ILLINOIS STATE BAR ASSOCIATION

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The Public Servant

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

Austin Fleming Newsletter Editor Award – Two of our very own

BY EMILY VIVIAN

On Friday, June 16, at the Illinois State Bar Association's 141th Annual Meeting, Lynn Patton and Kathryn ("Kate") Kelly, co-editors of the ISBA Standing Committee on Government Lawyers, will be the honored recipients of the 2017 Austin Fleming Newsletter Editors Award.

The Austin Fleming Newsletter Editors Award is a prestigious award that honors outstanding editors of the ISBA newsletters. To be considered for the Austin Fleming Newsletter Editors Award, an ISBA member must have served as an editor or co-editor for a minimum of 10 years. In addition, quality of work in writing and editing material for publication, importance of subject matter to the newsletter's audience and the reputation of the editor in the field covered by the newsletter are all considered.

Continued on next page

The Illinois Supreme Court provides guidance on the Open Meetings Act

BY BARBARA GOEBEN

This year, the Illinois Supreme Court issued an opinion in *Bd. of Educ. of Springfield Sch. Dist. No. 186 v. Attorney Gen. of Illinois*, 2017 IL 120343, affirming the lower court's reversal of the Attorney General's conclusion that the Springfield School Board (School Board) violated the Open Meetings Act (Act) (5 ILCS 120/1 *et seq.* (West 2012)).

Background

The School Board sought administrative review of the Attorney General's conclusions that the School Board

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Austin Fleming Newsletter Editor Award

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Both Lynn and Kate have devoted their legal careers to government service, with Lynn currently serving as Division Chief for the Public Access and Opinions Division of and Administrative Counsel for the Illinois Attorney General, and Kate serving as an Assistant U.S. Attorney in the Civil Division for the U.S. Attorney's Office for the Northern District of Illinois.

Lynn and Kate have both been considerably involved in the ISBA throughout their legal careers. Lynn has served as a co-editor for the Government Lawyers Committee for 16 years, and Kate has served as co-editor for the Government Lawyers Committee for 17 years. In addition, both Lynn and Kate are former Chairs of the Standing Committee on Government Lawyers. Lynn also served as past Chair of the Local Government Law Section Council, and Kate has served as a member of other ISBA sections and committees, such as the Legal Education Standing Committee, Women in the Law Standing Committee, and the Diversity Task Force.

One of Lynn's and Kate's most amusing tasks as ISBA members is entertaining an attentive audience in their star performances in "Ethics Extravaganza," an interactive role-playing CLE program, which is hosted by the Standing Committee on Government Lawyers.

When I first joined the Attorney General's Office, Lynn was my supervisor and taught me everything I know about government law. As one of the co-editors who will be replacing Lynn and Kate, I am privileged to have these women as mentors.

We congratulate both Lynn and Kate for receiving this well-deserved award! ■

The Illinois Supreme Court provides guidance

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had impermissibly terminated the superintendent's employment by taking final action during a closed board session and that it had failed to adequately inform the public of the proposed termination prior to a subsequent public meeting. ¶ 1.

On January 31, 2013, Dr. Walter Milton, Jr., the then-superintendent of the Springfield school district, signed a separation agreement that the School Board previously discussed in several closed sessions. ¶ 5. On February 4, 2013, during a closed session, six of the seven School Board members signed the agreement, but did not date it; counsel advised the Board that the matter was not final until a public vote was taken on the agreement. ¶ 5.

On March 1, 2013, the School Board posted on its website the March 5, 2013, Board's public meeting agenda which included the following item: "Approval of a Resolution regarding the Separation Agreement and Release between Superintendent Dr. Walter Milton, Jr., and the Board of Education." ¶ 8. The website also linked to both the proposed resolution and to the separation agreement. ¶ 8. At the March 5, 2013, meeting, the School Board president introduced this agenda item by stating "I have item 9.1, approval of a resolution regarding the separation agreement. The Board President recommends that the Board of Education of Springfield School District No. 186 vote to approve the separation agreement and release between Dr. Walter Milton, Jr., and the Board of Education." ¶ 9 No public vote was taken on this separation agreement. ¶¶ 70-71.

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The Attorney General then issued a binding opinion finding that the Board violated the Open Meetings Act in part because the government official failed to provide a sufficient verbal explanation of the proposed resolution at the March 5, 2013, meeting. ¶ 16. The Circuit Court of Sangamon County reversed the Attorney General's opinion, finding compliance with the Act, which the Fourth District Appellate Court subsequently affirmed (2015 IL App (4th) 14094). ¶¶ 1, 17-18.

Affirming the lower court orders, the Supreme Court in its opinion considered several issues concerning the Board's compliance with the Open Meetings Act: first, whether posting the agenda on the website complies with section 2(c) of the Act; second, whether the requirement of a public recital prior to a closed session mandates an explanation of the significance of the contemplated action; third, whether the Act requires a final public vote of matters considered in closed session; and finally whether the School Board complied with the public recital requirement in section 2(e). ¶ 20.

Compliance with the Agenda Requirement

The School Board posted the March 5, 2013, agenda on its website four days prior to the meeting. ¶ 31. The Supreme Court found that though the agenda's contents complied with the Act, simply posting the agenda on the website "cannot fulfill the public recital requirement of section 2(e)" of the Act, which is required before any public body's closed session. ¶ 35.

Review of section 2(e) of the Open Meetings Act, in which "a public recital must take place at the open meeting before the matter is voted upon."

