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The Personal Information Protection Act and its implications for integrated justice information systems

By Kathleen deGrasse and Wil Nagel[1]

Heightened alarm over identity theft and frequent high-profile media reports of data security breaches has prompted the Illinois General Assembly to enact legislation designed to protect persons whose personal information has been disclosed improperly. This legislation affects Illinois state and local government agencies, as well as commercial entities, that conduct business in the state. The Personal Information Protection Act (PIPA) (815 ILCS 530/1 et seq.) requires these agencies and businesses to disclose any breach of a computer system that contains the unencrypted personal information of Illinois residents. This article focuses on the statutory notification obligations PIPA imposes upon government agencies that utilize or participate in a state-administered integrated justice information system. It is important, however, to understand the structure and composition of an integrated justice information system before we discuss PIPA's impact on its government agency participants.

Although there are several different types of integrated justice information systems, a common approach at both the federal and state levels is the development of a centralized data warehouse. These systems enhance the sharing of information by aggregating local agency information and making it accessible across jurisdictions. In the criminal justice context, an integrated information system will frequently contain police incident reports from participating agencies. Police incident reports may be created for criminal or non-criminal events and frequently contain information about suspected offenders as well as victims, witnesses, and other persons or entities associated with an event. The development of information systems that compile personally identifiable information from multiple sources has, in part, spurred a flurry of legislation in most states that is intended to protect persons who may be adversely affected by the unauthorized disclosure of their personal information. These statutes, like PIPA, focus on notifying individuals if potentially sensitive information about them is inappropriately disclosed.

PIPA is the state's most far-reaching data protection legislation to date and outlines a data collector's responsibilities in the event of a security breach. It compels data collectors to notify Illinois residents when there has been a breach of the security of system data.[2]

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Notification must be made in the most expedient time possible and without unreasonable delay following discovery or notification of the breach.[3] PIPA only requires notification, however, if unencrypted personal information is compromised.[4] The statute provides for a variety of methods of notification.

The notification requirement is triggered if two pieces of unencrypted data are accessed, e.g., a resident's name together with their social security number, driver's license number, state identification card number, credit card number, or financial account number. These types of information are of significant importance to the criminal justice system and, as such, justice agencies should be especially aware of their requirements under PIPA.

PIPA has even broader implications for state agencies in that they are subject to stricter requirements than other data collectors. State agencies must make notification if there has been a breach of the security of system data or written material. Additionally, state agencies must file a report with the General Assembly within five business days listing the breach and outlining any corrective measures that have been taken to prevent future breaches. Furthermore, state agencies are required to dispose of personal data that is no longer needed in a manner that ensures its security and confidentiality.

One of the benefits of making personally identifying information readily available from multiple sources is a much more efficient justice system. However, this integrated information system also increases the risks, if that personal information is compromised. A breach may take the form of a brute force attack such as an intrusion at a weak link in the data warehouse itself or through a participating agency's information technology network. A breach may also occur if a user misplaces or discloses his password or if a user prints personally identifying information from the system and then misplaces that printout. Because PIPA provides no exception to an agency's duty to notify affected individuals when data within the possession of a third-party is compromised, agencies participating in an integrated justice information system must take steps to coordinate their response to a security breach. The data collector must provide notice if personally identifying information is accessed, regardless of the form of the breach.

This article recommends that participating agencies and system administrators preemptively address these issues by entering into memoranda of understanding (MOU) that clearly set forth each respective agency's obligations in the event of a breach. There is no provision in PIPA that allows one agency to delegate its duty to notify to another; thus, in the event a breach of an integrated system's security occurs, both the participating agency and the system administrator must coordinate their efforts and share responsibility for the notification.

MOUs set forth the basic principles and guidelines that agencies will abide by when working together to achieve a common goal. Such memoranda typically address, among other issues, costs associated with participation and how agencies will resolve unanticipated disputes. In order to ensure compliance with PIPA, the MOU should:

- Address interagency notification (e.g., local agencies need to notify the system administrator when they discover a breach; system administrators must notify the local agency whose data has been improperly disclosed);
- Require that the system administrating agency and each participating agency establish a core response group that can be convened in the event of a breach to help guide further response;
- Establish a formal process to evaluate whether breaches require notification;
- Establish criteria for determining whether notification is appropriate;
- Outline the shared responsibilities for costs associated with notice;
- Specify the manner and form of notice; and
- Identify the content of the notice.

