor Relations Board, State or Local Panel (ILLRB or ISLRB), or whatever agency issued a final agency decision.

1. What is reviewed?

Section 3-101 of the ARL defines "administrative decision" as a determination by an agency which affects the rights and duties of the parties and terminates the proceedings. Thus, the action must be final. The rules and statutes governing practice before the specific agency should be carefully reviewed to determine if additional steps are necessary to exhaust administrative remedies before court review is allowed.

2. When is the complaint/petition filed?

Section 3-102 of the ARL provided that if a complaint is not filed within the time and in the manner provided in the ARL, no jurisdiction is conferred and judicial review is barred.

3. What does "in the manner" provided mean under the ARL?

Section 3-103 provides: "Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days…."

4. How do you calculate 35 days?

Weekends and holidays are excluded from a deadline computation only if they fall on the last day of the filing time period; thus, intervening weekends are counted in calculating the 35 day deadline within which a plaintiff must file his complaint under 735 ILCS 5/3-103. *Carroll v. Dep't of Empl. Sec.*, 389 Ill. App. 3d 404, 409 (1st Dist. 2009).

In computing the 35-day period, the first day is excluded and the last day included. *Cox v. Board of Fire & Police Comm'rs,* 96 Ill. 2d 399 (1983).

The statute and rules governing the agency's practice should be reviewed to see when the 35 day period commences. They may specify that notices are effective when mailed, not when received.

5. Who must be named and served?

All parties of record to the proceeding, thus name the director of the agency, and the administrative agency, the board, committee, or other government entity, and name all other parties who participated in the administrative agency action, including, for example, if the proceeding had been held before the Cook County Sheriff's Merit Board based on a complaint for hearing brought by the Sheriff of Cook County, name the Sheriff

Section 3-108(a): **Plaintiff's Complaint** The complaint must allege that plaintiff was a party of record to administrative proceedings and that rights, privileges, or duties were adversely affected by the agency's decision. *Novosad v. Mitchell*, 251 Ill. App. 3d 166 (4th Dist. 1993). • The complaint must request that the transcript of evidence shall be filed by the agency as part of the record. • The complaint must also contain a statement of the decision or part of the decision sought to be reviewed. • The plaintiff has the burden of proving that the agency was wrong, and a court may not substitute its judgment for that of the agency. *Water Pipe Extension v. City of Chicago*, 195 Ill. App. 3d 50 (1st Dist. 1990).	Section 3-108(b): **Defendant's Answer** "The agency must file the original or a certified copy of the entire record of proceedings under review, including such evidence as may have been heard and the findings and decisions made." • This means that the agency does not have to frame the issues by filing an answer as provided for in other civil proceedings. *Kaminski v. Illinois Liquor Control Comm'n*, 20 Ill. App. 3d 416 (1st Dist. 1974). • If the agency has not reached a final decision, motion to dismiss for failure to exhaust administrative remedies.
Section 3-103: **Commencement of Action** • Every action to review shall be commenced by filing a complaint and issuance of summons within 35 days from the date that a copy of the decision was served upon the party affected by the decision • Except….	• If case is filed outside 35-day-limit, file motion to dismiss under Section 2-619(a)(1) 735 ILCS 5/2-619(a)(5) • If venue is prescribed by the agency's statute, file motion to transfer venue under Sec. 3-104 (735 ILCS 5/3-104) • If review is not applicable under ARL, file motion to dismiss under Section 2-615 735 ILCS 5/2-615 • If review should have been filed directly in the appellate court, file motion to dismiss. There is no mechanism for transfer of an action wrongly filed in the circuit court. *County of Coles v. Property Tax Appeal Bd.*, 275 Ill. App. 3d 945 (4th Dist. 1995) Improper service may be basis for motion to dismiss Improper parties may be motion to dismiss, but see P.A. 95-831, eff. 8/14/08.
Section 3-105: **Service of summons** **• The method of service shall be as provided in the Act governing the procedure before the administrative agency, but if no method is provided, summons shall be deemed to have been served either when a copy of the summons is personally delivered or when a copy of the decision is deposited in the U.S. mail… postage prepaid, addressed to the party affected by the decision at his or her last known residence or place of business.** (P.A. 95-831, eff. 8/14/08) • Service on the agency shall be made by the clerk of the court by sending a copy of the summons addressed to the agency at its main office in the State. • Service on the director or agency head, in his or her official capacity, shall be deemed service on the administrative agency, board, committee, or government entity.	Section 3-106: **Appearance of defendants** • The agency shall appear by filing an answer consisting of a record, or a written motion in the cause or a written appearance. • All other defendants desiring to appear shall appear by filing a written appearance.

of Cook County in the complaint for judicial review because the Sheriff had been a party to the administrative Cook County Sheriff's Merit Board proceeding; or name the Illinois Labor Relations Board, Local Panel, if the proceeding was held before the Illinois Labor Relations Board, Local Panel. Failure to name the "Local Panel" may result in dismissal of the review action. Similarly, where a former teacher, in the appeal of his termination, failed to name as a defendant the Illinois State Board of Education, which was charged with providing a termination hearing pursuant to 105 ILCS 5/2-3.8, and the hearing officer as parties of record under the Illinois School Code, may result in dismissal of the review action. *See Jones v. Cahokia Unit Sch. Dist. No. 187,* 363 Ill. App. 3d 939, 845 N.E.2d 866, (5th Dist. 2006).

