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New overdose prevention requirements for Illinois first responders

BY JENNIFER BANNON

Like many states in the nation, Illinois has experienced steady growth in heroin and other drug overdose. Between 2013 and 2014, drug overdose deaths in Illinois increased by 8.3 percent.[1] According to Illinois Department of Public Health provisional data, Illinois saw 761 heroin overdose deaths in 2015, an increase from 711 in 2014.[2] As part of the effort to combat fatal drug overdose, Illinois passed Public Act 99-0480, effective September 9, 2015.[3]

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Private communications and FOIA: Policy questions in search of answers

BY RUTH A SCHLOSSBERG

Although both the Illinois Open Meetings Act ("OMA")[1] and the Illinois Freedom of Information Act ("FOIA")[2] have been revised in the last decade to address many of the new electronic means of communicating, meeting, producing and retaining records, both the law and the limited number of decisions under that law still leave unanswered a number of practical questions about availability of public records. For municipal practitioners, it may seem as if the unanswered questions arise on almost a daily basis. This article revisits one of those recurring questions: Are all e-mails of anyone associated with a public body that relate in any way to public business subject to FOIA regardless of the device or email address from which they were sent?

We have seen multiple iterations of problems that have arisen related to the use of private devices or private e-mail addresses by public officials. These include the questions Hilary Clinton

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New overdose prevention requirements

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The law codifies various methods of drug overdose prevention. Among those is a requirement that all State and local government agencies that employ law enforcement officers or firefighters carry opioid antagonists.[4] Opioid antagonists are drugs that bind to opioid receptors and block or inhibit the effect of opioids (including heroin) acting on those receptors.[5] Naloxone, often known by the brand name Narcan, is an opioid antagonist that can be administered by injection or nasal spray. When administered promptly and correctly, naloxone can completely or partially reverse the effects of an opioid overdose, potentially saving an individual's life.

Covered agencies under the new law must establish a policy to control the "acquisition, storage, transportation, and administration of such opioid antagonists," and provide training in opioid antagonist administration.[6] State and local government agencies that employ firefighters, but do not respond to emergency medical calls or provide medical services, are exempt from this requirement.[7] Publicly and privately owned ambulances, special emergency medical services vehicles, non-transport vehicles, and ambulance assist vehicles, as defined in the Emergency Medical Service (EMS) Systems Act, that respond to requests for emergency services or transport patients between hospitals in emergency situations must also carry opioid antagonists.[8]

Agencies that are required to carry opioid antagonists under these sections are eligible to apply for grant funding to pay for the acquisition of the drug and for training programs on administration.[9] The Illinois Department of Public Health and the Department of Human Services are currently reviewing and updating existing training curriculum, and will work with State Police and regional local law enforcement training boards to coordinate training.[10]

Further legislative changes also make clear that any law enforcement officer or firefighter (as defined in Section 2 of the Line of Duty Compensation Act), emergency medical technician (as defined in Section 3.50 of the EMS Systems Act), or first responder (as defined in Section 3.60 of the EMS Systems Act), who provides emergency care in good faith, including the administration of an opioid antagonist, shall not be civilly liable to a person to whom care is provided, except in the case of willful and wanton misconduct.[11]

As administrative rules and policies are developed, they will be disseminated on the Illinois Department of Public Health Web site, and will also be shared with statewide professional organizations that have members affected by the legislative changes, including the Illinois Association of Chiefs of Police, the Illinois Sheriff's Association, Associated Firefighters of Illinois, and all Emergency Medical Services Systems.[12] ■

1. Centers for Disease Control and Prevention, "Opioid Overdose: State Data," http://www.cdc.gov/drugoverdose/data/statedeaths.html, Last updated December 18, 2015.

2. Illinois Department of Public Health, "Heroin Overdose Deaths, March 2016" http://www.dph.illinois.gov/sites/default/files/publications/Heroin-OD-Report-March-2016.pdf.

3. *See* http://www.ilga.gov/legislation/publicacts/99/099-0480.htm.