Although PIPA does not set forth the types of information that should be included in a notice of breach, the Government Accountability Office and the International Association of Privacy Professionals offer some guidance.[5] In addition to providing a general description of what occurred, these sources recommend that agencies provide affected individuals with information about:

1. The type of personal information involved;
2. Any steps that have been taken to prevent further unauthorized acquisition of personal information;
3. The types of assistance, if any, to be provided to affected persons;
4. Information about what individuals can do to protect themselves from identity theft; and
5. Any resources available to individuals in order to protect themselves from identity theft, e.g., the Federal Trade Commission Web site (http://www.ftc.gov/bcp/edu/microsites/idtheft/) or a Web site where consumers may monitor and review their credit report (www.annualcreditreport.com/cra/index.jsp).

For most agencies and organizations, the question is not if a security breach will occur, but when. Having a comprehensive MOU in place at the inception of an integrated justice information system is critical to ensuring a proper response to a breach and contributes to the ultimate success of the system.

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1. Kathleen deGrasse is a Master Sergeant and an attorney with the Illinois State Police. Prior to becoming Transportation Counsel for the Illinois Commerce Commission, Wil Nagel served as a policy analyst with the Illinois Integrated Justice Information System. The opinions expressed herein are those of the authors and do not reflect the position of the Illinois State Police or the Illinois Commerce Commission.

2. 815 ILCS 530/20 - A violation of PIPA constitutes an unlawful practice under the Consumer Fraud and Deceptive Business Practices Act.

3. 815 ILCS 530/10 (a) - Any data collector that owns or licenses personal information concerning an Illinois resident shall notify the resident that there has been a breach of the security of the system data following discovery or notification of the breach. The disclosure notification shall be made in the most expedient time possible and without unreasonable delay, consistent with any measures necessary to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system; (b) Any data collector that maintains computerized data that includes personal information that the data collector does not own or license shall notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person; (b-5) The data collector may first take any measures necessary

to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system. Notice may be delayed if an appropriate law enforcement agency determines that notification will interfere with a criminal investigation and provides the data collector with a written request for the delay. The data collector must make notification as soon as it will no longer interfere with the investigation.

4. A system administrator may encrypt its system's data during transmission but not while the data is at rest in the warehouse. In this case, PIPA notification requirements would apply only if the personally identifying information were accessed while at rest.

5. See David M. Walker, "Preventing and Responding to Improper Disclosures of Personal Information," U.S. Govt. Accountability Off. 06-833T, 16 (2006); Lisa J. Sotto and Aaron P. Simpson, "A How-To Guide to Information Security Breaches," The Privacy Advisor (newsletter of the Intl. Assn. of Priv. Prof.) Vol. 7, No. 5 (May 2007).

Someone You Should Know – Meet Jerry Larkin, Administrator of the ARDC

Between February 1, 1973, and March 16, 2007, the ARDC was led by only 3 Administrators; on March 19, 2007, Jerry Larkin took over the corner office as the fourth lawyer in Illinois to hold that title. Because he came to the ARDC as a newly-minted lawyer in 1978 and worked his way up the ranks of that organization, often doing behind-the-scenes tasks so necessary to a growing agency but unseen by the general public, he is perhaps less well known to the practicing bar than his predecessor, Mary Robinson. Jerry is now the supervisor of the ARDC's two offices, one in Chicago and one in Springfield, managing a staff of 36 attorneys and about 75 support staff, including investigators, paralegals, secretaries, registration staff, and personnel to handle accounting, purchasing, information services, human resources and all the other tasks needed to keep the ARDC a smoothly-running agency. He has the final say on who will be prosecuted for misconduct and what sanctions will be sought from the Supreme Court, and, working with the seven Commissioners appointed by the Illinois Supreme Court, he will be setting the policies of the ARDC, overseeing the registration process and administering the budget based on the fees collected annually from Illinois attorneys—so he is certainly someone you should know.

