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ILLINOIS STATE BAR ASSOCIATION

STANDING COMMITTEE ON GOVERNMENT LAWYERS

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

From the chair

By Marc Christopher Loro, Springfield

I am pleased to report on the activity of the Committee on Government Lawyers since our last newsletter. First and foremost, our ethics seminar, **"Ethical Considerations in Public Sector Law,"** was presented in Springfield on 12 September 2003. I believe that the seminar can be called nothing but successful. Based upon the questions and comments from the audience, and their engagement with the role players during the discussion periods, I am certain that a great deal of knowledge and information was exchanged. Our thanks to **James Grogan** of the Attorney Registration & Disciplinary Commission and to ISBA staff members **Janet Sosin** and **Trish Ashton**. For more information regarding the seminar, please see Cindy Ervin's article inside the newsletter.

As Mr. Grogan guided the audience through the thicket of the Rules of Professional Conduct, and attempted to explain how the rules apply to government practice, I found it difficult to imagine that any practicing government lawyer could read the Rules and have a clear understanding of his/her ethical responsibilities. The federal courts have recognized that "government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients—even those engaged in wrongdoing—from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest." *In Re Witness before Special Grand Jury* (7th Cir. 2002), 288 F.3d 289, 293. I submit that government lawyers are entitled to more than the vague references that one must glean from the current Rules of Professional Conduct. See, for example, Rule 1.13, "Organization as Client." I intend to expand and expound on this topic in future newsletters.

The seminar was followed by a well-attended reception and recognition ceremony for senior government attorneys at the recently renamed Gwendolyn Brooks State Library. The Government Bar Association was a co-sponsor for the reception, and we are deeply appreciative of its support. For the historical record, the following senior government attorneys were the first to be recognized by the ISBA's Committee on Government Lawyers for their distinguished and dedicated public service:

- **Thomas J. Carlisle**, of the Illinois Department of Revenue;
- **Shawn W. Denney**, recently retired from the Office of the Illinois Attorney General;
- **Matthew J. Finnell**, Administrator of the Illinois Court of Claims;
- **Theodore A. Gottfried**, Executive Director of the Office of the State Appellate Defender;
- **Patrick J. Hughes, Jr.**, recently retired from the Office of the State Appellate Defender;
- **Claire A. Manning**, recently retired from the Illinois Pollution Control Board;
- **Madalyn Maxwell**, recently retired from the Office of the Illinois Attorney General;
- **John J. Pavlou**, recently retired from the Office of the State Fire Marshall;
- **Darryl D. Pratscher**, Clerk of the 4th District Appellate Court;
- **James W. Redlich**, Chief Counsel for the Illinois State Police;
- **Edward J. Schoenbaum**, an administrative law judge with the Department of Employment Security;
- **George W. Tinkham**, recently retired from the Illinois Department of Transportation; and
- **Shirley K. Wilgenbusch**, Research

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See page 16 for details.

IN THIS ISSUE

Director for the 4th District Appellate Court.

Our Programs and Services Subcommittee was responsible for producing these two events, and much credit for their success goes to co-chairs **Rosalyn Kaplan** and **Nancy Easum**. Our thanks also to ISBA Executive Director **Robert Craghead**, who took the time to stop by and witness the recognition ceremony. Another recognition ceremony is in the offing, and any government lawyer who meets the qualifications of the recognition program is welcome to submit an application form. The form is published in this newsletter and will be available on the ISBA Web site.

On another subject, Secretary **Pat Hughes** and I met with **Brian Otwell,** Sangamon County Public Defender and President of the Public Defenders Association, in early August to open lines of communication with the Public Defenders Association ("PDA"). We discussed ways that the Committee on Government Lawyers and the PDA could work together to improve the working conditions of our constituencies. One area of mutual concern was state and federal legislation. For example, **Public Act 92-508**, effective July 1, 2002, (HB 549) requires the state to pay 66 ⅔ percent of the public defender's salary for every county. If a public defender is employed full-time in that capacity, his or her salary must be at least 90 percent of that county's state's attorney's salary. However, the General Assembly has not yet appropriated the money to fund this legislation. **House Bill 3563** provides for annual stipends of $3,500, adjusted for inflation, for a maximum of five years to assistant state's attorneys, assistant public defenders, assistant appellate defenders, assistant appellate prosecutors, assistant attorneys general, and non-supervisory legal aid attorneys. This legislation died in committee last year. The ISBA supported both of these bills, and we will support the efforts of the PDA and the Prosecutor's Bar Association to fund P.A. 92-508 and to win passage of HB 3563.

Zachary Raimi, a member of our legislation subcommittee, is following a bill which has been introduced in Congress called "The Prosecutors and Defenders Incentive Act." It has been introduced in both houses (S.1091.I and HR 2198.IH respectively). Co-sponsored by Illinois' Senior Senator Richard Durbin, the purpose of the legislation is to provide funding for student loan repayment for public attorneys. We will keep you posted on any developments with this legislation.

Our Membership Subcommittee has also been busy. Co-chair **Donna Del Principe** has put together a short survey to help us gauge the needs of non-ISBA member government lawyers. Do not be surprised if you receive a call from one of our committee members during the next several weeks.

Finally, anyone who would like to contribute a news item, brief a recent court decision, or publish an interesting piece of research, is welcome to submit the item to our dedicated and hardworking co-editors, **Kate Kelly** and **Lynn Patton**.

As you can see, we are busy. But that is how it should be. We welcome your participation in pursuing the mission of the Committee on Government Lawyers, and your input on how we are doing.

Encore CLE program

By Cynthia Ervin, Springfield

On September 12, 2003, the Standing Committee on Government Lawyers, in conjunction with the Government Bar Association, sponsored a continuing legal education program in Springfield, produced by and for government lawyers, entitled "Ethical Considerations in Public Sector Law." The program consisted of five scenarios, acted out by panelists, and depicted some of the ethical issues confronted by public sector attorneys. Each skit was followed by a discussion of the ethical dilemma(s) posed by the conduct of government workers, such as "Paul Politico," "Wanda Worcsalot," "Mark DeCode," and "Sam Gumshoe," and the application of the Rules of Professional Conduct to the various fact situations. Committee members Chuck Gunnarson, Kate Kelly, Paul Logli, Lynn Patton, Cynthia Ervin, and Lee Ann Schoeffel, energetically portrayed these roles, and other equally challenging parts. The ensuing discussions were led by Jim Grogan, Chief Counsel of the ARDC, who prompted the players as well as the audience to explore the ethical problems posed when, for example, a supervisor is more focused on the political realities than the legal arguments raised by a staff attorney.

The program was a reprisal of the same program held in Chicago on September 19, 2002, which also achieved rave reviews. More than 66 government attorneys attended this year's presentation of the program.

The first appearance

By James F. Holderman, U.S. District Judge, Chicago*

When appearing before a federal judge for the first time on a case, you of course want to make a good impression not only for yourself, but for your client and your case as well. To accomplish this, I suggest you consider following these simple steps:

1. Check the Court's Web site

Every federal court in Illinois has its own Web site, and those sites are:

- <http://www.ilnd.uscourts.gov> for Northern District of Illinois
- <http://www.ilnd.uscourts.gov> for Northern District Bankruptcy Court
- <http://www.ilcd.uscourts.gov> for Central District of Illinois
- <http://www.ilcb.uscourts.gov> for Central District Bankruptcy Court
- <http://www.ilsd.uscourts.gov> for Southern District of Illinois
- <http://www.ilsb.uscourts.gov> for Southern District Bankruptcy Court

Each Web site contains valuable information about each of the courts, including the court's local rules, courthouse locations and general procedures, as well as information about each individual judge's specific procedures, recent decisions, and schedules.

If you check the court's Web site just before your first appearance, you will

have the most up-to-date information on such practical things as knowing the exact location of the courtroom where the judge on your case will be sitting the day of your first appearance.

2. Go early

Go to the court prior to your first appearance, either go in early on the day your case is called or come in on some earlier day. Doing this provides you two benefits: (1) you can observe the way the judge deals with other cases on the judge's call; and (2) you can introduce yourself to the judge's staff, such as the judge's clerk and court reporter. Although you should not talk to them about the merits of your case, they are good people for you to know because at some point you will probably have to talk to the judge's clerk about scheduling and the judge's court reporter about transcripts. Plus, these people work with the judge on a daily basis and you can learn a lot from them. They are a good source of information about the judge. They know the judge's procedures, and what the judge expects from counsel in the courtroom. Judges often encourage their respective court reporters and clerks to let counsel know their specific courtroom procedures so counsel are better prepared. That makes the judge's life easier.

Also, an additional reason to go to the courthouse early on the day your case will be called is in this post-9/11 era, the time to get through U.S. courthouse security is unpredictable.