The Supreme Court then held that under "section 2(e) of the Open Meetings Act, a public recital must take place at the open meeting before the matter is voted upon. The recital must announce the nature of the matter under consideration, with sufficient detail to identify the particular transaction or issue, but need not provide an explanation of its terms or its significance." ¶ 64

In its determination, the Supreme Court agreed with the Attorney General's holding that the recitation of the matter considered must occur during the open meeting prior to the public body's closed session. ¶ 39. However, the Court differed with the Attorney General's opinion with regards to the specificity of this recitation, holding that the "public recital of the nature of the matter being considered" means that the public body must state the essence of the matter under consideration, its character, or its identity. ¶¶ 46-47. Further, compliance with section 2(e) only requires the disclosure of nonspecific terms of the action to be taken such as "the approval of a loan, a contract, a purchase, a policy, or a resolution" and other information "necessary to inform the public of the specific item of business (the purpose of the loan, the subject of the contract, the type of property being purchased, the title of the policy, or the purpose of the resolution)." ¶ 50. The Court then held that the recital can be more detailed including disclosure of key terms of the issue under review, but section 2(e) does not mandate it. ¶ 61.

Validity of the School Board's Approval of the Separation Agreement

The Attorney General's opinion raised two errors regarding the separation agreement's validity for non-compliance with the Open Meetings Act: first, the School Board cannot take final action at a closed meeting; and, second, the Board did not make an adequate recital of the issue at the open meeting. ¶ 66.

The Supreme Court confirmed what both parties acknowledged: that whatever happened at the closed meeting cannot by definition be considered a final action for "under the plain language of section 2(e) of the Open Meetings Act, the public vote is not merely a ratification of a final action taken earlier in a closed session; it is the final action. Without the public vote, no final action has occurred." ¶¶ 70-71, 74.

No violation of the Open Meetings Act occurred with regards to the sufficiency of the public recital at the March 5, 2013, public meeting. The Supreme Court concluded that the School Board president's statement regarding the general nature of the matter under consideration ("a separation agreement and release between Dr. Milton and the Board") complied with the public recitation requirement's purpose. ¶ 84. To hold to the Attorney General's position would require a public reading of the 16-page agreement, which the Court found unnecessary. ¶ 84.

By affirming the lower court's interpretation rejecting the Attorney General's position (¶¶ 86-87), counsel now has guidance on how specific the public recitation should be prior to a closed session. ■

Five quick tips for young government attorneys

BY KILBY MACFADDEN

The role of the government attorney is a unique privilege that can come with its own rewarding work and unique challenges. Some practice pointers can be helpful to ensure you navigate the world of government practice with confidence.

1. Learn your statutes

This may seem fairly straightforward, but each position that you hold as a government attorney will have frequently used statutes. You may handle a wide variety of cases, or have a more niche role depending on your agency or your client. Spend time at the beginning of your job delving into the nuances of the more common statutes you will be addressing. A little more legwork at the front end will help you master the law faster. It will also help you be a better advocate.

2. Know your judges

Whether you appear before an administrative hearing officer or federal judge, as the government attorney, more is always going to be expected of you. Embrace this role and be prepared. Observe the judges you will be appearing before prior to your first court date. Know who likes to start 15 minutes early, who appreciates extensive briefing, and what their preferences and quirks entail. Asking around the office and courthouse will acquaint you with a good list of dos and don'ts so that you are not ill prepared from the beginning. The old adage is true, you never get a second chance to make a first impression, especially with a judge.

3. Join Bar Associations & Volunteer

Oftentimes, government attorneys do not join bar associations. They are a financial and time commitment that government attorneys often shy away from because they do not need to worry about billable hours and client development. Joining bar organizations will definitely help you meet more experienced lawyers and judges. You will be exposed to people outside the courthouse and learn more about them as people. Professional relationships can be exceptionally valuable when you may want to change positions or assignments. The more people who know you, the more they can work with you and help you succeed. The chance to volunteer in your community is also a great opportunity to learn more about the people you serve and to network outside the courthouse while giving back.

4. Be courteous to all support staff and court staff

Resources can be scare as a government attorney. You need to utilize any assistance you receive and be appreciative. Always learn the names of the court clerks and the paralegals and secretaries. These people can be invaluable and oftentimes can be overlooked. Introduce yourself to the court reporter, make sure he knows how to spell your name, etc. Being respectful, prompt and trustworthy are things that staff will always remember, and your reputation will benefit from their kind reviews.

5. Be Yourself

Oftentimes, government attorneys are taught "this is how we do our closings" or "this is how we cross a defendant," as if there is a magic formula one can learn to become a great attorney. There is never one size that fits all. You have to be *authentically* you. This means that if you are a more quiet, reserved person, you have to stay true to yourself and work on your presence before a jury, etc. If you try to be a loud, gregarious attorney, it will fall flat with the judge and jury. Authenticity is something that jurors are excellent at observing. Own your own style and work on getting better every day at mastering the law and rules of evidence. Your own voice will take shape and be more effective if it is truly yours. ■

State employees' statements during internal investigations may be admissible in criminal proceedings, even though compelled under threat of job loss, if self-incrimination rights later waived

BY JOHN R. SCHLEPPENBACH

The right to remain silent is perhaps one of the best known principles enshrined in our Constitution, familiar to even the most casual viewer of *Law & Order*. Simply put, criminal suspects in police custody can validly refuse to make any statements at all and, unless they have been informed of this right and waived it, their statements may not be used as evidence against them.[1] Less well known, however, is the right of public employees to remain silent during internal investigations. Under *Garrity v. New Jersey*, such employees may not be coerced into speaking through threats of being fired or sanctioned; if a statement is obtained after such a threat, it will be inadmissible in any criminal proceeding or prosecution.[2] Although public employees can be compelled to answer questions "specifically, directly, and narrowly relating to the performance of [their] official duties," they will retain immunity from the use of their answers in criminal prosecutions.[3] This principle also applies to public contractors as well as public employees.[4] It should be noted, however, that *Garrity* merely protects public employees from the *use* of their compelled statements in criminal prosecutions; it does not bar prosecutions based on evidence other than the compelled statements.[5] In fact, the Eleventh Circuit recently held that even a statement compelled in violation of *Garrity* can be used in a subsequent criminal prosecution if the state employee who made it has subsequently been informed of his rights and validly waived them.[6]