When Jerry joined the ARDC, he was one of three new hires, thus doubling the Chicago legal staff of the ARDC at the time. Jerry recalls that the ARDC was, initially, a small, close-knit organization that grew quickly as staff was needed to respond to the Greylord crisis. In the ARDC's early days, each attorney was responsible for conducting investigations, preparing and filing formal complaints, conducting pre-hearing discovery, trying cases, and then briefing and arguing them before the Review Board and, eventually, the Illinois Supreme Court. As a staff attorney, and later as a senior staff attorney and chief counsel, Jerry tried more than 100 cases and argued 21 of them in the Supreme Court. While he relishes the range of experiences that he had as a new lawyer, he recognizes that the agency has become more efficient as it has grown, with separate staff now responsible for investigations, trials, and appellate work.

In 1984, when he became chief counsel to Carl Rolewick, the first Administrator, Jerry assumed supervisory duties over a staff that had grown to eight staff attorneys. In his new position, he led the legal staff in determining what cases to bring and how to prosecute them, once a formal complaint was filed. Jerry was named Assistant Administrator in 1986,

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becoming responsible for additional duties involving the administration of the office. He became the Deputy Administrator in 1988, when John O'Malley was appointed to be the ARDC's second Administrator; Jerry then took on even more responsibilities for agency-wide management, including provision of assistance to the Commissioners as they gave direction to the agency.

When John O'Malley left the ARDC to become counsel to the Archdiocese of Chicago, Jerry stepped in as Acting Administrator during the search that led to the March 1992 appointment of Mary Robinson as the ARDC's third Administrator. Jerry was promptly made her Deputy, a position that he retained throughout Mary's tenure. One of the first big projects that required his efforts, working with Mary and many members of the staff, was the ARDC's 1993 move to 1-1/2 floors of the old Prudential Building, from its original headquarters at 203 N. Wabash Avenue, where increasing amounts of (non-contiguous) space had been leased throughout a building devoted mostly to theatrical agents.

Throughout the 15 years of Mary's tenure as Administrator, Jerry worked with staff counsel to finalize formal complaints, serving as a sounding board for any sort of pre-hearing issue that a trial attorney needs to discuss; he attended countless disposition meetings convened by the Administrator to discuss matters heading for hearings or possible consent dispositions; and he fulfilled a variety of administrative duties, including his continued interaction with the Commissioners of the ARDC and attendance at Commission meetings, addressing personnel and budgeting issues, and moving plans for an ARDC Web site from the theoretical to the creation of a functioning portal to cyberspace that enables members of the bar to register on-line and provides the bar and interested members of the public with a means of electronically searching Illinois disciplinary precedent. Jerry will tell you, with some quiet pride and very marked appreciation for the leadership of the Supreme Court, the past Administrators and the Commissioners who have volunteered their services throughout the years, that the ARDC is now recognized as one of the most effective lawyer regulatory agencies in the country. In 2003, Jerry received the ARDC's twenty-five-year leadership and service award (it's a plaque hanging on the wall of his new office).

As someone who has devoted his career to legal ethics and professional responsibility, Jerry has not confined his efforts to the work of the ARDC. He has been an active participant in his law school alumni association, which conferred on him the Robert Bellarmine award for distinguished service (no sign of this award in the office). He has also devoted a great deal of energy to the National Organization of Bar Counsel, the bar association for lawyer regulators across the country. Gene Shipp, who is now Bar Counsel for the District of Columbia, recalls meeting Jerry on a train from Windsor Castle to London when they were both young lawyers who had scrupulously saved for a trip to England to attend an NOBC seminar there (and then blew a lot of those savings on just one dinner that turned out to cost a lot more than they realized while they were ordering). Both of them decided to become active in the organization by taking charge of "hospitality" for NOBC programs – seeing to the refreshments seemed to them a good way to get to know everyone, and that job led to bigger duties – Gene and Jerry are past presidents of that organization, and they remain friends and frequent participants at NOBC's semi-annual programs (even when the program is in Baltimore in February or Florida in August). Jerry recently received the NOBC President's Award for lifetime achievement in the field of lawyer regulation (it's a crystal piece in the shape of a flame, with a place of honor on his credenza). Gene describes Jerry as a "systems guy," who will design new systems or re-think, and fix, old ones, and he explained that Jerry "creates loyalty" by patiently working through the problems that come through his office door.