3. Bring your calendar

At the first appearance, most federal judges, be they district judges, bankruptcy judges, or magistrate judges, will want to set further dates in the case. Before judges set these dates, they usually want to learn from counsel what dates counsel are available to appear in court. If you do not have your calendar with you at the first appearance to let the judge know what dates you are, or more importantly, are not available to come to court, you will not be able to assist the judge on this point, and both your professional, as well as your personal schedule may be disrupted when a court appearance is set by the judge on a date which conflicts with something you have already scheduled. Moreover, the judge may be hesitant to later change a date the judge set in open court on the court calendar with all counsels' concurrence if opposing counsel objects to the change. So, bring your professional and personal calendar with you when you come to court for the first appearance for your convenience as well as the judge's.

4. Be ready to discuss your case

When your case is called in court for the first appearance, the most that the judge will probably know about your case is what has been previously filed in the public record. Consequently, many judges want to hear from the lawyers to obtain a further understanding about the case. Judges may want to know what the lawyers think the key issues are, what the possibility for settlement is, what time is necessary to complete discovery, and what would be a reasonable trial date. Before the first appearance, you should think about these points, talk to your co-counsel, and talk with opposing counsel. If you do, you will be able to succinctly and accurately state your position and answer all the judge's questions.

If you do these things, your first appearance in federal court should go smoothly and you will make the good impression you desire to make for the benefit of yourself, your client and your case.

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* This article was originally published in the ISBA's Federal Civil Practice newsletter, September 2003, Vol. 2, No. 1, and is reprinted with permission.

Federal rule change

By Christopher Minix, Carbondale*

The United States District Court for the Central District of Illinois has adopted an emergency rule banning "electronic devices" from federal courthouses. The change in Local Rule 83.7 is in response to the increasing security concerns of the Central District judges. The rule change was effective October 1, 2003; however, the court will accept and consider written comments concerning the emergency revision through November 1, 2003.

The rule change prohibits electronic devices in the courthouse, unless falling under an exception. In addition, because such devices will not be held within the courthouse, the rule urges those entering the courthouse to follow the rule in order to avoid delays in screening.

Rule 83.7 defines "electronic devices" as including "cameras, video recorders, audio recorders, cellular or digital phones, palm pilots and personal data assistants (PDAs) computers, and all similar electronic, cable, digital, computerized or other forms and methods of recording, transmitting, or communicating."

Exceptions to the rule include the use of electronic devices in ceremonial events such as naturalization proceedings or as otherwise ordered by the presiding judge. Also, the rule does not apply to U.S. Marshals, Deputy U.S. Marshals, Court Security Officers, law enforcement personnel with proper identification, and employees of the Illinois Department of Corrections who have transported state prisoners to court.

Attorneys must gain the permission of the presiding judge to use electronic devices within the courthouse and courtrooms. Furthermore, members of the news media who wish to conduct interviews relating to a court case may contact the presiding judge to seek permission to bring electronic equipment into the courthouse. If such permission is granted, the judge will designate an area of the courthouse where the equipment may be stored and used.

The full text of the rule is available at the District Court Clerk's office in Springfield, Peoria, Urbana, Rock Island, and on the Central District's Web site at: <www.ilcd.uscourts.gov>. Comments on the emergency rule may also be sent to: John M. Waters, Clerk, U.S. District Court, 600 E. Monroe, Room 234 Springfield, IL 62701.

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*Christopher Minix is a second-year law student at the Southern Illinois University School of Law.

Someone you should know: Diann Marsalek

By John Scully, Chicago*

Diann Marsalek has no trouble keeping busy. As Chief Counsel for the Illinois Department of Corrections ("DOC"), she is responsible for all legal affairs involving 13,000 DOC staff members, the 44,000 adults currently housed in Illinois' correctional facilities, and the thousands more residing in adult transition centers and juvenile detention centers. Her office currently has 7,000 cases pending in all levels of the judicial system.

After speaking with Marsalek for a short time, two things becomes evident: she is a Chicagoan through and through; and she puts tremendous value in public service. She was born and raised in the North-Side Lakeview neighborhood, where her mother worked at her children's school and later for their local alderman. Marsalek's father, Edward, was a judge on the Circuit Court of Cook County. When asked why she wanted to become a lawyer, she replies that the early exposure to the law that she received through her father and her cousin, and the public service example set by both of her parents, planted the seed in her mind from an early age.

After earning a B.A. in political science and an M.A. in sociology from DePaul University, she continued on to law school at Northern Illinois University. While a student there, she was active in the Women's Caucus and served as president of the Student Bar Association. The classes that she enjoyed most were constitutional law, domestic law, and juvenile law.

In the last two years of law school, she clerked for the Illinois Attorney General's Office, where she accepted a position after graduation. She spent the next 14 years with the Attorney General's office in Chicago, dealing primarily with issues relating to the Department of Corrections. She cites both Susan Weidel and Susan O'Leary, two of her predecessors as chief counsel of the DOC, as attorneys who had a positive impact on her legal career and with whom she worked closely during her years at the Attorney General's Office. As a result, she was highly experienced and familiar with the office when Governor Blagojevich appointed her to a four-year term as chief counsel in February 2003.

In that role, she oversees a staff comprised of four attorneys and two paralegals in Chicago, as well as two attorneys in Springfield. Due to recent departures, it is the smallest the staff has been in recent history. Ms. Marsalek lauded the diverse backgrounds within the group. "We have had people come here from work at the federal district court, from different state's attorney's offices, from private practice, and from other governmental agencies. It's helpful to have different people with medical, criminal, or labor backgrounds so that they can specialize in different areas within our office." A group with such a vast array of experience is necessary to take on the diverse issues that the office faces as the department's sole legal representative. A large part of the legal staff's duties involves reading and responding to correspondence, whether it be from the public, from inmates, or from staff members at the correctional facilities. The office issues legal opinions to the correctional institutions. They review all contracts and handle all land acquisitions for the department. They evaluate inmates' claims, which typically include religious rights, access to the courts, access to medical services, and use of force issues, as well as various due process challenges.

In addition, the attorneys spend time educating the DOC workforce so that they are aware of the legal issues that could potentially arise. They train employees about the basics of litigation in case an inmate should sue them. Marsalek's general approach is to be proactive, to try to identify possible conflicts early on, and to create policies or change existing policies so that trouble does not develop further down the road. The attorneys encourage all employees to write complete and accurate reports in case a problem arises.

Since taking the helm in February, Marsalek has tried to take the office in some new directions. First, she has made the use of videoconferencing a top priority. Utilizing the technology when an inmate has to testify in court, for instance, furthers both institutional efficiency and public safety. She has also made considerable efforts to ensure that all inmates convicted or in custody after August 22, 2002, have a sample of their DNA on file with the state, as required by state law.

Further, she has done away with the "Attorney of the Day" program, where each DOC facility was assigned on a rotating basis to an attorney who could be contacted with legal questions. The problem with that system, according to Marsalek, was that staff members in a given facility were not dealing with the same attorney consistently. Instead, she has assigned her attorneys to a set district or number of institutions, so that there is greater continuity between an attorney and the staff of any given facility. While she has found the reaction from the institutions to be abundantly positive, she notes that some have taken issue with the changes she has made. She recognizes that, "whenever you make a change, you have people who will resist."

One benefit of the job, says Marsalek, is that, "you're not just at your desk eight hours a day." She personally divides time between offices in Chicago, Stateville, and Springfield, and the staff attorneys frequently travel to the facilities in order to better serve their clients. "It's good to have a real hands-on approach with the staffs at the institutions, so that they feel they can approach us." On the whole, Marsalek finds her new position to consist of "interesting and rewarding work. Nothing is ever the exact same situation as something we've faced before."

In her spare time, Marsalek enjoys spending time with her family. She has a sister who works for American Airlines and a brother who is a chef. She is an avid Cubs fan and participates in outdoor activities, particularly golf.

As far as plans for the future go, Marsalek does not have anything specific in mind but expressed a desire to remain in government work. "I never had much ambition to go into private practice. My friends always thought I was crazy not to. But money was never the big issue for me. I was always more interested in public service, in having a job I like, in having a feeling that I'm helping people." She wishes more students would pursue employment in public service, and feels that more would if they realized how rewarding an experience it is. Her office, she notes, provides students with the opportunity to get a better look at government work and its rewards through undergraduate and law school internships.

Diann Marsalek takes pride in her status as Chicagoan and public servant. The strongest impression I received of her, though, is that she is a genuine person with a kind heart, just the type of person that citizens should hope to have in a position of public trust.

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* John Scully is a second-year law student and member of the Law Review at the DePaul University College of Law.

Ethics corner

By Rosalyn B. Kaplan, Chicago

Although part of the Web site is still "under construction," public information about Illinois attorneys, an explanation of the operation of the Attorney Registration & Disciplinary Commission ("ARDC") rules, and links to use for researching ethics issues are currently available at: <www.iardc.org>. The newest addition to this site, the "Lawyer Search" function, will enable you to verify registration information (business address, phone number, and year of admission) and current status of every Illinois lawyer. If the lawyer is, or has been, the subject of public discipline, further information is displayed about each disciplinary case following the registration details.