In *United States v. Smith*, a prison guard made statements during several internal investigations of an inmate's death from blunt force trauma.[7] One of the interviewers failed to advise the guard of his right to remain silent and, in fact, told him that he was duty-bound to tell him everything that he knew about the death.[8] The guard insisted that he had only used justifiable force in dealing with the inmate, despite reports from other witnesses that the guard had pulled the handcuffed inmate out of a hospital bed and stomped on his head until he passed out.[9] The guard was ultimately terminated and the FBI began its own criminal investigation into the inmate's death, again seeking to interview the guard.[10] FBI agents informed the guard that they had not seen his statements from the internal investigations, that they believed those statements had likely been compelled, and that he had the right to prevent those statements from being used against him under *Garrity*.[11] The guard said he understood these rights and signed a written waiver of them, insisting that his prior statements denying responsibility for the inmate's death had been truthful and that he wished to speak with the agents to set the record straight.[12] He then repeated his previous narrative of the events leading to the inmate's death.[13]

A federal grand jury subsequently indicted the guard for, among other things, making false statements, obstructing justice, and depriving the inmate of his civil rights under color of law, resulting in injury or death.[14] The guard moved to suppress his statements from the internal investigations on the grounds that they had been compelled in violation of *Garrity*.[15] The district court denied the motion to suppress and the guard was convicted of all charges.[16]

On appeal, the Eleventh Circuit affirmed the denial of the suppression motion.[17] The court first noted that some of the guard's statements—such as his duty and incident reports—had not been compelled at all because there was no evidence he was directly threatened with discipline if he did not make them.[18] Assuming, without deciding, that some of the guard's other statements were in fact compelled within the meaning of *Garrity*, the court concluded that the guard had waived his rights with regard to those statements when he signed the written form the FBI agents gave him.[19] The court determined that the waiver was voluntary because the guard's meeting with the agents was consensual, he was not in custody, and there was no evidence of coercion, threats, or deception.[20] It was also knowing and intelligent because the agents explained the guard's *Garrity* rights to him and he said he understood them.[21] Finally, there was no independent violation of *Garrity* by the agents, who did not have access to the guard's statements until after he had

executed the waiver.[22] Accordingly, there was no self-incrimination problem with the use of the guard's statements at trial, and his conviction and sentence could be affirmed.[23]

Thus, though internal investigators should still take pains to avoid the appearance that they are threatening public employees with sanctions should they decline to cooperate with an investigation, the Eleventh Circuit has now provided a blueprint for investigators to obtain a waiver and use an employee's statement even if such threats are made. ■

John R. Schleppenbach is an Assistant Attorney General in the Criminal Appeals Division of the Illinois Attorney General's Office and the Vice-Chair of the ISBA's Alternative Dispute Resolution Section Council. Any opinions expressed in this article are solely Mr. Schleppenbach's and are not intended to reflect the views of the Illinois Attorney General's Office.

1. *See, e.g., United States v. Williams,* 842 F.3d 1143, 1146 (9th Cir. 2016).
2. 385 U.S. 493 (1967).
3. *Gardner v. Broderick,* 392 U.S. 273, 279 (1968).
4. *Lefkowitz v. Turley,* 414 U.S. 70, 85 (1973).
5. *Lefkowitz v. Cunningham,* 431 U.S. 801, 809 (1977).
6. *United States v. Smith*, 821 F.3d 1293, 1296 (11th Cir. 2016).
7. *Id.* at 1298-99.
8. *Id.* at 1298.
9. *Id.* at 1297-98.
10. *Id.* at 1299.
11. *Id.* at 1299-1300.
12. *Id.*
13. *Id.* at 1300.
14. *Id.*
15. *Id.*
16. *Id.* at 1300-01.
17. *Id.* at 1302-06.
18. *Id.* at 1303-04.
19. *Id.* at 1304-05.
20. *Id.* at 1305.
21. *Id.*
22. *Id.* at 1305-06.
23. *Id.* at 1306.

The $10 million comma

BY REX GRADELESS

How much of a difference can a comma really make? One recent federal appellate court decision may put the cost of a single missing comma at $10 million.

On March 13, 2017, the First Circuit Court of Appeals[1] reversed a lower court's decision because of a missing comma. This missing comma created a significant-enough ambiguity within Maine's overtime wage law leading to the reversal.[2] The remanded matter may cost a Maine dairy company $10 million in overtime wages to its employees.

First, a quick lesson on punctuation: a serial comma or series comma (also called an Oxford comma or a Harvard comma) is a comma placed immediately before the coordinating conjunction (usually "and" or "or") in a series of three or more terms. For example, a list of three Illinois counties might be punctuated either as "Hardin, Pope, and Calhoun" (with the Oxford comma), or as "Hardin, Pope and Calhoun" (without the Oxford comma).[3, 4]

Now, back to the missing Oxford comma. In 2014, three Maine truck drivers sued Oakhurst Dairy, seeking more than four years' overtime pay. The workers argued that they were owed overtime based on Maine's overtime law. The overtime law requires workers to be paid 1.5 times their normal rate for each hour worked over 40 hours a week. However, Maine's overtime law also has some exceptions. The exceptions to Maine's overtime law were the subject of the dispute because the overtime law precluded employees involved in:

> "The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:
>
> (1) Agricultural produce;
>
> (2) Meat and fish products; and
>
> (3) Perishable foods."[5]

The drivers contended that this exception to the overtime law did not apply to them because the exception refers to the single activity of "packing," whether the "packing" is for "shipment" or for "distribution." The drivers contended that, although they do handle perishable food, they do not engage in "packing" them.[6]

The dairy responded that the disputed words refer to two distinct exempt activities, with the first being "packing for shipment" and the second being "distribution." Because the delivery drivers engage in distribution, the exception to the overtime law applies and the employees are not entitled to overtime pay.[7]