When asked about his plans for the ARDC's future under his leadership, Jerry speaks of wanting to build on the success of his predecessors in reaching out to the legal community to share the agency's collective knowledge and to assist lawyers in identifying and solving ethical dilemmas before they become disciplinary issues. He foresees even more outreach programs in the future to assist the bar in learning about amendments to the Illinois Rules of Professional Conduct that are anticipated as a result of proposals made following the Ethics 2000 work of the American Bar Association; the resulting revisions to the Model Rules of Professional Conduct led the Court's Committee on Professional Responsibility to propose numerous changes to the Illinois Rules.

Jerry graduated from Niles College and the Loyola University School of Law; he was president of the student government at both schools. He is one of six children, three of whom became attorneys—the first lawyers of the Larkin family. He is married to Antoinette Krakowski, a clinical psychologist, and they have two sons: Patrick, who will begin his studies at Villanova University in the fall of 2007, and Matthew, who will be a sophomore at New Trier High School.

Jerry is an avid bicyclist, who was among the first in line to rent a space when the Millennium Park bike storage facility opened its doors to the public—weather permitting, he may be seen enjoying his commute to or from the office on the city's bike paths. Jerry has been a soccer coach for his sons' teams and a Sunday School teacher at the family's church. He is (although a life-long north-sider) a loyal Sox fan, living with three loyal Cubs fans. As someone devoted to family traditions, Jerry makes sure that his family enjoys a Christmas-season meal under the Marshall Field's (okay, Macy's) tree, winter and summer car trips for vacations, and the July 3rd fireworks with the Grant Park crowds.

On announcing Jerry's appointment as the ARDC's new Administrator, Ben Schwarz, the Commission's Chairman, described him as having a wealth of experience and contacts in the lawyer discipline field, adding that the Commissioners "are proud and gratified to have someone of his ability at the helm." Asked to share a thought about her former Deputy, Mary Robinson said: "If you want to see a career public servant in action, look to Jerry Larkin. He believes in what he does, and he believes in doing it well."

E-Mail and the Attorney-Client Privilege: *In re County of Erie*

By Patrick T. Driscoll, Jr. and Patricia M. Fallon

In re County of Erie, 473 F.3d 413 (2d Cir. 2007), involved a class action lawsuit brought by a group of arrested individuals who alleged they were subjected to unconstitutional strip searches. During the course of the suit, a series of e-mails were exchanged between a government lawyer, an Assistant Erie County Attorney, and his client, the sheriff's department. The issue was whether or not the attorney-client privilege was waived when those e-mails were distributed to certain individuals within the county sheriff's department. The subjects of the e-mails were the law regarding strip searches of detainees, the county's current search policy, and possible alternate policies. The e-mails also addressed any liability the county may face regarding the existing policy as well as guidance for implementing alternative policies.

During discovery, the county defendants withheld the e-mails as privileged, and the plaintiffs moved to compel production. The district court ordered the e-mails produced asserting that policy advice is not legal advice. The United States Court of Appeals for the Second Circuit reversed the district court, issued a writ of mandamus ordering the district court to vacate its order, entered an interim order to protect the confidentiality of the disputed e-mails, and remanded the case to the district court. *County of Erie*, 473 F.3d at 423. The question was whether the e-mails were merely rendering legal advice or going further into the realm of policymaking and administration.

Confidential communications between an attorney and his or her client made for the purpose of obtaining or providing legal assistance are protected by the attorney-client privilege. *United States v. Construction Prods. Research*, 73 F.3d 464, 473 (2d Cir. 1996). The purpose of this privilege is to encourage full and frank communication and thereby promote "broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The attorney-client privilege in the context of a government lawyer is distinguishable from that of a private lawyer. This is an issue of first impression regarding whether communications between a government lawyer with no policymaking authority and his client, who is a public official, are protected by the attorney-client privilege.

In the instant case, the Second Circuit focused on whether the "predominant purpose" of the e-mails was to solicit and render legal advice. *County of Erie*, 473 F.3d at 420-421. The court held that the purpose of the e-mail communications was to assess the legality of a policy and to suggest alternative policies based on the government lawyer's advice. Id. at 422-423. In making its decision, the court considered the distinction between a government lawyer's recommendations to his client, which are designed to ensure compliance with the law, as opposed to a government lawyer's recommendations made for other reasons, such as policymaking, which may or may not be privileged. The court found that the government lawyer's advice was not "general policy or political advice," but was inherently legal in nature, and therefore protected from disclosure by the attorney-client privilege. Id. at 423.