Go to "Lawyer Registration" for details about the registration process and forms to download to change your registered address or request a written verification of registration status (often needed when applying for public sector jobs or admission to the bars of other states). Another section provides information and a form to download for any member of the public wishing to submit a request for investigation of a lawyer. Click on "Rules and Decisions," and you will find Supreme Court rules governing the disciplinary process, the Rules of Professional Conduct, the Code of Judicial Conduct, and the rules of the ARDC, the Board of Admissions, and the Committee on Character and Fitness (the "Decisions" part is still under construction but will, in time, enable you to research past disciplinary decisions of the Illinois Supreme Court and the Hearing and Review Boards of the ARDC).

Next on the site is a section describing the ARDC's Ethics Inquiry Program, a service provided to attorneys who call in to request research guidance when confronting ethical problems; here, the site includes answers to some Frequently Asked Questions. Publications of the ARDC, including articles and the entire Client Trust Account Handbook, are online. Click on "New Filings, Hearing Schedules and Clerk's Office" to review recent formal complaints filed against Illinois attorneys and to view the schedule for upcoming hearings and arguments. The Client Protection Program is described, and a claim form can be downloaded. "Resources and Links" are provided to state, local and national organizations that address ethics issues. Finally, a section on ARDC organizational information describes the work of the agency, provides contact information, and includes the last three annual reports to the Illinois Supreme Court.

News you can use: Ethics bill update

On August 26, 2003, Governor Rod R. Blagojevich filed his long-anticipated amendatory veto of House Bill 3412. House Bill 3412, among other things, creates the State Officials and Employees Ethics Act and prohibits state officers and state employees of the executive and legislative branches of state government and the office of the Auditor General from engaging in political activities on state time.

Through the exercise of his amendatory veto, the Governor has proposed stronger ethics reform than that which was passed by the General Assembly. Among the Governor's suggestions are the tightening of those laws addressing the receipt of gifts by government officers and employees and the creation of the office of Inspector General (See "General Assembly Passes Ethics Legislation, Governor Vetoes Ethics Bill," *Committee on Government Lawyers*, August 2003, Vol.5, No.1 for a more complete summary of the Governor's suggested changes). The General Assembly will reconvene November 4-6 and November 18-20, 2003 for veto session. At that time, the General Assembly will review all bills vetoed by the Governor, including House Bill 3412.

A copy of the Governor's veto message may be found on the General Assembly's Web site at <http://www.legis.state.il.us> under the full text link for House Bill 3412.

Ethics hotline and the office of the Inspector General

In furtherance of the changes he proposed in his amendatory veto of House Bill 3412, on September 10, 2003, Governor Rod R. Blagojevich announced the creation of a new ethics hotline and that the office of Inspector General is ready to respond to ethics inquiries and complaints of misconduct regarding government employees under his jurisdiction. The office of Inspector General is headed by former federal prosecutor Z. Scott. Currently, the function of the office of the Inspector General is to investigate fraud and abuse in state government by employees in agencies under the Governor's control. Ethics complaints or inquiries can be made to the Inspector General's office toll-free at 866-814-1113, or through the Web at: <www.inspectorgeneral.il.gov>.

The office of the Inspector General will investigate complaints of violations of any law, rule, regulation, abuse of authority or other forms of misconduct within the offices, boards and commissions that report to the Governor. Complaints received by the office of Inspector General are reviewed and evaluated to determine whether there is reasonable cause to believe the allegations, if true, would constitute a violation of any law, rule or regulation on the part of a state officer, agency, employee, or entity doing business with the State of Illinois. At the conclusion of an investigation opened by the office of Inspector General, the Inspector General will report findings and recommendations to the Governor and, where appropriate, to the agency director who manages the complained-of employee, contract or program for personnel action or corrective action. When appropriate, a report of investigation may also be forwarded to a prosecutor for review to determine whether the underlying facts are sufficient to support a criminal prosecution.

The office of the Inspector General will be establishing an ethics training program for all state employees under the Governor's jurisdiction.

Should you desire to file a complaint, the office of the Inspector General may be contacted as follows:

Office of Inspector General
32 West Randolph Street
Suite 1300
Chicago, IL 60601
(312) 814-5600 [Reception]
(866) 814-1113 [Hotline]

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

Chicago Regional Office
20 S. Clark Street, Suite 900
Chicago, IL 60603
Phone (312) 726-8775

Web site: www.isba.org

Managing Editor/Production
Katie Underwood

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

Lynn Patton
500 S. Second St.
Springfield, 62706

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

(312) 814-5479 [Fax]

The Governor's amendatory veto of House Bill 3412 proposes an expanded office of the Inspector General for all state employees in the executive and legislative branches of state government, not only those agencies that report directly to the Governor. The General Assembly is expected to take action on the Governor's amendatory veto during the November veto session.

Attorneys now have admission reciprocity in federal district courts throughout Illinois*

Each United States District Court in Illinois has now modified its local rules to allow a lawyer admitted to practice in one federal district court to be admitted in each of the other federal districts without requiring a personal appearance to do so. Lawyers in the past had to apply for admission and then appear personally before a designated judge in that U.S. District Court to take the oath of admission. The personal appearance is no longer a requirement if the lawyer has previously been admitted in another U.S. District Court in Illinois. All a previously admitted lawyer must do is file a motion seeking admission accompanied by a copy of the attorney's Certificate of Admission to Practice from another U.S. District Court in Illinois and, of course, pay the requisite admission fee.

Judge Phil Gilbert of the Southern District of Illinois, a member of the ISBA's Federal Practice Section Council, was the primary advocate for this change in the Illinois federal district courts to save lawyers time and money.

DOJ update

In past issues of the *Committee on Government Lawyers* newsletter, we have updated you on the class action lawsuit brought on behalf of Department of Justice ("DOJ") attorneys claiming that DOJ violated the Federal Employees Pay Act ("FEPA") by refusing to compensate attorneys for overtime as required by FEPA. The Court of Federal Claims granted summary judgment to the plaintiffs in 2002. DOJ argued that even though attorneys are covered by the FEPA, DOJ need not compensate them for overtime because DOJ neither authorized in advance nor approved after the fact any of the overtime hours. According to the pleadings, DOJ kept two sets of books, only one of which tracked the real number of overtime hours worked by attorneys. DOJ has now appealed the decision, on an interlocutory appeal, and briefing is complete. Oral argument is expected in either December, 2003 or January, 2004.

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The Governor's amendatory veto of House Bill 3412—What it could mean for units of local government

By Pat Lord, Naperville

As discussed elsewhere in this newsletter, Governor Rod Blagojevich recently filed an amendatory veto of House Bill 3412. House Bill 3412 ("HB 3412"), among other things, creates the State Officials and Employees Ethics Act. The bill's sponsor was House Republican Leader Tom Cross of the 84th District.

In his veto message, dated September 17, 2003, the Governor stated that: "The ethics bill passed in May needs substantial improvement…" Most people would consider this to be an understatement of mammoth proportion given that the Governor's amendatory veto is 10 pages long and contains radical changes to House Bill 3412 and to Illinois law.

HB 3412, as passed by the General Assembly, had no impact on the State Gift Ban Act (5 ILCS 425/1 *et seq.*). However, with one sentence, buried on page 9 of his amendatory veto, Governor Blagojevich proposes repealing the Gift Ban Act in its entirety. The relevant language in the Governor's message simply states: "The State Gift Ban Act is repealed upon the effective date of the State Officials and Employees Ethics Act."

If the Governor's amendatory veto is accepted by the General Assembly, the only statutory ethical provision left standing applicable to local governmental entities (other than those provisions oth-

erwise contained in specific legislation) will be section 70-5 of the new State Officials and Employees Ethics Act. That section requires "government entities," a term defined to include "a unit of local government or a school district but not a State agency," to adopt, within six months of the effective date of the new Act, an ordinance or resolution that regulates, in a manner no less restrictive than section 5-15 of the State Officials and Employees Ethics Act, the political activities of officers and employees of the governmental entity. To that end, the amendatory veto requires the Attorney General to develop model ordinances and resolutions and to advise governmental entities on their contents and adoption.

At first blush, local governmental entities, many of which were never big fans of the controversial State Gift Ban Act in the first place, may not mourn its death. This is particularly true for counties and municipalities that will not be affected by the lion's share of the new State Officials and Employees Ethics Act. But life is never that simple.

Section 83 of the State Gift Ban Act (5 ILCS 425/83) requires all units of local government, including home rule units and school districts, to adopt enforcement provisions for the prohibition and solicitation of gifts in a manner no less restrictive than provided for in that Act. Such ordinances were to be in place by July 1, 1999. In response, some municipalities passed ordinances that simply made the Gift Ban Act applicable to all municipal employees and salaried officials. Others hedged their bets and added qualifying language to the effect that if the State Gift Ban Act was ever legislatively amended, the amendments would be automatically incorporated by reference, and that if the State Gift Ban Act was held unconstitutional by the Illinois Supreme Court, the ordinance adopting the Gift Ban Act would be automatically repealed as of the date of the court's decision.