Twenty-five pages later, and after exploring the ambiguities caused by the missing Oxford comma within Maine's overtime law, the Appellate Court found there was enough ambiguity created by the missing Oxford comma that the court had to consider the legislative intent of Maine's overtime law. In considering the legislative intent of the overtime law, the court adopted the delivery drivers' reading of the statute because it furthered the broad remedial purpose of the overtime law, which was to provide overtime pay protection to employees.[8]

The Court reached this conclusion even though Maine's Legislative Drafting Manual expressly instructs that: "when drafting Maine law or rules, don't use a comma between the penultimate and the last item of a series." However, that same manual also contained a warning to "be careful if an item in the series is modified" and sets out several examples of how lists with modified or otherwise complex terms should be written to avoid the ambiguity that a missing Oxford comma would otherwise create.[9]

The Court noted that guidance on legislative drafting in most other states, and in the U.S. Congress, appears to differ from Maine's when it comes to the use of the Oxford comma. In fact, some state legislative drafting manuals, including Illinois, expressly warn that the absence of Oxford commas can create ambiguities concerning the last item in a list. One analysis noted that only seven states either do not require or expressly prohibit the use of the Oxford comma.[10]

What about Illinois? Illinois favors the drafting of clear statues and rules. In fact, the 2012, Illinois Legislative Drafting Manual covers the Oxford comma as follows:

> "As a general rule, placing a comma before the conjunction will be clear, but omitting the comma may cause ambiguity. Because clarity is one of the cardinal virtues in drafting statutes, follow the practice of inserting a comma before the conjunction.
>
> Potentially ambiguous:
>
> Real estate is classified as vacant, residential, farm, commercial and industrial.
>
> In the example, are there 4 or 5 categories? Is "commercial and industrial" one category, or are "commercial" and "industrial" 2 categories?
>
> Clearly 5 categories: Real estate is classified as vacant, residential, farm, commercial, and industrial.
>
> Clearly 4 categories: Real estate is classified as (i) vacant, (ii) residential, (iii) farm, and (iv) commercial and industrial."[11]

The debate over the using the Oxford comma will likely not be resolved anytime soon, and it may get costly. In fact, a 2014 survey of 1,129 Americans by FiveThirtyEight and SurveyMonkey Audience found that 57 percent of Americans favor the use of the Oxford comma and 43 percent were opposed.[12]

However, one thing is clear: clarity is king. If an Oxford comma provides clarity, use it. ■

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1. The First Circuit Court of Appeals has federal appellate jurisdiction over Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.
2. *O'Connor v. Oakhurst Dairy*, No. 16-1901 (1st Cir. 2017), *available at* http://cases.justia.com/federal/appellate-courts/ca1/16-1901/16-1901-2017-03-13.pdf (last visited Apr. 24, 2017).
3. *Serial Comma*, Wikipedia.Org, https://en.wikipedia.org/wiki/Serial_comma (last visited April 24, 2017).
4. Most all style guides mandate the use of the Oxford comma, including the APA Style Guide, The Chicago Manual of Style, The MLA Style Manual, Strunk and White's Elements of Style, the U.S. Government Printing Office Style Manual, and Garner's Modern American Usage. Garner, Bryan A. (2009). Garner's Modern American Usage (3rd ed.). Oxford University Press. p. 676.
5. *O'Connor v. Oakhurst Dairy*, No. 16-1901, p. 4 (1st Cir. 2017).
6. *Id.*
7. *Id.*
8. *Id.* at 29.
9. *Id.* at 15.
10. Amy Langenfeld, Capitol Drafting: Legislative Drafting Manuals in the Law School Classroom, 22 Perspectives: Teaching Legal Res. & Writing 141 (2014), *available at* https://info.legalsolutions.thomsonreuters.com/pdf/perspec/2014-spring/2014-spring-10.pdf (last visited Apr. 24, 2017).
11. Legislative Reference Bureau, *Illinois Bill Drafting Manual* 232 (2012), *available at* http://www.ilga.gov/commission/lrb/manual.pdf (last visited Apr. 24, 2017).
12. *Elitist, Superfluous, Or Popular? We Polled Americans on the Oxford Comma*, Fivethirtyeight.com, https://fivethirtyeight.com/datalab/elitist-superfluous-or-popular-we-polled-americans-on-the-oxford-comma/ (last visited April 24, 2017).

Sanctuary cities

BY PAT LORD

In response to the extraordinary events that have taken place since President Trump took office, counties, cities, and villages across the country are evaluating whether to take official action to designate themselves as a Sanctuary City (also known as a "Welcoming County/City/Village"),[1] and wondering if they do whether they'll lose federal funding. This is a complicated and volatile subject, but here are the questions this article will attempt to explore:

I. What does federal law currently require from local government entities with respect to information and assistance relative to immigration matters?
II. What are some common provisions of Illinois Sanctuary City Ordinances?
III. Will Sanctuary Cities risk losing federal funds in light of Executive Order 13768?
IV. Are Sanctuary City ordinances necessary or effective?
V. Will there be a state-wide legislative fix?
VI. Alternatives to Sanctuary City Ordinances.

The following definitions will be helpful to have in mind as you read this:

"Administrative Warrant" – Chicago and Evanston define Administrative Warrant as any document issued by ICE that can form the basis for an individual's arrest or detention for a civil immigration enforcement purpose. This definition does not include criminal warrants issued upon a judicial determination of probable cause.

The first part of Oak Park's definition is more specific: "An immigration warrant of arrest, order to detain or release aliens, notice of custody determination, notice to appear, removal order, warrant of removal or any other documents issued by ICE that can form the basis for an individual's arrest or detention for a civil immigration enforcement purpose."

"ICE" - the United States Immigration and Customs Enforcement Agency.

"Immigration Detainer" - Chicago and Evanston define Immigration Detainer as a request by ICE to a federal, state or local law enforcement agency to provide notice of release or maintain custody of an individual based on an alleged violation of a civil immigration law. Oak Park's definition goes on to reference specific U.S. Code provisions and forms.

A detainer is not a court order but a *request* to detain directed to a jurisdiction holding an individual.[2]

I. What does federal law currently require from local government entities with respect to information and assistance relative to immigration matters?