The clerk of the circuit court will serve summons on all parties that plaintiff has identified, so be sure to include the names and addresses of each and every party to assure that the summons is served within the 35-day statutory time period. Note Supreme Court Rule 12, which specifies when service is effective by mail (12(d): 4 days); by commercial carrier (12(e): on 3d business day); and by fax (12(f): on next court day).

6. The complaint must request that the transcript of evidence shall be filed by the agency; the complaint must contain a statement of the decision or part of the decision sought to be reviewed, so many plaintiffs include the final agency decision as an exhibit to the complaint for judicial review.

THEREFORE, read the Administrative Review Law, and read the governing law of the administrative agency to determine where you file your complaint/petition for review. This could be direct appeal in the appellate court or complaint for review in the circuit court. Your petition should:

- Allege plaintiff was a party of record to the administrative proceeding;
- Request transcript of evidence be filed;
- Contain a statement that the decision of the agency be reviewed;
- File complaint within 35 days from the date that a copy of the decision was served upon plaintiff;
- Name, as a defendant, each and every party to the administrative proceeding;
- Serve summons upon all parties of record to the administrative proceeding;

Key components of the ARL are briefly summarized in the tables above and at the

Section 3-107: **Defendants** SB 2111, P.A. 95-831, effective August 14, 2008. See Senate Transcript, 95th General Assembly 4/16/2008.	
Section 3-110: Scope of review "The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." It is not a court's function on administrative review to reweigh evidence or to make an independent determination of the facts. *Cook County Republican Party v. Illinois State Board of Elections*, 232 Ill. 2d 231, 244 (2009). Questions of law are reviewed de novo, while mixed questions of law and fact are reviewed under the clearly erroneous standard. *Outcom, Inc. v. Illinois Department of Transportation*, 233 Ill. 2d 324 (2009); *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill. 2d 200 (2008); *City of Belvidere v. Illinois State Labor Rels. Bd.*, 181 Ill. 2d 191, 205 (1998). An administrative decision is clearly erroneous where the reviewing court is left with the definite and firm conviction that a mistake has been made. *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Rels. Bd.*, 216 Ill. 2d 569, 577-78 (2005).	Section 3-110: "No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court." An administrative agency's decision regarding the conduct of its hearing and the introduction of evidence is properly governed by an abuse of discretion standard and subject to reversal only if there is demonstrable prejudice to the party. *Wilson v. Department of Prof'l Regulation*, 344 Ill. App. 3d 897, 907 (1st Dist. 2003)
Section 3-111(a): The Circuit Court has nine delineated powers including the power • To dismiss parties, to correct misnomers, to realign parties, or to join agencies or parties (P.A. 95-831, eff. 8/14/08) • to stay the decision of the agency in whole or in part upon notice to the agency and good cause shown; • to affirm or reverse the decision in whole or in part; • to reverse and remand the decision in whole or in part, and, in that case, to state questions requiring further hearing or to give such other instruction as may be proper; • to remand for the purpose of taking additional evidence (However, the court shall not remand upon grounds of newly discovered evidence, unless the evidence could not upon exercise of reasonable diligence have been obtained in the administrative proceeding).	Section 3-111(b): • Technical errors in the proceedings before the agency or its failure to observe the technical rules of evidence shall not constitute grounds for reversal, unless such error or failure materially affected the rights of any party and resulted in substantial injustice.
Briefing and Court Hearing (typically): • Plaintiff sets out what is sought to be reviewed in complaint • Court sets briefing schedule • Plaintiff files MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT • Plaintiff has the burden of proof. *Marconi v. Chicago Heights Police Pension Bd.*, 225 Ill.2d 497 (2007). • Plaintiff files a REPLY BRIEF, due either seven or 14 days from the filing of the RESPONSE BRIEF. Check the court's local rules and check judges' standing orders: some judges have maximum page limit, and require oral argument. In the Circuit Court of Cook County, the Chancery Division hears some administrative review actions; County Division hears Cook County Electoral Board cases pursuant to the statute, based on a petition for judicial review; Tax & Miscellaneous Remedies Section, Law Division, hears administrative review of IDOR cases and IDES cases; and, the First Municipal District, Civil Division, hears review of the City of Chicago's Department of Administrative Review cases.	RESPONSE BRIEF: Defendant's RESPONSE BRIEF is typically due within 28 days of Plaintiff's memorandum of law. Applicable standard of review may determine the direction the court takes on review. Standard depends on whether the question presented is one of fact, one of law, or a mixed question of fact and law. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008).
Section 3-112: **Appeals** • Plaintiff may appeal final decision or order of judgment of the Circuit Court entered in an administrative review action, which is reviewable by appeal as in any other civil cases. • Method of review is filing Notice of Appeal. See Sup.Ct. Rule 301. File with clerk of the circuit court within 30 days of the entry of the final judgment. See Sup. Ct. Rule 303.	Section 3-112: **Appeals** Defendant may file appeal as in any other civil cases. File with clerk of the circuit court within 30 days of the entry of the final judgment. See Sup. Ct. Rule 303. Agency may petition the court to stay its decision pending review.