However, if the Gift Ban Act is repealed by the legislature, the safety-valve qualifiers built into many local governmental entities' ordinances regarding legislative amendments and the potential finding by the Illinois Supreme Court of unconstitutionality would not appear to apply (unless one takes the position that legislative repeal is the ultimate form of amendment). That being said, aside from political and public relation considerations, there would be nothing to stop local governments from repealing their Gift Ban ordinances and, if they so choose, passing some other ethics ordinance that they believe is clearer and fairer.

It is extremely doubtful, however, that the Gift Ban Act will actually end up on the cutting room floor, so to speak. The Governor and the members of the General Assembly are engaged in serious bi-partisan discussions regarding a compromise position on HB 3412 that will be considered during the veto session in November. In all probability, legal counsel for local governmental entities will find that the Gift Ban Act survives, but with some amendments, such as the elimination of the more popular, but infamous exceptions enumerated in the Gift Ban Act (e.g. the exception for "golf and tennis" (5 ILCS 425/15 (21)).

It is interesting to note that there are serious questions regarding whether Governor Blagojevich's amendatory veto of HB 3412 exceeds the scope of his authority. When addressing the scope of a Governor's authority with respect to an amendatory veto, the Illinois Supreme Court has consistently held that:

> While the exact boundaries of the Governor's power under this section [Illinois Constitution 1970, article IV, Section 9(e)] have not been totally defined, a Governor may not substitute a completely new bill (*People ex rel Klinger v. Howlett* (1972), 50 Ill.2d 242, 249) or change the fundamental purpose of the legislation. (*Continental Illinois National Bank & Trust Co. v. Zagel* (1979), 78 Ill.2d 387, 398). The Governor's amendatory veto power may make changes that constitute minor enhancements which relate to clarity, fairness or the practical requirements of the legislation. *People ex rel. City of Canton v. Crouch* (1980), 79 Ill.2d 356, 376.
>
> *Department of Central Management Services v. Illinois State Labor Relations Board*, 619 N.E. 2d 239, 243 (4th Dist 1993).

Clearly, Governor Blagojevich's amendatory veto goes beyond simply clarifying HB 3412, or making "minor enhancements" to it, and would therefore be vulnerable to a constitutional attack.

The propriety of Governor Blagojevich's amendatory veto of HB 3412 will become a non-issue if a compromise on the bill is achieved, as appears likely. In a story that ran in the *Chicago Tribune* on Friday, October 17, 2003, Representative John Fritchey (11th District), a House sponsor of HB 3412 who has been involved in negotiations on the amendatory veto, has indicated that the Governor is willing to negotiate regarding his demand for creation of the position of Executive Inspector General. Instead there may be "inspectors general" working for each statewide officer.

No matter what, it appears that significant legislative changes are on the horizon regarding ethics in Illinois, though mainly for state officers and employees. As for the exact fate of the State Gift Ban Act, we will have to wait and see what the fall veto session brings. This newsletter will continue to monitor this subject.

In-sites

By Lee Ann Schoeffel, Springfield

This edition of the In-sites column provides a listing of some useful Web sites with information about the Health Insurance Portability and Accountability Act ("HIPAA"). In 1996, Congress enacted HIPAA (*see* Public Law 104-191, effective August 21, 1996) to apply to health information created or maintained by health care providers who engage in certain electronic transactions, health plans, and health care clearinghouses. The Department of Human Services has issued a Privacy Rule that provides comprehensive federal protection for the privacy of health information.

A site maintained by the federal Department of Health and Human Services' Office of Civil Rights and which contains comprehensive information about HIPAA and medical privacy is <www.hhs.gov/ocr/hipaa/>. This site contains general information, links to HIPAA regulations and standards, educational materials and information about how to file a health information privacy complaint. There are links containing targeted information for consumers, small providers and small businesses. Additionally, the site

provides links to HIPAA information contained on other federal agency Web sites. A useful portion of the site is the "Answers to Frequently Asked Questions" link. Examples of frequently asked questions that are answered on that site include: "Who must comply with these new HIPAA privacy standards?"; "Does the HIPAA privacy rule override state laws that require consent to use or disclose health information?"; "Will the privacy rule impede the disclosures needed to pay workers' compensation claims"; "Will the privacy rule make it easier for police and law enforcement to get my medical information"; "May I make disclosures to public officials who are responding to a bioterrorism threat/emergency"; and "Are hospitals able to inform the clergy about parishioners in the hospital?"

A preliminary draft analysis assessing the impact of HIPAA and its related regulations on a variety of Illinois laws related to the use or disclosure of health information can be found at: <www.illinois.gov/hipaa/>.

A number of state agency Web sites also contain HIPAA information. The Illinois Department of Insurance site contains information about HIPAA and pre-existing conditions at: <www.ins.state.il.us/HealthInsurance/HIPAApreex.htm>. The Comprehensive Health Insurance Program (CHIP) site <www.chip.state.il.us/chip.htm> contains information about qualifying as a federally eligible individual under Section 15 (HIPAA) of the CHIP Act. HIPAA information may be accessed at the Department of Human Services site <www.dhs.state.il.us/hipaa/> and at the Department of Public Aid site <www.myidpa.com/hipaa/>. The Department of Central Management Services site contains information about HIPAA in publications relating to benefit choice options at: <www.state.il.us/cms/2_servicese_ben/groupins.htm>.

Enforcement of municipal ordinances—A new, efficient method

*By Kathleen Field Orr, Chicago**

Redevelopment of blighted real estate

Every profession has its own set of regularly occurring frustrating circumstances. For example, a police officer is often forced to abandon an investigation in order to preserve an individual's right of privacy; the teacher is always required to have the simplest curriculum change make its way through a bureaucratic maze before implementation is permitted; or, the administrator is mandated to take a certain tact due to political factors instead of following a higher set of standards. For a municipal planner, conquering the usual hurdles of political influence—financial limitations, bureaucratic procedures or the continuing objection to change—pales in comparison to the frustrations encountered when attempting to implement a development plan once it has been approved and accepted.

The implementation of a well-planned redevelopment plan most often requires the assembly of property having diversity of ownership to create a parcel of real estate sufficient in size to support new development. Most often the planner is presented with numerous obstacles in the acquisition of property given the constitutional protections afforded to property owners in all states. Most redevelopments in urban areas include property which is blighted and tax delinquent for many years. Given the judicial procedures required to clear title on such land and the serious backlogs which exist in most courtrooms across this country, plans to remove blight and undertake urban redevelopment are often abandoned. It is not uncommon for a redevelopment plan to be set on a shelf given the cost of implementation of zoning changes and enforcement of building codes.

Legislative authority

In recent years, state legislatures have found that those jurisdictions (counties and municipalities) which most often enact the legislation controlling land use and conditions which affect the public health, safety and welfare of citizens, should be empowered to enforce such legislative enactments in a cost-effective way. For this reason, many state legislatures have empowered counties and municipalities to create systems of administrative adjudication to enforce local code requirements. The purpose of this article is to review the legislation of several states which has granted local jurisdictions the authority to undertake enforcement of zoning and building codes. The proper establishment and operation of these adjudicatory systems should enhance the ability of planners to proceed expeditiously to deal with blighted properties that often delay, if not destroy, the ability to undertake a development or redevelopment plan and the ability to enforce adherence to the maintenance of the plan after it has been fully constructed and is in operation. The protection of the public health, safety and welfare of citizens can be substantially enhanced by justice systems which can be operated cost effectively and efficiently while affording due process to all parties concerned.

Illinois

In order for units of local government to protect the health, safety and welfare of its residents, some state legislatures have empowered local units of government with extensive enforcement powers. In 1998, the State of Illinois authorized home rule municipalities to undertake a system of administrative adjudication of local ordinance violations. (*See* Public Act 90-156, effective January 1, 1998, codified at 65 ILCS 5/1-2.1-1 *et seq.* (West 2002)). The system established by Illinois law was an adjudicatory hearing process presided over by a hearing officer appointed by the municipality who must be an attorney licensed to practice law in the state for at least three years. The legislation further provides that such hearing officer must have completed a formal training program with instruction on the rules of procedure of the administrative hearings to be conducted, orientation to the area of code violations that will be adjudicated, observation of actual hearings and participation in hypothetical cases.