A. 8 U.S.C. Section 1373 of the United States Code, "Communication between government agencies and the Immigration and Naturalization Service" has been in place since 1996. Section 1373 (a) and (b) provide that:

(a) Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service ***information regarding the citizenship or immigration status***, lawful or unlawful, of any individual.

(b) Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
(2) Maintaining such information.
(3) Exchanging such information with any other Federal, State, or local government entity.
[Emphasis added.]

8 U.S.C. Section 1373 is fairly limited in its focus. It applies *only* to the adoption of policies regarding maintaining and communicating information about ***the citizenship or immigration status*** of any individual. It does not require compliance with administrative arrest warrants or immigration detainers; nor does it require notification regarding custody status or release dates of individuals in custody. It does not require public bodies to *acquire* information regarding citizenship or immigration status.

A highly instructive Memorandum that clarifies how the U.S. Department of Justice interprets 8 U.S.C. Section 1373 is posted on the DOJ website. It is dated May 31, 2016, and provides an extensive response to a claim that 140 states and local jurisdictions who were federal grant recipients were in violation of 8 U.S.C. Section 1373.[3] In the Memorandum, the DOJ cites the legislative history of Section 1373 as being "…designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that **prohibits or in any way restricts any communication between State and local officials and the INS**." [Emphasis added.] Further, under the section of the Memorandum titled "State and Local Cooperation with ICE," the DOJ acknowledges that Section 1373 does not specifically address restrictions by state or local entities regarding cooperation with ICE detainers, and goes on to state: "A legal determination has been made by the Department of Homeland Security (DHS) that civil immigration detainers are voluntary requests."

B. Executive Order 13768 "Enhancing Public Safety in the Interior of the

United States" was issued by President Trump on 1/25/17 and targets sanctuary jurisdictions.

The following is an excerpt from Section 1 ("Purpose") of the Executive Order:

> "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic."

Section 9 of the Executive Order is titled "Sanctuary Jurisdictions" and states that: "***It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.***" Then follows a list of provisions intended to obtain local compliance with federal immigration enforcement actions through a combination of grant loss, enforcement actions, and publication of crimes caused by "aliens" occurring in sanctuary jurisdictions - summarized as follows:

- The Director of the Office of Management and Budget is to obtain and provide information regarding Federal grant money that is currently received by sanctuary jurisdictions.
- Jurisdictions which willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants except as deemed necessary for law enforcement purposes by the Attorney General or Secretary of Homeland Security ("Secretary").
- The Secretary has the authority to designate which jurisdictions are sanctuary jurisdictions (*in his discretion and to the extent consistent with law*.)
- The Attorney General shall take appropriate enforcement action against an entity violating 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.
- The Secretary is to create a weekly list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens to better inform the public regarding safety threats associated with sanctuary jurisdictions.

It is interesting to note that Executive Order 13768 states that its purpose is to ensure compliance with 8 U.S.C. 1373 since Section 1373 is, as noted above, limited in its focus. If the Secretary of Homeland Security does designate which jurisdictions are sanctuary jurisdictions in a manner that is consistent with law, and if sanctuary jurisdictions are careful in how they draft their policies and laws, there should be little for the Secretary to enforce. Unless policies or laws limit communication with federal agencies regarding individuals' citizenship or immigration status, or prohibit maintaining that information if it has been acquired, it would appear that they should not be found to be violative of 8 U.S.C. Section 1373. That said, some of the language in Section 9 of the Executive Order goes further than the language of 8 U.S.C. Section 1373, so it is possible that a broader enforcement approach could follow.

II. What are some common provisions of Illinois Sanctuary City Ordinances?

There is no one definition of a "Sanctuary City" (also sometimes called a "Welcoming City").[4] This section discusses ordinances passed in Chicago, Evanston, Oak Park, and Skokie that contain sanctuary provisions.

Chicago has a history with sanctuary city ordinances that dates back to the mid-1980s. An updated version was approved in 2012 and the ordinance was amended again on 10/5/16. Evanston passed its Welcoming City Ordinance on 11/28/16 (specifically noting that its ordinance is modeled after Chicago's), Oak Park passed its Welcoming Village Ordinance on 2/6/17, and Skokie passed an ordinance amending the Human Relations Chapter of its Village Code on 3/6/17.

The following is a paraphrased summary of some of the more critical "Welcoming City" provisions in ordinances adopted by Chicago, Evanston, Oak Park, and Skokie. Other municipalities, such as Urbana, have also passed resolutions that address some of these same issues.[5]

1. Requesting Information Prohibited.

The Chicago, Evanston, Oak Park, and Skokie ordinances provide that no agent or agency[6] of the city/village shall request information about or otherwise investigate or assist in the investigation of the citizenship or immigration status of any person unless required by a court decision or unless relevant to potential or actual legal actions of the public entity itself. Chicago, Evanston, and Skokie also make exceptions if such information is required by Illinois state statute or federal regulation.

2. Disclosing Information Prohibited (unless required or authorized).

This is the section that needs to be considered most carefully when drafting a Sanctuary City ordinance in light of the provisions of 8 U.S.C. Section 1373 and Executive Order 13768 discussed above. Chicago, Evanston, Skokie, and Oak Park all use language in this section of their ordinances to make it clear that they will comply with federal law.

The Chicago and Evanston ordinances provide that *unless required by federal law or legal process,* or authorized in writing by the individual, or a guardian if the individual is a minor or not legally competent, no agent or agency shall disclose information regarding the citizenship or immigration status of any person.

Skokie and Oak Parks' ordinances prohibit providing information to support or assist with immigration enforcement operations; however both ordinances acknowledge that federal law forbids any prohibition against providing information regarding an individual's citizenship or immigration status. For instance, Skokie's ordinance provides that: "Nothing in this Article prohibits the Village sending to, or receiving from, any local, state or federal agency, a statement of an individual's country of citizenship or a statement of an individual's immigration status. Village staff shall be instructed that federal law does not allow such prohibition." *NOTE: This statement, or something similar, should go a long way toward precluding a determination of violation of 8 U.S.C. Section 1373, particularly in light of the

DOJ's Memorandum referenced in I.A above.