There is little case law addressing the attorney-client privilege in the government context. However, in *United States v. Doe* (*In re Grand Jury Investigation*), 399 F.3d 527, 535 (2d Cir. 2005), the Second Circuit addressed this issue and upheld the attorney-client privilege in the context of a grand jury investigation. In that case, the court held that the attorney-client privilege applied, even in light of a grand jury subpoena, and refused to fashion a balancing test or otherwise establish a rule whereby a generalized assertion of privilege must yield to the demonstrated, specific need for evidence. The court further stated that a public official who is responsible for drafting policy that may directly effect the legal rights or responsibilities of the public and who is "expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice." *Grand Jury Investigation*, 399 F.3d at 534. By holding that the legal counsel for the former governor could assert the privilege applied to conversations about a federal investigation into quid pro quos for gifts received by the governor, the panel admittedly staked out a position it said was in conflict with one other federal appeals court and "in sharp tension" with decisions in two other circuits. Id. The Second Circuit's decision in *County of Erie* further bolsters this circuit's endorsement of the attorney-client privilege in the government attorney context.

Conflict with Other Circuits

In Re: A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002) (*Ryan*), the Seventh Circuit found that government lawyers are under a higher, competing duty to act in the public interest. "While we recognize the need for full and frank communication between government officials, we are more persuaded by the serious arguments against extending the attorney-client privilege to protect communications between government lawyers and the public officials they serve when criminal proceedings are at issue." *Ryan*, 288 F.3d at 293. The Seventh Circuit fashioned a balancing test and determined that the "lack of criminal liability for government agencies" and the significant duty of government lawyers to "uphold the law and foster an open and accountable government" outweighs the need for an attorney-client privilege in this context. Id. at 294.

Similarly, in *In Re: Bruce R. Lindsey* (*Grand Jury Testimony*), 158 F.3d 1263 (D.C. Cir. 1998) (*Lindsey*), the D.C. Circuit supported the view that the attorney-client privilege in the government context is weaker than in its traditional form. The court found that government lawyers have a higher, competing duty to act in the public interest and rectify

wrongful official acts despite the general rule of confidentiality. The court held that a government attorney is absolutely distinct from a private attorney in the context of a grand jury subpoena for information related to federal crimes. Further, the court found that "when government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury." *Lindsey*, 158 F.3d at 1278.

The Eighth Circuit also fashioned a balancing test in support of the proposition that the "governmental" attorney-client privilege is outweighed by a federal grand jury seeking information or statements that would otherwise be privileged in order to further a criminal investigation in *In re: Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (*Grand Jury Subpoena*). Similar to the rationale in *Ryan*, the Eighth Circuit found that because entities of the government are not themselves subject to criminal liability, a government attorney has the liberty to discuss anything with a government official, except for possible criminal wrongdoing by that official, without concern for later revelation of the discussion. *Grand Jury Subpoena*, 112 F.3d at 921. However, a government official who may have violated a criminal law and needs legal advice should consult with a private attorney.

Id.

Ryan, Lindsey and *Grand Jury Subpoena* all questioned the significance of the traditional rationale supporting the attorney-client privilege and how that rationale applied in the government context. In *County of Erie*, the court reiterated its holding from *In re Grand Jury Investigation* that the attorney-client privilege applies with special force in the government context. *County of Erie*, 473 F.3d at 418-9 (2d Cir. 2007). The Second Circuit continues to construe this privilege narrowly because although an open and accessible government is extremely important, public officials must have access to sound legal advice in order to serve the public interest. *County of Erie*, 473 F.3d at 419. The court found that as long as ". . . the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it." Id. at 420. The court held that all of the e-mails at issue were "sent for the predominant purpose of soliciting or rendering legal advice." Id. at 422. By upholding the attorney-client privilege, the Second Circuit has furthered a culture in which consultation with government lawyers is accepted as a normal and even indispensable part of conducting public business. However, given the tension with other circuits, the Second Circuit's endorsement of the attorney-client privilege for government officials may be a strong candidate for U.S. Supreme Court review.