The hearing officer is authorized under Illinois law to impose penalties, except the penalty of incarceration or a fine in excess of $50,000. The decision of the hearing officer is subject to review under the Illinois Administrative Review Law which is under the jurisdiction of the county courts. Any fine, sanction or cost imposed and not appealed is tantamount to a judgment

and enforceable as a judgment which might have been rendered by a court of competent jurisdiction. In the four years that the law has been available to home rule municipalities in Illinois, many jurisdictions have availed themselves of the powers granted. The experience has been that the system permits a more expedient and cost-efficient method to enforce adherence to all zoning requirements and building permits as well as compliance with existing building codes. It has been recommended that building code violations which involve the demolition of a structure still proceed before the county courts in order to avoid any question of notice and due process; however, violations of codes which hamper the implementation of a redevelopment plan or reduce the effect of the benefits of a redeveloped area can be immediately addressed. In addition, since fines imposed by the local jurisdiction are retained by it after collection, the system is not burdensome to a community by its total cost. It is highly recommended that in a system of administrative adjudication, a prosecuting attorney not be utilized so that all matters may be addressed without concerns for the rules of evidence. Regardless of this, Illinois law mandates that a record be kept of the proceedings in order to afford all parties the constitutional guarantees of due process.

New York

In the State of New York, administrative adjudication of code and ordinance violation is authorized in any municipality having the population of more than 300,000 but less than 350,000. The municipalities affected to date in New York are Yonkers, Rochester, Syracuse, Albany and Buffalo. In the case of the City of Buffalo, the legislature gave the City the authority to undertake administrative adjudication in March of 1996.

An example of the implementation of this legislation occurred when the city council of the City of Buffalo established the bureau of administrative adjudication to hear and determine charges of municipal code violations or statutory violations which constitute a threat or danger to the public health, safety and welfare of its citizens. The bureau is headed by a director appointed by the mayor for a term of five years and is the chief administrative law judge of this division of government. The director is authorized to appoint administrative law judges who must be attorneys admitted to the practice in the State of New York for at least three years to hear any infractions of the municipal code or statutory violations within the City of Buffalo. By local ordinance, the bureau of administrative adjudication provides the following services:

- Investigates and issues summonses for municipal code violations that affect the quality of life of residents, such as various street and trash violations, snow violations and illegal dumpings;
- Coordinates enforcement of city ordinances relating to quality of life and nuisance violations with street sanitation, fire, license, inspections, dogs and police departments and process summonses issues by departments;
- Accepts pleas to hear and determine charges of municipal code violations;
- Meets with businesses to discuss city ordinances and various municipal code violations and their compliance with same;
- Meets and discusses quality of life issues with various block clubs and organizations;
- Investigates and responds to citizen services complaints relating to municipal code violations;
- Maintains complete and accurate records of all adjudication summonses and related accounts receivables;
- Accepts testimony and hears and determines disposition of fee disputes for excessive avoidable alarms; and,
- Accepts testimony and hears and determines disposition of fee disputes for $75 inspection fee.

Indiana

In Indiana, the state legislature has authorized the three cities having the largest populations and counties having a population of more than 400,000 but less than 700,000 to create city courts which are governed by the laws and rules governing the practice, pleading and processes in circuit courts. The law provides that all judgments, decrees, orders and proceedings of the city courts have the same force as those of the circuit court; however, an appeal from a judgment of a city court may be taken to the circuit or superior court of the county and tried *de novo*. The law further permits a city court to impose a late fee when a judgment has not been paid in full. Unlike other local courts, a party before the city court may demand a jury trial. The jury must consist of six qualified voters of the city and must be summoned by the court's bailiff by an order issued by the judge. It would appear that the functioning of the city courts in the State of Indiana mirrors those of the circuit and state appellate courts. Unlike Illinois, where formal rules of procedure do not apply to the local adjudication systems established by local units of government, Indiana city courts must abide by the same formal rules as that of the circuit or superior court of the county.

Texas

In 2001, the Texas legislature amended the Local Government Code to permit a municipality, by ordinance, to provide for an administrative adjudication process under which an administrative penalty may be imposed for the enforcement of any ordinance. The law requires that any procedure to be put into place must entitle the person charged with violating an ordinance to a hearing before a hearing officer with authority to administer oaths and issue orders, and subpoena the attendance of witnesses and the production of documents. The amount and disposition of administrative penalties, costs and fees must also be established by municipal ordinance. All notifications of a person charged with violating an ordinance must advise the addressee that there is a right to a hearing and must provide sufficient notice of the time and place of the hearing.

At a hearing before the municipal hearing officer, such officer shall issue an order stating whether the person charged with violating an ordinance is liable and the amount of penalty, cost or fee assessed against such person. A copy of this order may be filed with the clerk or secretary of the municipality who shall keep the order in a separate file. This order may be used for the filing of a civil suit for collection of an unpaid penalty or obtaining an injunction that prohibits specific conduct that violates an ordinance or requires specific conduct necessary for compliance with an ordinance. A person found liable may appeal the decision of the hearing officer by filing a petition in the municipal court before the 31st day after the determination has been filed with the clerk of the municipality. An appeal does not stay enforcement and collection of a judgment unless the person found liable posts a bond.

It would appear that enforcement of

local ordinances under administrative adjudication in the State of Texas is similar to that utilized in Illinois. The law in Texas, however, does not prescribe the procedures which may be utilized in the conducting of the actual hearing. It is unclear as to whether or not rules of evidence apply in such instances.

Arizona

One of the best examples of legislation which could assist the planning and development of communities is that found in the State of Arizona which authorizes counties to provide for enforcement of its own ordinance and also authorizes the county to establish civil penalties for the violation of any zoning regulation or ordinance so long as the civil penalties do not exceed the amount of the maximum fine for a second-class misdemeanor.

Arizona law requires that any county establishing a civil penalty for violation of a zoning regulation may appoint hearing officers to hear and determine such alleged violations. The hearing officer must hold the hearing after serving notice on the violator, which notice must be personally served by the zoning inspector at least five days prior to the date set for the hearing. If personal service is not possible, a 30-day service by any other means is required.

At the hearing, the zoning inspector presents evidence showing the existence of a zoning violation and the violator must be given a reasonable opportunity to be heard and present any and all evidence available. The law also provides the county attorney to present evidence on behalf of the zoning inspector. At the conclusion of the hearing, a determination is made by the hearing officer and if a violation is found to exist, the hearing officer is authorized to impose civil penalties.

The hearing officer must be appointed by the board of supervisors who are also authorized to review any decision at the request of any party to a hearing. Rules of procedures for the hearing and a review of the hearing shall also be established by the county board of supervisors. Arizona law also provides that all remedies for abatement of ordinance violations may also be sought to any other appropriate action or proceedings. In other words, ordinance violations are not limited to the hearing process established pursuant to a county ordinance.

Conclusion

The foregoing includes only some of the states which have established and are implementing a hearing process for enforcement of local ordinances. The experience of these local adjudicating systems has been positive and have shown due process has been afforded to the parties while government has been allowed to fairly and efficiently undertake enforcement of legislation enacted for the general good of the community. Since these types of procedures are cost-efficient and expeditious, fairness and the guarantee of due process should be a primary concern to the government of establishment. These systems can effectively permit redevelopment and development of properties without the substantial delays often resulting when a formal court process is required. It is the opinion of this office that such systems would substantially assist all local governments with pursuing a safe and decent quality of life for all of its citizens.

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*Kathleen Field Orr is a practicing attorney with offices in Chicago, Illinois, and is a member of the Illinois State Bar Association Business Advice and Financial Planning Section Council. This article was originally published in the ISBA's *The Counselor*, June 2003, Vol. 17, No. 4, and is reprinted with permission.

Executive Director of AFSCME addresses Government Bar Association

Mr. Henry Bayer, Executive Director of the American Federation of State, County and Municipal Employees ("AFSCME"), Illinois Council 31, was the featured speaker at the Government Bar Association ("GBA") luncheon on Thursday, September 18, 2003, in Springfield. He spoke on the upcoming contract negotiations for State of Illinois AFSCME members.

Mr. Bayer began by noting that the results of previous contract negotiations have often had far-reaching impacts, affecting union and non-union members alike. For example, under prior administrations, AFSCME worked very hard to obtain dental and vision benefits coverage and measures for state payment of employee contribution shares toward pension benefits.

He stated that the negotiating climate is quite challenging, given a state budget deficit that goes into the billions, and will not be completely resolved with the new budget in place and given the long-term anticipated financial picture. Nearly all other states are cutting back on state spending. Illinois was one of the few states that had an inflation rate wage increase (four percent) for its union workers this year. This was a result of negotiations four years ago during the Ryan administration, when fiscal times were much better and an unprecedented four-year contract was approved.

During the upcoming contract negotiations, Mr. Bayer suggested that there will be tremendous pressure for the states, including Illinois, to ask employees to contribute more monies to their health care benefits. Likewise, there will be pressure to follow the measures implemented for all management under the Governor's control—to contribute the employee share of the cost of pension benefits, which is in most cases four percent. Finally, there will be pressure for AFSCME to agree to no annual pay increase, also imposed on management personnel in agencies under the Governor's control this year.

Despite these challenges, Mr. Bayer stated that AFSCME is confident that it will be going to the bargaining table to get more benefits for state workers, as has been the case in all prior contract renewal negotiations.