3. Threats Based on Citizenship or Immigration Status Prohibited.

The Chicago, Evanston, Oak Park, and Skokie ordinances provide that no agent or agency of the public entity shall coerce or threaten deportation or engage in verbal abuse of any person based on that person's (or that person's family members') actual or perceived citizenship or immigration status. A thorough definition of "family member" is included in the Chicago, Evanston and Oak Park ordinances.

4. Conditioning Benefits, Services, and Opportunities on Immigration Status Prohibited.

The Chicago, Evanston, Oak Park, and Skokie ordinances provide that benefits, opportunities, and services which they provide may not be conditioned on matters related to citizenship or immigration status unless required by statute, federal regulation or court decision.

Chicago, Evanston, and Oak Parks' ordinances also provide that a photo ID issued by a person's nation of origin (such as a driver's license, passport or consulate-issued document), shall not subject that person to a higher level of scrutiny or different treatment than if they had an Illinois driver's license or identification card. (This section does not apply to federal I-9 Forms which are required to be filled out for all citizens and noncitizens to verify an individual's identity and legal authorization to accept employment in the United States.)

5. Elimination of citizenship/ immigration status questions from city applications and forms.[7]

The Chicago, Evanston, Oak Park, and Skokie ordinances provide that applications, questionnaires, and interview forms used in relation to city benefits, opportunities, or services, shall be promptly reviewed and any questions regarding citizenship or immigration status are to be deleted (other than those required by statute, ordinance, federal regulation or court decision).

6. Detentions based on citizenship/ immigration status. Interactions with ICE.[8]

This is the most complicated section of the Chicago, Evanston, and Oak Park ordinances. There are some variations between the three ordinances not specified here, but in summary this section of the three ordinances provides that:

a. Arrest & Detention. Municipal agencies and agents shall not arrest, detain, or continue to detain a person solely:

1. On the belief that the person is not present legally in the U.S. or that the person has committed a civil immigration violation;
2. On an administrative warrant in the FBI's National Crime Information Center database when the administrative warrant is based solely on a violation of civil immigration law; or
3. On an immigration detainer when the detainer is based solely on a civil immigration law.[9]

b. Access to Detainees/Use of Municipal Facilities/Use of Municipal Time. Absent a criminal warrant, municipal agencies and agents shall not: (i) give ICE agents access to a person being detained by or in the custody of the agency or agent; (ii) allow ICE agents use of municipal facilities for investigative interviews or other investigative purposes; or (iii) spend time while on duty responding to ICE inquiries or communicating with ICE. However, a municipal agency or agent may communicate with ICE in order to determine whether a matter involves enforcement based solely on a violation of a civil immigration law.[10] Oak Park's ordinance also prohibits transferring any person into ICE custody unless a valid criminal warrant has been issued and prohibits any agency or agent from supporting or assisting ICE or other agencies with immigration enforcement operations. It also prohibits any agency or agent from entering into any agreement under Section 1357(g) of Title 8 of the United States Code[11] or any other federal law that permits state or local governmental entities to enforce federal immigration laws.

c. Exceptions. The Chicago and Evanston ordinances provide that the provisions summarized in 6(a) and (b) above are not applicable when a municipal agent or agency conducts an investigation that indicates that the subject of the investigation:

1. Has an outstanding criminal warrant.
2. Has been convicted of a felony or is a defendant in a pending felony criminal case.
3. Has been identified as a known gang member in a law enforcement agency's database or by his or her own admission.

Skokie's ordinance contains provisions that no Village staff, elected or appointed officials, or any person acting on behalf of the Village shall accept requests by any agency to support or assist with immigration enforcement operations. Nor shall the Village detain any individual based on their citizenship or immigration status unless pursuant to an outstanding criminal warrant.

7. No private cause of action.

Chicago, Evanston and Oak Park provide varying provisions in their Welcoming City ordinances that state that such ordinances do not create a basis for liability against them or their agents or employees. The exclusive remedy for violation of the Welcoming City provisions is disciplinary action against employees of the city or village.

III. Will Sanctuary Cities risk losing federal funds in light of Executive Order 13768?

Given the broad discretion given to the Secretary of Homeland Security in designating which jurisdictions he believes to be sanctuary jurisdictions, and the possible necessity of litigating a determination by the Secretary that a sanctuary jurisdiction is violating federal law, it is possible that federal funds could be jeopardized if only until litigation is concluded. Public bodies can protect themselves to some degree by drafting their ordinances carefully so as not to violate

8 U.S.C. 1373. And of course it would be helpful if no horrific crimes committed by "aliens" show up on the weekly list required by Executive Order 13768 to be generated by Secretary of Homeland Security (see Section I.B above), which could cause public pressure on public bodies to take some action in response.

Nothing in federal law requires local jurisdictions to enforce the Immigration and Nationality Act and regulations. Article I, Section 8 of the U.S. Constitution specifies the powers of Congress; all other lawmaking powers are left to the states. The Tenth Amendment to the U.S. Constitution[12] precludes the federal government from coercing state or local governments to use their resources to enforce federal regulatory programs such as immigration. *See Printz v. United States,* 521 U.S. 898, 926 (1997), federal government may not compel states to implement, by legislation or executive action, federal regulatory programs. Nor it is it a violation of federal law to refuse to comply with ICE detainers (see the discussion of *Moreno v. Napolitano* decision noted in footnote 2 of Section I above). In fact, public bodies now more than ever need to be careful about potential liability if they hold, or continue to hold, an individual solely on the basis of a civil immigration detainer. *See Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (United States District Court D. Oregon, 2014).