Local Need for the Privilege

The Cook County State's Attorney's Office is routinely called on to give legal advice and counsel to elected and appointed county officials. Many of these officials are policymakers who may not yet be involved in litigation but could be the subject of future litigation based on their conduct and implementation of various policies that may be adopted. The legal advice given often impacts policy as well as legislation. The court's decision in *County of Erie* is important in that it affirms that legal advice given should lead to a governmental policy that promotes compliance with existing law.

Cook County is involved with many types of litigation, including compliance with several consent decrees and/or settlement agreements that involve jail overcrowding, juvenile detention facilities, and political hiring. Negotiating the entry of such decrees and agreements and obtaining compliance with these requires careful legal advice. This legal advice impacts how policies are implemented and executed by elected and appointed public officials. Confidentiality of this legal advice is essential and must be protected by attorney-client privilege. As the court noted in *County of Erie*, "legal considerations will play a role in governmental policy making." The legal advice given by government lawyers must be protected and kept confidential to promote and preserve public interest. The availability of confidential legal advice clearly benefits the governmental client as well as the general public.

Public sector discipline: Two Illinois prosecutors disciplined for *Brady* violations during May term of the Supreme Court

By Rosalyn Kaplan

In re Murphy and Campbell, Commission Nos. 06 SH 74 and 75 (consolidated), S. Ct. No. M.R. 21566 (May 18, 2007). Bradley Murphy and John Campbell, two career Assistant United States Attorneys in central Illinois, were both assigned to the prosecution of Paul A. Childs, after Childs delivered crack cocaine to three individuals who were cooperating with the authorities. One of those cooperating individuals, Alan Logston, confided to a detective, three days before the trial began, that he had kept some of the crack cocaine that he had purchased from Childs. The detective immediately informed Campbell, who in turn informed Murphy, of Logston's statement. On the day of his scheduled testimony, Logston told Campbell directly that he had taken one-half of the crack cocaine that he had purchased in the controlled transactions. Campbell relayed this statement to

Murphy, but neither attorney disclosed Logston's statements to the defense prior to or during the trial. Logston did, however, testify to this conduct under cross-examination and also testified that he had told police and prosecutors of his conduct. Defense counsel moved for dismissal, under *Brady v . Maryland*, 373 U.S. 83 (1963), but the district court denied the motion, citing lack of prejudice to the defendant while acknowledging, nonetheless, that the prosecutors had wrongly failed to disclose this information. The jury's subsequent guilty verdict was affirmed on appeal.

The conduct of Murphy and Campbell was investigated by the Justice Department, and both attorneys were sanctioned by one-day suspensions from work. The Illinois Supreme Court, taking into consideration their lack of prior misconduct, their remorse, their cooperation, and their good reputations in the legal community, but also considering the fact their substantial experience should have caused them to avoid this conduct, accepted the Attorney Registration and Disciplinary Commission Administrator's petition for discipline on consent and censured both attorneys.

The full text of the Murphy/Campbell consent petition, as well as the Supreme Court's final order, may be accessed through the Attorney Registration and Disciplinary Commission's Web site at <www.iardc.org>, by selecting "Rules and Decisions."

News Flash: Illinois Appellate Court cases decided prior to 1935 are not precedential

By Lisle A. Stalter*

One thing that I have learned over the years is that there is always something new to learn in the law. My latest legal enlightenment was found in *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, No. 1-07-0700 (1st Dist., May 21, 2007). The case discusses election law, which had nothing to do with my "ah-ha" moment. Although my office provides legal advice on election law, it is not one of my areas of concentration. Thus, I perused the case, although not too closely.

I read "this case is not binding on this court and has no precedential value as it was decided prior to 1935." *Cinkus*, at 6 (referring to *People v. Hamilton*, 24 Ill. App. 609 (1886) citing *Sklodowski v. Countrywide Home Loans, Inc.*, 358 Ill. App. 3d 696, 701 (2005); *Graham v. White-Phillips Co.*, 296 U.S. 27, 31, 80 L. Ed. 2d 20, 24, 56 S. Ct. 21, 22 (1935)). My first reaction was "Did I read that correctly? I have never heard this before."

I got curious and did a little research. The research was prompted by a couple of interests: (1) the statement was simply intriguing; and (2) I practice in the area of land use law and platting issues come up every once in a while, where I've relied upon cases from the early 1900s so it may be good to have an understanding of this axiom.