Mr. Bayer indicated that the Governor's decision to rule out an increase in state income taxes was a mistake, given our current budget situation. Most other states have higher income tax rates than Illinois. Bayer also stated that AFSCME would try to avoid a strike if at all possible. He noted that attempting to educate the public on these issues could be difficult, given strongly held misconceptions by the public about the kind of work loads carried by state employees.

The GBA luncheon series takes place each month. Anyone interested in attending or finding out when the next luncheon will be held may contact Ms. Keleigh Biggins at 217/782-3654 or Keleigh.Biggins@OSAD. state.il.us.

Case law update

By Lee Ann Schoeffel, Springfield

Administrative law

Doe v. Illinois Department of Professional Regulation, No. 1-02-1045 (1st District, June 26, 2003). The circuit court erred in enjoining the Department of Professional Regulation from disclosing plaintiff's mental health records without his release, because section 38 of the Medical Practice Act of 1987 (225 ILCS 60/38 (West 2000)) and section 7(a) of the Illinois Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/7(a) (West 2000)) authorize the use of a patient's redacted mental health records without his consent in a disciplinary proceeding against the patient's psychiatrist.

In re Abandonment of Wells Located in Illinois by Leavell, No. 5-02-0220 (5th District, August 14, 2003). The circuit court erred when it dismissed plaintiff's complaint challenging the administrative decision of the Department of Natural Resources that plaintiff's oil wells were abandoned. Plaintiff failed to provide for the issuance of summons within 35 days of the administrative decision as required by section 3-103 of the Illinois Administrative Review Law (735 ILCS 5/3-103 (West 2000)), arguing that summons did not issue because it was not notified of the administrative hearing. The court noted that attempting to serve notice by certified mail is not sufficient to meet due process requirements. Cause remanded for further proceedings.

Constitutional law

Canel v. Topinka, No. 1-01-2069 (1st District, June 30, 2003). Trial court erred when it dismissed class action complaint that section 15 of the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025/15 (West 2000)) violated the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §15) and deprived the plaintiff of his Fifth and Fourteenth Amendment rights under the United States Constitution (U.S. Const. amends. V, XIV), thus violating 42 U.S.C. §1983 (42 U.S.C. §1983 (1996)). The Unclaimed Property Act is not an escheat statute, thus the state does not acquire title to property, it merely holds it as custodian for the owner. Therefore, provisions in the Unclaimed Property Act allowing the state to retain dividends on unclaimed property constitutes a taking. However, the amount of compensation due plaintiff for keeping dividends earned on abandoned stock must be determined by the trial court.

People v. McGee, No. 1-02-2637 (1st District, June 30, 2003). Defendant was properly convicted of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (West 2000)), and defendant failed to prove that statute violated either the proportionate penalties (Ill. Const. 1970, art. 1, §11) or the substantive due process clauses of Illinois Constitution.

Criminal law

People v. Vasquez, No. 1-01-1131 (1st District, May 13, 2003). A defendant, whose timely-filed direct appeal is dismissed under the fugitive rule, does not waive the right to a direct review, but may petition for reinstatement of his appeal upon his return. Defendant here tried to resurrect his appeal by filing a series of motions in the trial court. The trial court lacked jurisdiction to consider the motions filed after defendant's return. The void orders do not cloak the appellate court with jurisdiction to reach the merits of defendant's appeal. The proper procedure for defendant to pursue his direct appeal rights is to petition the appellate court to reinstate his earlier-filed appeal. That appeal is held in abeyance under the fugitive rule "unless and until" defendant returns.

People v. Burdunice, No. 3-01-0776 (3rd District, May 29, 2003). Defendant was convicted of the unauthorized delivery of electronic contraband (cellular telephone batteries) into a penal institution by an employee (720 ILCS 5/31A-1.2(c)(1), (4)(xi) (West 1998)). On appeal, defendant argued that the Act under which she was convicted, Public Act 89-688, effective June 1, 1997, violates the single subject rule of the Illinois Constitution, and, therefore, her conviction was void. The appellate court concluded that Public Act 89-688 violates the single subject rule of the Illinois Constitution. Curative legislation has not been passed. Defendant's conviction was reversed as a matter of law.

In re Robert S., No. 2-02-0262 (2nd District, June 30, 2003). Although hearing on petition to involuntarily administer psychotropic medication was held outside of the statutorily prescribed time frame, the delays were almost exclusively at the request of or otherwise attributable to the respondent. Further, it was not an error under section 2-107.1 of the Mental Health and Developmental Disabilities Code (405 ILCS 5/2-107.1 (West 2000)) for the court to appoint a named doctor or a "designee whose license and credentials permit" to administer psychotropic medication. The trial court properly applied provisions of the Criminal Code (725 ILCS 5/104-18 (West 2000)) to criminal detainee found unfit to stand trial, and was not required to provide criminal defense attorney with notice of petition.

People v. Morales, No. 1-02-1566 (1st District, August 19, 2003). Trial court properly dismissed defendant's post conviction petition seeking to vacate his guilty plea and sentence for aggravated battery with a firearm, because of single subject rule challenge to PA 86-890, as patently without merit.

Criminal counsel

People v. Graham, No. 86382 (June 19, 2003). Defendant was convicted in the circuit court of three counts of first degree murder and was sentenced to death. Defendant appealed. While his appeal was pending, defendant's death sentence was commuted to natural life imprisonment. The Supreme Court held that: (1) commutation of defendant's sentence rendered defendant's sentencing- phase issues moot; (2) defense counsel's action of going to the police station on the night of defendant's arrest to "see about" a prosecution witness that was being questioned did not create *per se* conflict of interest, because counsel had no attorney-client relationship with the prosecution witness; (3) state's witness' testimony and prosecutor's closing arguments, which referred to defendant's exercise of his right to remain silent after his arrest, were not so fundamental as to constitute plain error; and (4) defendant was not denied effective assistance of counsel because of defense counsel's failure to object to witness' inadmissible testimony, as failure to object does not necessarily establish substandard performance.

People v. Ledesma, No. 93628 (June 19, 2003). Court concluded that police could properly stop defendants' vehicles after anonymous 911 tipster reported having inadvertently overheard a cellular telephone conversation over police

scanner that an illegal drug transaction was to occur at a specific location. Defendants failed to establish that anonymous tip about possible drug deal violated either state eavesdropping statute or federal wiretap statute, so as to require suppression of evidence seized in traffic stops. Information provided by anonymous caller carried sufficient indicia of reliability to justify forcible stop. Defendant gave a valid general consent permitting police to search the vehicle and its contents, which was never limited nor withdrawn. Motion to suppress was properly denied.

People v. Rosemond, No. 1-00-1483 (1st District, May 14, 2003). Testimony of defendant and defendant's other evidence of circumstances of interrogation and confession were not so suggestive of coercion that polygraph results could be admitted under narrow *People v. Jefferson*, 184 Ill. 2d 486, 493, 705 N.E.2d 56 (1998), exception. Therefore, trial court abused its discretion in admitting polygraph evidence and by giving jury instructions compounding the error. Further, although defense attorney's cross examination of witness to elicit hearsay testimony of defendant's other crimes was not sound, defendant did not establish prejudice prong of *Strickland v. Washington,* 466 U.S. 668, 695, 80 L. Ed. 2d 674, 698, 104 S. Ct. 2052, 2068-69 (1984), test for ineffective assistance of counsel.

People v. Grant, No. 1-01-1134 (1st District, May 22, 2003). Defendant was properly convicted of unlawful use of a weapon based on testimony of officer that she saw defendant reach back to rear seat of vehicle in which defendant was passenger and that officer subsequently saw loaded gun at location in vehicle where defendant was reaching. Further, failure to call driver of vehicle, who, according to police testimony at suppression hearing, claimed that gun belonged to him, did not constitute ineffective assistance of counsel. Additionally, defense counsel's dual representation of defendant and co-defendant in joint trial did not deprive defendant of conflict-free counsel. Unlawful use of weapon statute did not violate due process by requiring only knowing possession.

People v. Arroyo, No. 2-00-0498 (2nd District, June 2, 2003). On reconsideration pursuant to supervisory order of the Supreme Court, the appellate court found that prosecutor's improper comments during opening statements, in which prosecutor stated that accomplice was serving a 20-year sentence for her involvement in murder offense and would testify, and stated that accomplice was convicted of being get-a-way driver in regard to murder offense, did not substantially prejudice defendant. Defense counsel's failure to call accomplice as a witness even though accomplice had testified at defendant's first trial for murder offense that other perpetrator committed offense, was not deficient for purposes of ineffective assistance claim. Circuit court judgment affirmed.

People v. Gandy, No. 5-02-0015 (5th District, June 26, 2003). Defendant was denied effective assistance of counsel in connection with second post-conviction petition by counsel's failure to file Rule 651(c) affidavit coupled with failure to file motion to amend *pro se* post conviction petition or respond to state's motion to dismiss after indicating intent to do so.