On Monday, 3/27/17, United States Attorney General Jeff Sessions made a statement regarding sanctuary jurisdictions which threatened termination and "claw back" of grant funding to jurisdictions that willfully violate 8 U.S.C. Section 1373. Nothing particularly new was said. Moreover, his statement that the Department of Justice will require jurisdictions seeking or applying for federal grants to certify compliance with Section 1373 as a condition for receiving grant awards reflects a lack of understanding of the current DOJ process which already requires such certification.

IV. Are Sanctuary City ordinances necessary or effective?

Because cities and villages generally hold individuals in custody for very short periods of time (until they can get them to a county jail facility), it is probable that Sanctuary City provisions that pertain to detention and information about detainees about to be released from detention are far more likely to be relevant in a county setting.[13] The balance of the Sanctuary City provisions found in the ordinances discussed in Section II above (e.g. threats prohibited, conditioning services or benefits prohibited, etc.) can be useful in almost any unit of local government. However, an argument can be made that it's not worthwhile for municipalities to draw the potential ire of the Secretary of Homeland Security in order to adopt policies that could be implemented on an administrative basis without unnecessary hoopla.

The argument against the administrative "quiet" approach to adopting sanctuary policies (rather than formally codifying Sanctuary City law), is that while a municipality may want to avoid putting the Secretary of Homeland Security on notice of certain protections being afforded, the public may not be aware of them either. One of the main reasons many municipalities feel the need to enact Sanctuary City ordinances is to reach out to their communities to make sure the public knows where the city stands on immigration issues and to assure them that the city will do what it can to protect them. A quiet approach, while effective to some degree, will not attain the important goal of extending some degree of comfort to people who are frightened to even let a public body know that they exist.

Law enforcement officers know the drawbacks of people who are unwilling to file criminal complaints or to serve as witnesses in criminal cases. Here's an all-too-common example: an attorney I know served jury duty last month in an aggravated battery case in a municipality outside of Cook County. The defendant took a pair of heavy pliers and struck the victim in the head with them a couple of times. In an effort to claim self-defense, the defendant called the police to tell them about the incident and to proclaim that it was self-defense. The defendant was convicted. The irony was that the victim never did call the police and the entire incident would have gone unnoticed by the police absent the defendant making the call himself. The reason? Obvious, of course. The victim was worried about someone discovering his immigration status.

V. Will there be a state-wide legislative fix?

The short answer is that it appears not, or at least not yet. While there are three pieces of pending legislation pertaining to sanctuary-type protections, each of them has a different focus, and a focus that addresses issues that are different than those addressed in the ordinances discussed in Section II above. Enactment of one or all of the legislative bills summarized below will not resolve any of the issues covered by the Sanctuary City ordinances.

1. Immigration Safe Zones Act. HB 426 introduced 1/12/17 by Representative Chris Welch

- Prohibits State-funded schools (including licensed day care centers, pre-schools, elementary and secondary schools and institutions of higher education), and State-funded medical treatment and health care facilities, from granting access to ICE or to State and local law enforcement agencies acting pursuant to an agreement with ICE unless there is a court-issued warrant and "appropriate personnel have reviewed that warrant."
- Prohibits employees of elementary schools, secondary schools, and institutions of higher education from asking about a student's immigration status or that of the student's family (except in cases of in-State or in-district tuition verification, scholarships, grants or services that are contingent upon that information).
- Provides for training of teachers, administrators, medical facility staff and other staff in dealing with immigration issues pursuant to a plan to be developed within 90 days of the effective date of the legislation.
- Any immigration or citizenship

questions contained in applications or forms used by a State agency are to be removed within 60 days of the effective date of the Act.

2. Safeguarding Sanctuary Cities Act. HB 3739 introduced 2/10/17 by Representative Jaime M Andrade, Jr.

Provides that notwithstanding any other provision of law, if a unit of local government has a policy in place that limits or restricts compliance with or otherwise does not comply with a detainer issued by the Secretary of Homeland Security, any grant of State funds that the unit of local government would otherwise receive may not be reduced or not made available by reason of such noncompliance. The legislation defines "detainer" as any order or request by the Secretary of Homeland Security to a unit of local government official to: (1) temporarily hold a person in the custody of that State or unit of local government until such person may be taken into federal custody; (2) transport such a person for transfer to federal custody; or (3) notify the Secretary of Homeland Security prior to the release of such a person.

3. Sanctuary State Act. HB 3698 introduced 2/10/17 by Representative Robyn Gabel

Provides that a law enforcement agency of the State or its political subdivisions shall not use State funds, equipment, personnel, or resources, nor accept or utilize federal funds, equipment, personnel or resources for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship who have entered or are residing in the United States in violation of federal immigration laws in Title 8 of the United States Code, unless legally required to do so.

VI. Alternatives to Sanctuary City Ordinances

What can be done short of a full-blown Sanctuary City ordinance along the lines discussed in Section II above?

1. Implement administrative policies that contain similar types of provisions as those contained in the Welcoming City Ordinances discussed in Section II above. This is the "quiet" approach briefly discussed in Section IV above.
2. Pass a resolution which articulates the city's policies with respect to fair, equal, and respectful treatment of all people irrespective of race, color, religion, sexual orientation…and immigration or citizenship status.
3. Be willing to join forces with other units of local government to defend against any of them from being stripped of funding because they have adopted policies that protect all individuals irrespective of their immigration status.

CONCLUSION

If a decision is made to proceed with a Sanctuary City ordinance, and care is taken with how it is written and implemented, it seems unlikely that federal funding will be jeopardized. On the other hand, some municipalities may conclude that their current policies and practices already address the issues that would be addressed by legislative action. Others may simply want the people who live in and visit their community to know that they welcome diversity and will treat everyone equally and fairly regardless of differences in background, religion, and culture. Each city (and each village and county) needs to find its own way on the issue of whether or not a Sanctuary City ordinance, or some other approach, or maybe no approach at all, best serves their community. ■

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1. This article originally appeared in the April 2017 Illinois Local Government Lawyers Association newsletter (Vol. 15, No. 4) and is reprinted with permission. Note: City and Village are used interchangeably in this article.

