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ILLINOIS STATE BAR ASSOCIATION

THE PUBLIC SERVANT

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

From the Chair

By Kevin Lovellette

This past year has been a busy one for the ISBA Standing Committee on Government Lawyers. We presented the "Ethics Extravaganza," a live seminar providing 4 hours of PMCLE credit. The Extravaganza was well received by the audience, and the Committee hopes to continue presenting it in future years. We are also producing a webinar regarding cameras in the courtroom. The program will feature a panelist from the news media, one from the area of criminal law, and one from the judiciary (a special guest from the Illinois Supreme Court). This CLE webinar will be broadcast live online on June 3, 2015, and it will be recorded and available on the ISBA website free of charge for ISBA members. It will be moderated by Committee member Evan Bruno. The Committee is also producing a second webinar to discuss the timely topic of concealed carry permits, including a discussion of the changing law in this area, moderated by Committee member Justin Leinenweber. Keep watching the ISBA website for details of this event, currently scheduled for August 2015.

In addition to these CLE events, the Commit-

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When the term "shall" is directory: The Illinois Supreme Court reinforces the presumption that statutory language that issues a procedural command to a government official is directory, rather than mandatory

By Barbara Goeben

In three recent decisions, *In re M.I.*, 2013 IL 113776, *In re James W,* 2014 IL 114483, and *In re Rita P.*, 2014 IL 115798, the Illinois Supreme Court has reinforced the presumption that statutory language that issues a procedural command to a government official, in these cases circuit courts, is directory, rather than mandatory. These opinions are noteworthy because even though all three cases reviewed statutes utilizing the term "shall," the Court found the statutes directory.

In re M.I. - The Supreme Court in *In re M.I.*, 2013 IL 113776, addressed the holding of a hearing on a motion to designate a juvenile proceeding as an extended jurisdiction juvenile prosecution. The Court held that the language of section 5-810(2) of the Juvenile Court Act of 1987, requiring that "the court shall commence a hearing [on the motion] within 30 days of the filing of the motion for designation, unless good cause is shown * * * as to why the hearing could not be held within this time period. If * * * good cause has been demonstrated, then the hearing shall be held within 60 days of the filing of the motion" (708 ILCS 405/5-810 (West 2008)), is directory. ¶¶14, 28.

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tee is pleased to bestow the inaugural Roz Kaplan Award, an honor which recognizes a government attorney's dedication to public service. The award is presented in memory of Ms. Kaplan, a former member of the Committee, who exemplified the best of government attorneys. She lost her battle with cancer a few years ago, and the Committee is extremely proud to present this award in her honor. The recipient will be announced by the ISBA and the award will be presented at the ISBA Annual Meeting, June 18-20, 2015, at the Grand Geneva Resort and Spa in Lake Geneva, Wisconsin.

Throughout the year, the Committee also published "The Public Servant," the Committee's newsletter which has the mission to provide government attorneys with information useful to them in their public practice. Many volumes of the newsletter are available on the ISBA website, free of charge. The Committee would be remiss if it did not commend Lynn Patton and Kate Kelly, the editors of the newsletter, for their tireless efforts. While we did not always make things easy for them, they persevered and produced a number of outstanding issues.

The Committee also provided commentary to the ISBA Legislative Affairs Department on proposed legislation that could affect government lawyers. We used our unique perspective as public servants to help shape the ISBA's opinions on House and Senate Bills.

On a personal note, serving as the Chair of the Committee this year has been very rewarding. I wish to thank everyone on the Committee for their hard work and dedication to the ISBA and the Committee. I am excited for Marylou Kent as she takes the helm of the Committee as the 2015-2016 Chair, starting at the ISBA Annual Meeting in June. I look forward to continuing to work with each member of the Committee as the *ex-officio* member next year. ■

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When the term "shall" is directory: The Illinois Supreme Court reinforces the presumption that statutory language that issues a procedural command to a government official is directory, rather than mandatory

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Regarding a mandatory/directory reading, a statute is automatically mandatory for a government official if the "legislature dictates a particular consequence for failure to comply with the provision." ¶16 (citations omitted). Statutes that have no specified consequence for the government official's noncompliance, such as dismissal of a cause of action, are considered directory. ¶16. The Court then summarized the presumption for a directory reading:

> With respect to the mandatory/directory dichotomy, we presume that language issuing a procedural command to a government official indicates an intent that the statute is directory.› [Citations omitted.] This presumption is overcome, and the provision will be read as mandatory, under either of two conditions: (1) when there is negative language prohibiting further action in the case of noncompliance or (2) when the right the provision is designed to protect would generally be injured under a directory reading. ¶17. (Citations omitted.)