As applicable to the Illinois Appellate Court, the 1933 Illinois Revised Statutes specifically required that all opinions and decisions shall be in writing, briefly giving the reasons for the opinion, and filed in the case in which it was rendered. Ill. Rev. Stat. ch. 37, par. 41 (Smith-Hurd 1933). This paragraph continues "Provided, that such opinion shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed." Id. (emphasis added). This is the authority upon which the *Cinkus* court relied. *Cinkus*, at 6. This only applies to Illinois Appellate Court opinions entered prior to 1935. On April 25, 1935, the Illinois General Assembly amended this section and completely deleted the language stating that Illinois Appellate Court decisions are not precedential. 1935 Laws 696; Ill. Rev. Stat. ch. 37, par. 41 (Smith-Hurd 1935).

In case you were wondering, this rule is not applicable to Illinois Supreme Court cases. The 1933 Illinois Revised Statutes does not specifically state that Illinois Supreme Court decisions are precedential but it does provide that opinions shall be delivered in writing and shall be "spread at large upon the records of the court." Further, the 1933 Illinois Revised Statutes provides for the distribution of the reports of decisions of the Supreme Court. See Ill. Rev. Stat. ch. 37, pars. 21, 24 (Smith-Hurd 1933).

This begs the question: what is an attorney to do when the only on point authority located is an Illinois Appellate Court decision prior to 1935? Obviously, you can continue your research and look for a Supreme Court opinion or an appellate court opinion after 1935. A second option is to use your creative skills and argue that although not binding pursuant to this particular statute, the authority cited may be considered by the court as persuasive authority and the court should follow it. See *First Midwest Bank/ Danville v. Hoagland*, 244 Ill. App. 3d 596, 604, 613 N.E.2d 277, 283 (4th Dist. 1993). And, for those who practice land use and platting law, a final argument could be that as the plat was created in the 1890s (or whatever year you have prior to 1935), the cases to consider in interpreting the provisions of the statutes with respect to the plat are those that applied at the time of platting. While still arguing its persuasive authority application, it may give the court more comfort in using this very old case as authority. One final point to consider: if you cannot find anything directly on point, opposing counsel will probably be in the same position.

Happy researching!

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*Lisle Stalter is an Assistant State's Attorney in the Lake County State's Attorney's Office. The views expressed herein are solely hers and not those of the office.

HHS Launches New Web site on HIPAA Privacy Compliance and Enforcement

To coincide with the fourth anniversary of the enforcement of the HIPAA Privacy Rule, the Department of Health and Human Services (HHS) announced the launch of an enhanced Web site that will make it easier for consumers, health care providers and others to get information about how the Department enforces health information privacy rights and standards. In launching the Web site, Winston Wilkinson, the Director of the HHS Office for Civil Rights, noted: "HHS has obtained significant change in the privacy practices of covered entities through its enforcement program. Corrective actions obtained by HHS from these entities have resulted in change that is systemic and affects all the individuals they serve."

The Health Information Privacy Web site provides comprehensive information about the Privacy Rule, which creates important federal rights and requirements to protect the privacy of personal health information. The enhanced Web site, <http://www.hhs.gov/ocr/privacy/enforcement> provides information for consumers, health care providers, health plans and others in the health care industry about HHS' compliance and enforcement efforts. The new information describes HHS activities in enforcing the Privacy Rule, the results of those enforcement activities, and statistics showing which types of complaints are received most frequently and the types of entities most often required to take corrective as a result of consumer complaints. The other information on the Web site covers consumers' rights to access their health information and significantly control how their personal health information is used and disclosed, as well as guidance about how to submit complaints about possible violations of the law and extensive guidance for entities who must comply with the rule.

HHS issued the patient privacy protections pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The first and only comprehensive federal privacy standards to protect patients' medical records and other health information provided to health plans, doctors, hospitals and other health care providers took effect on April 14, 2003. Developed by HHS, these standards provide patients with access to their medical records and more control over how their personal health information is used and disclosed. The regulation covers health plans, health care clearinghouses, and those health care providers who conduct certain financial and administrative transactions (e.g., enrollment, billing and eligibility verification) electronically. HHS has conducted extensive outreach and provided guidance and technical assistance to providers and businesses to help them to implement the new privacy protections. These materials are available at <http://www.hhs.gov/ocr/hipaa>.

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