beginning of this article.

Note that the Circuit Court of Cook County has several official forms for use in different types of administrative review actions. Practitioners are cautioned that the forms are only a starting point. As noted above, there are agency-specific and ARL elements that need to be considered in all administrative appeals. The Cook County forms are at right.

Additional Resource: The ISBA publishes a Handbook of Illinois Administrative Law, now in its Second Edition. Author Julie Ann Sebastian's chapter on Administrative Review, Carl Draper's chapter on Certiorari, and William A. Price's chapter on Attorney Fees are all worth reviewing before preparing the paperwork for administrative review. ■

Form No.	Divison	Description	Revision
CCG 0124	GENERAL	SUMMONS IN ADMINISTRATIVE REVIEW (VILLAGE OR TOWNSHIP)	5/4/2001
CCG 0125	GENERAL	PRO-SE COMPLAINT FOR IL ADMINISTRATIVE REVIEW	4/11/2006
CCG 0600	GENERAL	SUMMONS IN ADMINISTRATIVE REVIEW	8/23/2001
CCL 0040	LAW	SUMMONS IN ADMINISTRATIVE REVIEW	2/7/2001
CCL 0092	LAW	SUMMONS IN ADMINISTRATIVE REVIEW (DEPARTMENT OF EMPLOYMENT SECURITY)	3/29/2007
CCL 0093	LAW	PRO SE COMPLAINT FOR ADMINISTRATIVE REVIEW (DEPARTMENT OF EMPLOYMENT SECURITY)	9/6/2000
CCM 0002	CIVIL	ADMINISTRATIVE REVIEW PARKING VIOLATION - VEHICLE IMPOUNDMENT HEARING INFORMATION SHEET	4/27/2010
CCM 0005	CIVIL	PRO SE COMPLAINT FOR ILLINOIS ADMINISTRATIVE REVIEW	7/16/2001
CCM 0140	CIVIL	COMPLAINT FOR ILLINOIS ADMINISTRATIVE REVIEW	1/15/2009
CCM 0141	CIVIL	SUMMONS IN ADMINISTRATIVE REVIEW	4/7/2009
CCM 0142	CIVIL	ADMINISTRATIVE REVIEW COVER SHEET	4/7/2009

Klein Construction and the Commission's duty to review issues

By Michael Edwalds

The Illinois Appellate Court, in *Klein Construction v. Illinois Workers' Compensation Comm'n*, 384 Ill. App. 3d 233 (2008), inspected the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2008)) and the Commission's rules implementing the Act. The court found a conflict between the Act and the rules. In resolving the conflict, the court traced the statutory duties of the Commission. Because of the conflict, the Commission should consider revising its rules. Because the statutory duties conflict with the need for speedy determination of cases, the legislature should consider amending the Act.

John Klein suffered a back injury while working for Klein Construction on April 26, 1999. John filed a claim under the Act. The arbitrator found the work injury caused deterioration of John's cervical spine, but the work injury did not cause the complaints related to John's thoracic spine. The arbitrator awarded John temporary total disability benefits for about three years. John filed a petition for review of the arbitrator's decision. In the petition John argued that his complaints related to his thoracic spine, and the associated medical costs, resulted from the work injury, and the accident led to a longer period of total disability. But John filed no statement of exceptions, and no supporting brief, to challenge the arbitrator's findings.

The Commission's rules provide

> The Commission will only consider, and oral arguments will be limited to, the issues raised *** in the party's statement of exception(s) *** and supporting brief ***. Failure of any appellant or petitioning party to file timely any statement of exception(s) *** and supporting brief *** shall constitute waiver of the right to oral argument by that party and an election not to advise the Commission of any reason to change the Arbitrator's decision or to grant the petition.
>
> 50 Ill. Admin. Code sec. 7040.70 (d) (2006).