People v. Daly, No. 4-01-0575, 4-01-0576, 4-01-0577, 4-01-0657, 4-02-0823 cons. (4th District, June 30, 2003). Defendants were denied effective representation of counsel due to trial counsel's prior representation of a confidential informant, who was the state's chief witness against defendant.

People v. Young, No. 4-01-0627 (4th District, June 30, 2003). Defendant, prisoner at correctional facility convicted of aggravated battery, was not denied effective assistance of counsel by failure to object to prior criminal history being admitted, it being impossible to keep from jury in light of defendant's incarceration, evidence that defendant was in segregation or fact that correctional officer on which defendant spat was five months pregnant. Further, court was not required to give Rule 401(a) admonitions between finding of guilty and sentencing before allowing defendant to proceed *pro se.* In addition, trial court was not required to conduct investigation into allegations of ineffective representation because all of the claimed misconduct occurred in trial in the presence of the judge.

People v. Stewart, No. 5-02-0427 (5th District, July 30, 2003). Prosecutor's remarks, which implied that everyone who worked for a conviction would be betrayed in the absence of a guilty verdict, were improper. However, the defendant failed to properly preserve the issue in his post-trial motion, and it did not constitute plain error because the evidence of defendant's guilt was so overwhelming.

People v. Friend, No. 2-01-0101 (2nd District, July 8, 2003). Defendant was deprived of effective assistance of counsel when trial court failed to investigate allegations of ineffective counsel raised in defendant's *pro se* motion to withdraw his guilty plea and appoint new counsel to represent him.

People v. Dutton, No. 5-01-0963 (5th District, July 31, 2003). Defendant, who pled not guilty by reason of insanity to charges of attempted first-degree murder and aggravated battery under a plea agreement whereby she would be referred to Department of Mental Health for evaluation, was not deprived of effective counsel by attorney's comments at disposition hearing after evaluation recommended commitment, that he believed detention was in defendant's best interests.

People v. Rucker, No. 1-01-3617 (1st District, August 19, 2003). Defendant's post sentencing *pro se* petition containing bald allegation that his counsel failed to adequately represent him and asking for reduction of sentence did not qualify as exception to rule that *pro se* motions by represented defendants should not be considered by the court, and record is not sufficient to establish ineffective assistance of counsel. Further, evidentiary stipulation was sufficient to waive foundation requirement for drug tests. Stipulated evidence that substance tested positive for presence of cocaine was sufficient to support conviction.

Sentencing

People v. Moss, No. 91012, 91013, 91044, 91046, 91047, 91048, 91049, 91050, 91051, 91052, 91328 cons. (June 19, 2003). Public Act 91-404, effective January 1, 2000, codified at 720 ILCS 5/33A-1 (West 2000) imposing mandatory 15-year and 20-year sentence enhancements for possession of a firearm and personal discharge of a firearm, respectively, in commission of armed robbery, aggravated kidnapping, and aggravated vehicular hijacking violated proportionate penalties clause of state Constitution (Ill. Const. 1970, art. I, §11). Mandatory sentence enhancement of 25 years for armed robbery in cases involving personal discharge of a firearm causing great bodily harm, permanent disability, permanent disfigurement, or death, did not violate proportionate penalties clause. Mandatory sentence enhancement based on use of firearm during commission of armed robbery did not result in double enhancement and did not result in multiple punishments for same offense in violation of Double Jeopardy Clause.

People v. Harth, No. 2-02-0320 (2nd District, June 19, 2003). Defendant was not deprived of due process by court's allowance of four-page victim impact statement introduced at sentencing hearing and read by victim's mother. Although introduction was error, erroneous admission of a victim impact statement cannot serve as a basis for appellate relief, and the admission of the statement was not unduly prejudicial as the court, when imposing harsh sentence to defendant drug dealer, focused on his long, sophisticated and unrepentant career and the need to protect public from him.

Election law

Heabler Jr. v. Municipal Officers Electoral Board Village of Lakemoor, No. 2-03-0345 (2nd District, May 5, 2003). Prospective candidate sought judicial review of village municipal officers electoral board's decision sustaining objections to nominating papers for candidacy in village trustee election. The court held that nominating papers failed to specify which office candidate was seeking, and electoral board was not estopped from removing candidate's name from ballot.

Girot v. Keith, No. 3-03-0073 (3rd District, July 11, 2003). Candidate's due process rights were violated by the city clerk sitting on the electoral board and testifying before board at same hearing. The electoral board's error of allowing city clerk both to sit on board and to testify, however, was harmless. Securing nominating petitions with paper clip did not satisfy requirement of Election Code (10 ILCS 5/10-4 (West Supp. 2003)) that petitions be fastened in secure and suitable manner. Candidate had duty to fasten all nominating petitions together, even though one page of signatures would have been enough to meet requirements to be placed on ballot.

Board of Education of Indian Prairie School District No. 204 v. Du Page County Election Commission, No. 2-02-0985 (2nd District, July 15, 2003). Trial court erred when it granted section 2-615 (735 ILCS 5/2-615 (West 2002)) motion to dismiss plaintiff school district's complaint against election commission for failure to timely publish notice of bond referendum. Under statute regarding notice of elections (10 ILCS 5/12-5 (West 2000)), election commission owed board of education a duty in addition to any duty that ran to the public as a whole. School board's expenditures to secure curative legislation were reasonable. The school board was not required to show that the election commission's conduct was willful.

Municipal law

1350 Lake Shore Associates v. Mazur-Berg, No. 1-02-1731 (1st District, May 21, 2003). Developer petitioned for writ of mandamus directing city's commissioner of department of planning and development to issue approval letter of architectural plans for high-rise residential development, which was prerequisite for zoning certificate and building permit. The circuit court denied the petition. On remand, developer filed motion for final judgment order requesting court order requiring issuance of approval letter, zoning certificate, and injunction prohibiting city from enforcing new zoning ordinance. On appeal, the court held that: (1) developer was not entitled to order requiring city zoning administrator to issue zoning certificate due to failure to apply for certificate; (2) developer was not automatically entitled to zoning certificate upon receipt of approval letter; (3) developer's failure to apply for building permit prior to passage of down-zoning ordinance and expiration of rezoning ordinance did not preclude developer from obtaining building permit; and (4) issues of whether developer knew prior to actual introduction of down-zoning ordinance that it could not rely in good faith on probability it would obtain zoning certificate and building permit and whether developer made expenditures based on that good faith which gave developer vested property interest required remand. On second remand, circuit court must ascertain date upon which plaintiff could no longer rely on existing zoning scheme, determine expenditures reasonably incurred prior to that date, and determine whether those expenditures are extensive enough to give rise to vested right.

State Bank v. City of Waterloo, No. 5-01-0942 (5th District, May 30, 2003). Even though applicant received, as partial compensation for property taken by eminent domain, a series of permits for access to a planned highway, city is not preempted by state regulation from denying access to a state highway where the state has granted it, so long as it is pursuant to more stringent regulation than the state's, and not beyond the bounds of municipal, authority.

Philip v. Daley, No. 2-02-0749 (2nd District, June 2, 2003). Trial court did not err when it granted injunction to plaintiffs prohibiting defendants from any further acquisitions of land in order to construct new runway, because section 47 of the Illinois Aeronautics Act (620 ILCS 5/47 (West 2000)) unambiguously requires that the City of Chicago obtain Illinois Department of Transportation ("IDOT") permit for renovation plan before it begins to acquire new land and because condemnation authority of city is not preempted by Federal law.

City of Waukegan v. Illinois Environmental Protection Agency, No. 2-02-0635, 2-03-0200 cons. (2nd District, June 13, 2003). The regional sanitary district could not amend record on appeal with minutes from city council's meeting at which council denied district's petition for conditional use permit and variance to construct facility; sanitary district was required to meet and secure all necessary zoning approvals from city in order to construct facility; genuine issue of material fact as to whether city's building regulations frustrated regional sanitary district's statutory purpose precluded summary judgment and judgment on the pleadings; proof of local siting approval was not jurisdictional prerequisite for issuance of permit by the state Environmental Protection Agency ("EPA"); city was not entitled to judicial review of EPA's decision to issue permit to regional sanitary district; and (6) evidence was sufficient to sustain trial court's order temporarily restraining district from beginning construction.

Pace v. Regional Transportation Authority, No. 2-02-0651 (2nd District, July 17, 2003). Trial court erred when it dismissed complaint filed by Pace against the Regional Transportation Authority ("RTA") for violating section 4.11 of the Regional Transportation Authority Act (70 ILCS 3615/4.11 (West 2000)) when it decreased Pace's operating subsidy after setting the percentage of its operating budget that must be derived from revenues at a higher proportionate level than the other subsidiaries of the RTA. Because the complaint asserts that the RTA exceeded its statutory authority and does not challenge the wisdom of its budget decisions, it does state a cause of action. Further, because Pace has a separate existence under the Regional Transportation Authority Act, it is not barred from suing the RTA as a division of the RTA, as the trial court held. However, in order to go forward, Pace must join the other subsidiaries of the RTA as necessary parties.