4. 20 ILCS 301/5-23(e)(1).

5. 105 ILCS 5/22-30(a).

6. 20 ILCS 301/5-23(e)(1).

7. *Id.*

8. 20 ILCS 301/5-23(e)(2).

9. 20 ILCS 301/5-23(e)(3).

10. "Update on the Implementation of PA 99-0480 (Heroin & Opioid Overdose Prevention)," Illinois Department of Public Health, http://www.dph.illinois.gov/sites/default/files/publications/pa99-0480-implementation.pdf.

11. 745 ILCS 49/70.

12. "Update on the Implementation of PA 99-0480 (Heroin & Opioid Overdose Prevention)," Illinois Department of Public Health, http://www.dph.illinois.gov/sites/default/files/publications/pa99-0480-implementation.pdf.

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Private communications and FOIA

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has faced related to her use of a private email server for certain State Department communications,[3] the resignation of the University of Illinois' Chancellor following revelations that she had deliberately used private email addresses in an effort to avoid scrutiny of those emails under FOIA,[4] a recent lawsuit by the *Chicago Tribune* against the City of Chicago for refusal to produce email correspondence by the Mayor that he conducted on his private device,[5] and allegations made several years ago against Sarah Palin regarding her use of private emails while Governor of Alaska.[6, 7] In each of these cases, the public's right to know and access certain communications runs directly into unanswered questions about what information belongs to the public and what belongs to the individuals sending or receiving them. Because this matter has only been partly considered in Illinois, it seems reasonable to expect that within the next few years we will see new court decisions further fleshing out the application of FOIA to elected officials' communications. Therefore, a quick review of the state of the law is in order.

What electronic communication is and is not subject to disclosure to the public?

When FOIA was significantly revised in 2010, it was done in part to address changes in technology. In that regard, the Act provides specifically that:

> …The General Assembly further recognizes that technology may advance at a rate that outpaces its ability to address those advances legislatively. To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption….[8]

This general statement of intent, however, does not supersede the explicit definition of "public record" that is included in the Act and provides that:

> (c) 'Public records' means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.[9]

This definition makes clear that the term "public record" is expansive and applies to multiple forms of communication including electronic communication. But it also limits "public records" to only those records that were prepared by or for a public body, those used by a public body, those received by a public body, and those in the possession of or control of a public body. This means that not every document or communication related to public business necessarily becomes a "public record." Instead, whether a communication that is related to public business constitutes a public record partly depends on whether such communication is a communication of the "public body" itself.

While the term "public body" is expansively defined in the Act,[10] it refers only to "bodies" and not directly to specific individuals associated with the public body. Thus, any evaluation of a FOIA request for emails depends on a determination of whether an email is one that was prepared by or for a public body or whether it was used by, received by or is in the possession or control of the public body.

Is every document related to public business subject to FOIA?

There has been little challenge in Illinois to the notion that emails or texts related to the business of the public body that are sent by employees of a public body are public records. That is, documents related to public business that have been prepared by or controlled by an employee of a public body, almost by definition, pertain to the transaction of public business since such work is within the job description and expectation of employees who perform work for a public employer.[11] As a result, regardless of the device used or the contact address used for such communication or records, in practice these generally are presumed to be public records and subject to FOIA unless an appropriate exemption applies.[12]

However, the same reasoning does not necessarily apply to the elected officials of multi-member governing bodies who use their private devices and private email addresses. That is because, acting alone, no single Council, Board or committee member can decide the policy or work of the entire body.[13] Each is only one voice among many, and it is the voice of the majority or super-majority of the entire governing body that can set the policy or actions of the body. Or, if considered through an Open Meetings Act lens, elected governing body members are just individuals unless a majority of a quorum of their members have gathered in some way. [14] This, at least, is essentially what the one Illinois Court to consider this issue has held.