Following the rule, the Commission did not hear oral argument on John's petition. However, the Commission considered the issues on the merits and found the condition of John's thoracic spine causally related to the work accident. Accordingly, the Commission awarded John medical expenses related to his thoracic spine and extended his disability payments to almost five years.

On appeal Klein Construction argued that the Commission breached its own rules by considering the issues on the merits, and that even if the Commission had authority to consider the issues, it abused its discretion by reviewing the issues here. The court acknowledged that according to the rule, the Commission would not consider any issues not raised in the statement of exceptions and the supporting brief. But the court held that the rule conflicted with the Act, which provides, "[i]f a petition for review and agreed statement of facts or transcript of evidence is filed, *** the Commission shall promptly review the decision of the Arbitrator and all questions of law or fact which appear from the statement of facts or transcript of evidence." 820 ILCS 305/19(e) (West 2008). Thus, the Act authorizes the Commission to consider the issues on the merits. The court explained:

> Once a timely petition to review an arbitrator's decision has been filed along with an agreed statement of facts or a transcript of the evidence, the Commission is obligated to review all questions of law or fact which appear from the transcript of evidence ***.
>
> Although the claimant's failure to file a Statement of Exceptions acted as *** an election not to advise the

> Commission of any reason to change the arbitrator's decision or to grant his petition, the Commission was nevertheless required by statute to review all questions of law or fact which appeared from the transcript of evidence.

Thus the court seems to hold that the Commission has a duty to review, on the merits, any question which appears from the transcript of the evidence, even if the parties fail to raise the question on review.

In the closing paragraphs, however, the court finds that the Commission did not abuse its discretion by considering the merits of the waived issues. The court said, "we are unable to find that the Commission's election not to invoke the waiver doctrine in this case was an abuse of discretion." This phrasing seems to imply that the court has discretion to invoke the waiver doctrine, and so to choose not to review a waived issue on its merits. The decision elucidates a tension implicit in the Act.

The Act gives the Commission broad powers to review any issues the Commission chooses to consider, even if the parties do not raise the issues in the petition for review, the statement of exceptions, or the supporting brief. 820 ILCS 305/19 (b) and (e) (West 2008). The Commission may make specific findings on questions the parties have "submitted in writing, " presumably in the statement of exceptions and supporting brief. 820 ILCS 305/19 (e) (West 2008). No provision requires the Commission to make explicit findings on questions not submitted in writing. Yet the Act requires the Commission to review any questions that appear from the record. As the appellate court held, the language of the Act broadly requires the Commission to review issues the parties failed to raise in the statement of exceptions and the supporting brief. The broad language of the Act appears to impose on the Commission a duty to search the record for any meritorious issues, regardless of the parties' failure to raise those issues at any point. Such a broad duty to review, without guidance from the parties, increases the time the Commission must spend on each case.

The Act suggests a limit to the duty: the Commission in its written decision need not address every possible issue suggested by the record. The Commission may address questions the parties properly submitted in writing, and any other issues that present the Commission with grounds to modify or reverse the arbitrator's decision. Some questions appearing from the transcript, questions the Commission must review, will not merit comment in the Commission's concise decisions. See 820 ILCS 305/19 (e) (West 2008).

The Commission in its rules, and the legislature in the Act , should clarify the extent of the Commission's duty to search the record for possible grounds for modifying or reversing the arbitrators' decisions. In the interest of reaching fair results, the Commission should have the authority to address any issue that causes the Commission to question the justice of the arbitrator's decision. The Commission's rules should not purport to foreclose the Commission from addressing such issues. But the Act should not require the Commission to do all of the work of the parties' attorneys. In the interest of judicial economy and timely decision-making, the Commission should not have the duty to address any issues beyond those the parties properly present, with adequate citations to the factual record and adequate legal support. Proper amendments to the Act and the rules should reshape the Commission's authority and its duty. ■

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

August

Tuesday, 8/3/10- Teleseminar—Buy/Sell Arrangements in LLCs. 12-1.

Thursday, 8/5/10- Webcast—Administrative Adjudication: Administrative Hearings- Presenting Effectively. Presented by the ISBA Administrative Law Section. <http://isba.fastcle.com/store/seminar/seminar.php?seminar=5254>. 12-1.

Friday, 8/6/10- Teleseminar—LIVE REPLAY: Choice of Entity for Service Businesses, Including Law Firms. 12-1.

Tuesday, 8/10/10- Teleseminar—Estate Planning for Non-Traditional Families, Part 1. 12-1.

Wednesday, 8/11/10- Teleseminar—Estate Planning for Non-Traditional Families, Part 2. 12-1.

Thursday, 8/12/10- Webinar—Advanced Legal Research on Fastcase. Presented by the Illinois State Bar Association. 12-1.

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