Taxation

Du Page County Board of Review v. Department of Revenue, No.2-02-0430 (2nd District, May 29, 2003). County board of review's decision awarding a charitable tax exemption to church for five-room residence of teacher is manifestly erroneous because only a small part of the building is dedicated to church use and there is nothing about teacher's duties that requires that she reside in church owned housing. However, detached garage in which school equipment is stored does qualify for charitable exemption.

Brazas v. Property Tax Appeal Board, No. 2-02-0878 (2nd District, June 11, 2003). Decision of property tax appeal board that residence, which assessor determined was 80 percent complete as of beginning of assessment year, could be assessed to the extent which new construction added value to the property is not against manifest weight of the evidence. Further, taxpayer failed to prove that his equal protection rights were infringed by differential taxation.

Peacock v. Illinois Property Tax Appeal Board, No. 4-02-0554 (4th District, June 20, 2003). The Appellate Court concluded that: (1) both the circuit court and the Appellate Court have personal jurisdiction over school boards named as additional defendants; (2) assessment ratio study was properly disregarded by the property tax appeal board; (3) property owners did not show violation of uniformity requirement (Ill. Const. 1970, art. IX, §4); (4) a property owner's claim of excessive property tax assessment must be proved by a preponderance of the evidence, overruling *Illini Country Club v. Property Tax Appeal Board*, 263 Ill. App.3d 410, 635 N.E.2d 1347 (1994); and (5) property tax appeal board was required to accept property owners' valuation of farm outbuildings.

Cook County Board of Review v. Property Tax Appeal Board, No.1-00-1183, 1-00-1184, 1-00-2213, 1-00-2228, 1-00-2237, 1-00-2238, 1-00-2239, 1-00-2595 cons. (1st District, June 30, 2003). The property tax appeal board ("PTAB") erred when it applied assessment method to determine whether the county board violated uniformity clause in its assessment of real estate taxes without any evidence on that issue being raised by taxpayers. Although PTAB reviews issues *de novo*, it is limited to evidence presented at the board of review hearing. The PTAB may not address new issues on appeal. Further, PTAB could not take judicial notice of sales ratio studies or change rate of assessment established by county ordinance. However, PTAB's findings with regards to fair market value, based on appraisals submitted by taxpayers, is not against manifest weight of the evidence.

Bond County Board of Review v. Property Tax Appeal Board, No. 5-02-0064 (5th District, August 26, 2003). Trial court erred when it reversed the property tax appeal board's decision that farmland that had been platted as a subdivision, but which was still being actively farmed, must be assessed as farmland. Subdivided but undeveloped parcels are agricultural rather than rural residential.

People ex rel. Madigan v. Dixon-Marquette Cement, Inc., No. 2-02-0638 (2nd District, August 27, 2003). Trial court erred when it granted section 2-615 (735 ILCS 5/2-615 (West 2000)) motion to dismiss counts of complaint alleging that defendants operated waste disposal facility without permit based on section 21 of the Illinois Environmental Protection Act (415 ILCS 5/21(d)(1) (West 2000)) exemption for disposal of wastes generated on site, because the Pollution Control Board's interpretation of exemption as applying only to "minor" amounts of waste that represent no danger to the environment has been affirmed by previous court decisions and has not been legislatively overruled. Seventy-foot-high pile of cement kiln dust containing toxic chemicals located 200 feet from river does not qualify as "minor" waste disposal site.

Tort immunity and liability

Rexroad v. City of Springfield, No. 94374 (August 21, 2003). School district could not apply provisions of section 3-106 of Tort Immunity Act (745 ILCS 10/3-106 (West 1994)) to obtain summary judgment dismissing plaintiff's, football team student manager's, claim for personal injuries sustained when he was running through school parking lot and tripped in open hole which had previously been barricaded. Because school parking lot served all of school, the lot was not recreational within the meaning of recreational use statute immunizing public entities and employees from premises liability based on the existence of a condition of any public property intended or permitted to be used for recreational purposes. The city and the school board owed duty to the manager even if the hole was an open and obvious condition.

Doe v. Chicago Board of Education, No. 1-02-0207 (1st District, June 13, 2003). Trial court properly dismissed plaintiff's complaint against school board for ordinary negligence for allowing a child with a history of sexually aggressive behavior to ride school bus without attendant where he sexually abused plaintiff's ward. The trial court erred when it dismissed count alleging willful and wanton misconduct, because the guardian alleged sufficient facts to support claim and school board did not have statutory immunity (745 ILCS 10/3-108 (West 2000)).

Curtis v. Chicago Transit Authority, No. 1-02-0815 (1st District, June 23, 2003). Plaintiff's complaint for personal injuries was properly dismissed for failure to provide requisite notice under section 41 of the Metropolitan Transit Authority Act (70 ILCS 3605/41 (West 2000)). Motorist's filing of complaint did not cure notice's failure to contain correct date of accident, and transit authority was not estopped from asserting failure of notice to set forth correct date of accident.

Ozik v. Gramins, No. 1-00-3280 (1st District, June 30, 2003). Plaintiff stated and proved cause of action, not barred by Tort Immunity Act, for willful and wanton negligence on the part of police officers for arresting driver of vehicle in which plaintiff's decedent was riding as passenger without arresting minor driver, with BAC over .2 for DUI but instead, sending him on his way, resulting in decedent's death in subsequent automobile collision. Willful and wanton conduct in the execution and enforcement of the law is an established exception to the public duty rule and the immunities granted by the Tort Immunity Act. Tort Immunity Act's sections providing immunity to local public entities and their employees for failure to provide adequate police protection or service, and for injuries caused by failure to make arrest or by releasing person in custody, did not prevail over willful and wanton exception. Officers and employer municipality are not entitled to apportion liability to defendant driver under several liability statute, where driver was dismissed as defendant prior to judgment.

Hanley v. City of Chicago, No. 1-01-0869 (1st District, June 30, 2003). Pedestrian brought action against city for injuries she sustained when she tripped and fell in a pothole within crosswalk at street intersection. City did not waive affirmative defense of discretionary

immunity by raising it for first time in its motion for summary judgment. Once trial court allowed city to raise its affirmative defense after the close of discovery, it should have allowed pedestrian to rebut this affirmative defense with evidence presented after close of discovery. Issues of fact precluded summary judgment for city on its discretionary immunity defense. Once city embarked on repair of pothole, it had duty to perform repair in a reasonably safe and skillful manner. Affidavit of plaintiff's expert was admissible summary judgment evidence.

Leonardi v. Chicago Transit Authority, No. 1-02-3135 (1st District, June 30, 2003). Because City of Chicago had transferred all rights and responsibilities for the use and maintenance of its facilities at the bus station at which plaintiff fell to the Chicago Transit Authority, the trial court properly granted summary judgment to the City dismissing the plaintiff's complaint for negligently failing to maintain the sidewalk.

Wheaton v. Suwana, No. 5-02-0693 (5th District, July 15, 2003). Plaintiff's medical malpractice complaint against surgeon was properly dismissed for violation of one-year statute of limitations contained in Tort Immunity Act because doctor was employee of county hospital. Further, neither estoppel nor equitable tolling are available to avoid limitations defense because there is no evidence that defendant did anything to mislead the plaintiffs.

Clarage v. Kuzma, No. 3-02-0451 (3rd District, July 30, 2003). Complaint which alleged that attorney for township and township board member circulated letter, which they knew falsely accused landowner of inventing prospective affiliation with hotel chain for property that landowner was trying to develop for resort, stated cause of action for defamation, tortuous interference with business expectancy, tortious interference with contract and civil conspiracy, which was not protected by conditional privilege or the Tort Immunity Act.

ESM Development Corp. v. Dawson, No. 5-02-0741 (5th District, August 6, 2003). Plaintiff's complaint for damages based on promissory and equitable estoppel for inducing plaintiffs to develop tract of land as part of enterprise zone when, in fact, tax abatement had been approved by only half of requisite taxing bodies, is subject to provisions of Tort Immunity Act. Because developers complaint did not assert equitable claims capable of circumventing the one-year limitations period of the Tort Immunity Act, the trial court properly dismissed plaintiff's complaint.

Ferguson v. City of Chicago, No. 1-02-2463 (1st District, August 14, 2003). Because cause of action for malicious prosecution accrued on date that trial court dismissed criminal complaint against plaintiff with leave to reinstate, rather than expiration of reinstatement period, trial court properly dismissed plaintiff's complaint against city for violation of the one-year limitations period contained in the Tort Immunity Act.

Lanning v. Harris, No. 3-02-0637 (3rd District, August 29, 2003). Municipality was entitled to dismissal of complaint alleging ordinary negligence against police officer for personal injuries suffered by plaintiff as result of high speed chase involving criminal offender. Tort Immunity Act applies to exempt police officers from ordinary negligent conduct committed while in the act of enforcing laws.

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