The Court found that neither condition applied, because section 5-810 does not contain specific consequences for noncompliance with its 60-day limit in holding the motion hearing (¶18) and because the respondent did not show "how having the hearing occur outside the 60-day limit, but before trial, prejudiced him in any way." ¶27.

Although section 5-810 used the term "shall," the Court noted that "in no case regarding the mandatory/directory dichotomy has 'shall' controlled the outcome. Whenever the mandatory/ directory dichotomy is at issue, as in this case, the word "shall" is not determinative." ¶19. (Citations omitted.)

In re James W. - Following *In re M.I.*, the Supreme Court found another statute directory, this time section 3-800(b) of the Mental Health and Developmental Disabilities Code (the Mental Health Code). *In re James W.,* 2014 IL 114483, (Petition for Rehearing denied May 27, 2014), ¶¶ 1, 49; 405 ILCS 5/3-800(b) (West 2010). The Supreme Court reversed the Fifth District Appellate Court's opinion that found that the circuit court's setting the jury trial for an involuntary commitment 96 days later violates section 3-800(b) of the Mental Health Code (which requires a continuance of no more than 15 days). ¶¶ 1, 49; 405 ILCS 5/3-800(b) (West 2010).

The Supreme Court found the statute concerning the setting requirement directory in that:

> [t]he proposition that failure [by the circuit court] to strictly adhere to section 3-800(b)'s 15-day limitation does not, in itself, render the circuit court's judgment invalid is consistent with this court's recent decision in *In re M.I.,* 2013 IL 113776 regarding the difference between statutory commands which are mandatory and those which are directory. As we explained in that case, the law presumes that statutory language issuing a procedural command to a government official is directory rather than mandatory, meaning that the failure to comply with a particular procedural step will not have the effect of invalidating the governmental action to which the procedural requirement relates. That presumption can be overcome under either of two conditions: (1) when there is negative language prohibiting further action in the case of noncompliance or (2) when the right the provision is designed to protect would generally be injured under a directory reading * * * Neither circumstance, however, is present here. ¶35. (Citations omitted.)

In re Rita P. - The Supreme Court, in *In re Rita P.* (2014 IL 115798), also reaffirmed the directory/mandatory analysis utilized in *In re M.I.* (2013 IL 113776). Applying and citing to *In re M.I.*, the Court found that section 3-816(a) of the Mental Health Code, which stated that mental health orders "shall be in writing and shall be accompanied by a statement on the record of the court's finding of fact and conclusions of law" (405 ILCS 5/3-816(a) (West 2010)), directory on circuit courts. ¶¶42, 44, 52.

Citing to *In re M.I.* (2013 IL 113776), the Court found that section 3-816(a) directory because it failed to satisfy either of the conditions to make it a mandatory requirement on the courts. First, 3-816(a) failed to list any specific consequence in case of noncompliance. ¶45. Likewise, the Court found that the second condition for a mandatory reading (injury to the designed right) is also not satisfied for there is "no reason to conclude that a respondent's appeal rights or liberty interests will generally be injured through a directory reading of section 3-816(a)." ¶68. Specifically the Court rejected the arguments that section 3-816(a) would injured the respondent's appellate rights, liberty interest, or right to notice of the circuit court's reasoning. ¶68. Because it found this section directory, the Court reversed the appellate court's finding that the circuit court violated section 3-816(a) by not providing in the mental health order findings of fact and conclusions of law.

In light of these decisions, a trial court litigator must consider prejudice when arguing about a procedural violation of a statute. Further, appellate attorneys should also consider this precedent in defending an alleged procedural violation by a governmental official. It will be interesting to see if the Supreme Court further expands this application of a directory reading in future cases. ■

Time to rethink absolute prosecutorial discretion?

By Evan Bruno

In an October 2007 article for Slate, legal scholar Tim Wu described a game prosecutors in the Southern District of New York would play amongst themselves during their downtime.[1] The game was both simple and unnerving. One prosecutor would name a famous person—say, Mother Teresa—and the junior prosecutor would figure out which crime(s) he or she could indict the person on. Anyone familiar with the Federal Code, or even State criminal codes, should not have much trouble with this game. After a few rounds, it becomes clear how nearly impossible it is to live a completely crime-free life.