2. [**Note:** On 9/30/16, in *Moreno v. Napolitano*, 2016 WL 5720465, Judge John Z. Lee of the U.S. District Court for the Northern District of Illinois held in a class action lawsuit that ICE's practice of issuing immigration detainers without first obtaining an arrest warrant or making a determination about the chances that the targeted individual was likely to escape before a warrant could be obtained was prohibited by the Immigration and Nationality Act. Judge Lee's order did not address the constitutionality of ICE detainers. Instead, in his opinion, Lee wrote that the immigration agency exceeded its authority by issuing detainers rather than seeking judicial warrants.] *See also Galarza v. Szalczyk,* 745 F.3d 634, 645 (3d Cir. 2014) and the DOJ Memorandum discussed in Section 1A and footnote 3.

3. The DOJ Memorandum "Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. ¶1373 by Grant Recipients" is worth reading. Just search "8 U.S.C. 1373" on the U.S. DOJ website. Also take a look at the 8 U.S.C. Section 1373 Compliance Guidelines and Additional Compliance Guidelines.

4. The terms "Sanctuary City" and "Welcoming City" are used interchangeably in this article. "City" and Village are also used interchangeably.

5. *See* Urbana's Resolution No. 2016-12-070R "RE-AFFIRMING URBANA AS A SANCTUARY CITY."

6. "Agency" is defined as City departments, divisions, council, board, or other body established by authority of the City, and "Agents" defined as employees and individuals acting on the City's behalf.

7. Titled "Exchanging File Information" in the Chicago and Evanston ordinances. Oak Park includes this under their Benefits, Services and Opportunities section. Skokie includes this under "Requesting Information Prohibited.

8. Titled "Civil Immigration Enforcement Actions – Federal Responsibility" in Chicago, Evanston, and Oak Parks' ordinances. Titled "Assistance with enforcement operations" in Skokie's ordinance.

9. Whether or not to honor Immigration Detainers should be considered in light of the *Moreno v. Napolitano* and *Galarza v. Szalczyk* decisions referenced in end note 2 above.

10. The language in 6 (b) (iii) could run afoul of the DOJ's analysis regarding restrictions on the exchange of information pertaining to individuals' immigration status per the DOJ Memorandum referenced in Section I.A.

11. 8 U.S.C Section 1357 - Powers of immigration officers and employees **…** **(g) Performance of immigration officer functions by State officers and employees**: **(1)** Notwithstanding section 1342 of title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law. (…g(2) –g(5)).

12. 10th Amendment to the U.S. Constitution: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

13. Per an informal poll of several municipal attorneys taken in mid-March, none of their municipalities had been contacted by ICE for assistance in the last 5 years.

Upcoming CLE programs

TO REGISTER, GO TO WWW.ISBA.ORG/CLE OR CALL THE ISBA REGISTRAR AT 800-252-8908 OR 217-525-1760.

June

Thursday, 06-01-17 – Webinar— Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

Friday, 06-02-2016—NIU Conference Center, Naperville—Solo & Small Firm Practice Institute Series: A Balancing Act: Maximize Your Technology with Minimized Expense. ALL DAY.

Thursday, 06-08-17 – Chicago Regional Office—Commercial Loans/ Documenting For Success and Preparing For Failure. Presented by Commercial Banking, Collections & Bankruptcy. 9:00 a.m. – 4:30 p.m.

Thursday, 06-08-17 – LIVE Webcast— Commercial Loans/Documenting For Success and Preparing For Failure. Presented by Commercial Banking, Collections & Bankruptcy. 9:00 a.m. – 4:30 p.m.

Thursday, 6-08-17 – Webinar— Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00.

Friday, 06-09-17 – Chicago Regional Office—Estate Administrative Issues: Are You Prepared to Handle Some of the Difficult Issues Facing Your Client? Presented by Trust and Estates. 9:00 a.m. – 4:15 p.m.

Friday, 06-09-17 – LIVE Webcast— Estate Administrative Issues: Are You Prepared to Handle Some of the Difficult Issues Facing Your Client? Presented by Trust and Estates. 9:00 a.m. – 4:15 p.m.

Tuesday, 06-13-17- Webinar—Excel Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 06-14-17 – Live Webcast— Implicit Bias: How it Impacts the Legal Workplace and Courtroom Dynamics. Presented by the ISBA Committee on Racial and Ethnic Minorities and the Law. 12:00 -2:00 pm.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—Moneyball for Lawyers: Using Data to Build a Major-League Practice. Time TBD.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—Effectively and Ethically Handling Referrals for Personal Injury Clients. Presented by Law Office Management and Economics. Time TBD.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—E-Filing in Illinois. Presented by the ISBA Standing Committee on Legal Technology. 8:45 – 10:15 am.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—Boost Your Memory Power - Improve Your Practice. Master Series Presented by the Illinois State Bar Association.

Wednesday, 06-21-2017—Chicago, ISBA Regional Office—Gain the Edge! ® Negotiation Strategies for Lawyers - Marty Latz Negotiations. Master Series Presented by the ISBA. 9:00 a.m. – 4:30 p.m.

Wednesday, 06-21-2017—Live Webcast—Gain the Edge! ® Negotiation Strategies for Lawyers - Marty Latz Negotiations. Master Series Presented by the ISBA. 9:00 a.m. – 4:30 p.m.

Tuesday, 06-27-17- Webinar—Google Apps Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

Tuesday, 06-27-2017 Live Webcast— The Inappropriate Use of Non-Competition Agreements: A Conversation on National and Local Trends. Presented by Racial and Ethnic Minorities and the Law. 2:00 p.m.-3:00 p.m.

Thursday, 06-29-17, Chicago, ISBA Regional Office—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section (tentative). 8:30 am – 5:00 pm.

Thursday, 06-29-17 – Live Webcast— How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section (tentative). 8:30 am – 5:00 pm. ■