So why don't most people have a criminal rap sheet 10-feet long? Even non-lawyers intuitively know the answer to that question: *prosecutorial discretion*. When it comes to the notorious crimes that have always been illegal—such as battery, rape, murder, theft, and so on—our freedom from criminal prosecution is largely in our own hands. People do not accidentally commit armed robberies. But what about the obscure offenses listed throughout our nation's criminal codes that most people don't even know exist? *See, e.g.*, the Yo-Yo Waterball Sales Prohibition Act (815 ILCS 445/5-15). Of course, the criminal justice system, to some extent, *must* operate on the assumption that ignorance of the law is no excuse. But with the increasing criminalization of conduct that is not intuitively *wrongful*, perhaps it is time to revisit the due process implications of unfettered prosecutorial discretion.

The only thing preventing our prosecution for the crimes we commit—yes, you and I both commit crimes—is the prosecutor's total discretion. And although prosecutorial discretion has always been a part of our criminal justice system, the *criminalization renaissance* we have seen over the past half century has elevated the prosecutor to a potentially dangerously high level of power. This gives rise to due process concerns that may not have been present in the days of yore.

Remember the eavesdropping law the Illinois Supreme Court struck down last year? That law made it a crime to record any part of a conversation unless all parties to the conversation consented. *People v. Clark*, 2014 IL 115776, ¶ 14. Thankfully, prosecutors in Illinois decided—in their discretion—*not* to prosecute the thousands of parents who certainly broke the law by recording their children's school plays. No one was charged and convicted with felony eavesdropping for using their iPhone to record a political debate in a public park. But could they have been? Under the current law governing prosecutorial discretion, the answer is an unequivocal "yes."

Perhaps the eavesdropping law might be a bad example. After all, it was found to be unconstitutionally overbroad. So take a look at another currently valid law. In Illinois, one commits "transmission of obscene messages" when he or she "sends messages or uses language or terms which are obscene, lewd or immoral with the intent to offend by means of or while using * * * equipment or wires of any person[.]" 720 ILCS 5/26.5-1(a). Welp, welcome to the Internet everyone. If every person who committed this crime was charged, the criminal docket of almost every county would be overflowing with juveniles and adults alike. So what should guide a prosecutor's decision to bring charges under this statute? This is the type of decision in which political motivations and personal grudges can turn a prosecutor into a tyrant.

But even if conviction does not result from a charge, the mere *power to charge* gives rise to its own liberty concerns. Professor Glenn Reynolds made the following observation about prosecutorial discretion:

Once charged with a crime, defendants are in a tough position. First, they must bear the costs of a defense, assuming they are not indigent. Second, even if they consider themselves entirely innocent, they will face strong pressure to accept a plea bargain—pressure made worse by the modern tendency of prosecutors to overcharge with extensive "kitchen-sink" indictments: Prosecutors count on the fact that when a defendant faces a hundred felony charges, the prospect that a jury might go along with even one of them will be enough to make a plea deal look attractive. Then, of course, there are the reputational damages involved, which may be of greatest importance precisely in cases where political motivations might be in play. Worse, prosecutors have no countervailing incentives not to overcharge. A defendant who makes the wrong choice will wind up in jail; a prosecutor who charges improperly will suffer little, if any, adverse consequence beyond a poor win/loss record. Prosecutors are even absolutely immune from lawsuits over misconduct in their prosecutorial capacity. Glenn Harlan Reynolds *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 Columbia L. Rev. Sidebar (2013), <http://www.columbialawreview.org/ham-sandwich-nation_Reynolds>.

The bench and bar should be willing to at least talk about the constitutional considerations underpinning our system of unfettered prosecutorial discretion. Certainly, a revived discussion would not hurt, even if no concrete changes follow. In the meantime, prosecutors should never lose sight of their sacred duty to do the right thing. This applies not only to prosecuting criminals, but also—perhaps even more so—deciding whether to prosecute in the first place.

1. Tim Wu, "American Lawbreaking," Slate (Oct. 14, 2007), <http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/introduction.html>.

Upcoming CLE programs

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

July

Wednesday, 7/1/15- Teleseminar— Outsourcing Agreements. Presented by the ISBA. 12-1.

Thursday, 7/2/15- Teleseminar—Planning with Life Insurance Trusts. Presented by the ISBA. 12-1.

Tuesday, 7/7/15- Teleseminar—Business Planning with Series LLCs. Presented by the ISBA. 12-1.

Wednesday, 7/8/15- Teleseminar—Ethical Issues When Representing the Elderly—LIVE REPLAY. Presented by the ISBA. 12-1.

Thursday, 7/9/15- Teleseminar—Settlement Agreements in Litigation- LIVE REPLAY. Presented by the ISBA. 12-1.

Tuesday, 7/14/15- Teleseminar—Tax Planning for Real Estate, Part 1. Presented by the ISBA. 12-1.

Wednesday, 7/15/15- Teleseminar—Tax Planning for Real Estate, Part 2. Presented by the ISBA. 12-1.

Tuesday, 7/21/15- Teleseminar—Restrictive & Protective Covenants in Real Estate. Presented by the ISBA. 12-1.

Wednesday, 7/22/15- Teleseminar—Fiduciary Duties & Liability of Nonprofit/Exempt Organization Directors and Officers. Presented by the ISBA. 12-1.

Thursday, 7/23/15- Teleseminar—Ethics and Digital Communications- LIVE REPLAY. Presented by the ISBA. 12-1.

Friday, 7/24/15- Teleseminar—Estate Planning for Farms and Ranches- LIVE REPLAY. Presented by the ISBA. 12-1.

Tuesday, 7/28/15- Teleseminar—Business Planning with S Corps, Part 1. Presented by the ISBA. 12-1.

Wednesday, 7/29/15- Teleseminar—Business Planning with S Corps, Part 2. Presented by the ISBA. 12-1.

Thursday, 7/30/15- Teleseminar—Eminent Domain, Part 1- LIVE REPLAY. Presented by the ISBA. 12-1.

Friday, 7/31/15- Teleseminar—Eminent Domain, Part 2- LIVE REPLAY. Presented by the ISBA. 12-1.

August

Tuesday, 8/4/15- Teleseminar—Construction Agreements, Part 1. Presented by the ISBA. 12-1.

Wednesday, 8/5/15- Teleseminar—Construction Agreements, Part 2. Presented by the ISBA. 12-1.

Tuesday, 8/11/15- Teleseminar—Estate Planning with Annuities & Financial Products. Presented by the ISBA. 12-1.

Thursday, 8/13/15- Teleseminar—2015 in Age Discrimination Update. Presented by the ISBA. 12-1.

Friday, 8/14/15- Teleseminar—Ethical Issues in Buying, Selling, or Transferring a Law Practice. Presented by the ISBA. 12-1.

Tuesday, 8/18/15- Teleseminar—Business Divorce: When Business Partners Part Ways, Part 1. Presented by the ISBA. 12-1.

Wednesday, 8/19/15- Teleseminar—Business Divorce: When Business Partners Part Ways, Part 1. Presented by the ISBA. 12-1.

Thursday, 8/20/15- Teleseminar—Easements in Real Estate. Presented by the ISBA. 12-1.

Monday, 8/24/15- Teleseminar—Like-Kind Exchanges of Business Interests- LIVE REPLAY. Presented by the ISBA. 12-1.

Tuesday, 8/25/15- Teleseminar—Estate Planning for Guardianship and Conservatorships. Presented by the ISBA. 12-1.

September

Tuesday, 9/1/15- Teleseminar—Estate & Trust Planning With the New 3.8% on Income. Presented by the ISBA. 12-1.

Wednesday, 9/2/15- Teleseminar—Drafting Service Agreements in Business. Presented by the ISBA. 12-1.

Thursday, 9/3/15- Teleseminar—Drafting Effective Employee Handbooks- LIVE REPLAY. Presented by the ISBA. 12-1.

Friday, 9/4/15- Teleseminar—Rights of First Refusal/Rights of First Offer in Transactions. Presented by the ISBA. 12-1.

Tuesday, 9/8/15- Teleseminar—Ethics and Pre-Trial Investigations. Presented by the ISBA. 12-1.

Thursday, 9/10/15- Teleseminar—Selling Closely-Held Companies to Employees, Part 1- LIVE REPLAY. Presented by the ISBA. 12-1.

Friday, 9/11/15- Teleseminar—Selling Closely-Held Companies to Employees, Part 2- LIVE REPLAY. Presented by the ISBA. 12-1.

Tuesday, 9/15/15- Teleseminar—Planning to Obtain Tax Free Treatment in Business Combinations. Presented by the ISBA. 12-1.

Wednesday, 9/16/15- Teleseminar—Duress & Undue Influence in Estate and Trust Planning- LIVE REPLAY. Presented by the ISBA. 12-1.

Wednesday, 9/16/15- Live Studio Webcast—Litigating the Municipal Division Case: "Small" Cases Can Create Big Headaches. Presented by the ISBA Tort Law Section. 10:30-noon.

Thursday, 9/17/15- Chicago, ISBA Regional Office—Complex Asset Recovery: Fraudulent Transfers, Offshore Assets & Charging Orders. Presented by ISBA Commercial Banking, Collections and Bankruptcy Section. 8:45-12:15 pm.

Thursday, 9/17/15- Live Webcast—Complex Asset Recovery: Fraudulent Transfers, Offshore Assets & Charging Orders. Presented by ISBA Commercial Banking, Collections and Bankruptcy Section. 8:45-12:15 pm. ■