In the 2013 *City of Champaign v. Madigan* case[15] the fourth district Illinois appellate court considered whether correspondence about government business conducted by elected officials

on their personal devices constituted public records of the public body. The court found that elected officials were not by themselves a "public body" and that, for instance, an email from a constituent to an elected official on the official's private email address and private device, would not be subject to FOIA. In contrast, however, the court found that messages sent between elected officials during public meetings—that is when a majority of a quorum was present and sitting as a public body—were subject to FOIA as public records of a public body. The court specifically noted that if the General Assembly meant for city council members' communications pertaining to public business on their personal devices to be subject to FOIA in every case, then it should pass a law making that clear.[16]

The *City of Champaign* court also made it clear that correspondence to an elected official's government email address or on a government issued device would also be subject to FOIA because, in that case, not only would it pertain to public business (as it might on a private device) but it would also be "under the control of a public body." Similarly, a privately received message that an elected official forwards to a publicly issued device would be subject to FOIA. FOIA would also apply to a message pertaining to public business that was received on a private device but was forwarded to a quorum of the public body since then it would be directed to the body and not just an individual.[17]

In short, the test laid out by the *City of Champaign* court carefully followed the statutory language to the effect that: "… communications from an individual city council member's personal electronic devices do not qualify as "public records" unless they (1) pertain to public business, and were (2) prepared by, (3) prepared for, (4) used by, (5) received by, (6) possessed by, or (7) controlled by the "public body."[18] We do not yet know if this same "public body" analysis will be applied by other Illinois courts, nor is it clear that this is a distinction that can be clearly understood or practically implemented in any way by elected officials or FOIA officers. However, at this point, the critical Illinois test regarding communication on private devices will depend on whether or not such communications constitute "public records."

How far does the *City of Champaign* analysis extend?

Even if the *City of Champaign* rule proves to be the generally accepted rule in other districts, this still leaves unanswered whether the same analysis should apply to other elected officials who have the legal authority to act on their own as a representative of the public body. Thus, for instance, the current *Chicago Tribune* lawsuit seeking Chicago Mayor Emmanuel's correspondence from his private device may provide an opportunity for a court to carve out a distinction from the reasoning of the *City of Champaign* case.[19]

It is reasonable to ask whether the definition of "public record" can be met in such a case. That is, are the communications of an elected official who does have authority to bind or represent the public body more like those of an employee than those of a council or board member? In the case of Chicago, while many of the Mayor's appointment powers are subject to the advice and consent of the City Council, the Mayor is still given a great deal of supervisory and enforcement authority under the City's code.[20] Using the analysis laid out by the *City of Champaign* court and the FOIA statute, do such communications—even on a private device or sent from a private address—pertain to public business? And if so, is it fair to say that communications of a mayor working on city affairs in his capacity as chief executive of the city are prepared for and used by the city which is a "public body."

Even if the court in the *Chicago Tribune* case concludes that the Mayor does, in fact, act in a manner that can be said to represent communications of the public body, would this same analysis apply to all mayors, presidents, treasurers or clerks, chairs of committees or commissions or other appointed and elected officials who have some separate authority to act apart from the actions of their governing boards? Would a careful analysis of their codes and the scope of their powers be required in each case? And would it be good policy to make FOIA analysis depend on the exact nature of each official's responsibilities rather than on larger considerations of public policy about what information should or should not be subject to public disclosure?

Is it good policy to subject to FOIA any document whatsoever, held by anyone who is in any way formally associated with a public body, if it pertains to public business? Such a rule would treat all documents equally regardless of the device on which they are held and regardless of the manner in which they are sent. A bright line test or clearly established statutory guidelines might be much easier to implement than a standard based solely on the job description of each party, but any such guidelines first should be the subject of careful policy reflection. They will implicate a host of public policy questions and the best interests of the public may not be well served without such consideration.

For instance, do we want to subject to public scrutiny *every* communication related to a public body by *each* individual elected official—not just the public body as a whole—or are there competing legitimate and policy privacy interests that deserve serious consideration? Does the public have a right to know how and why each elected official formulates every policy? How should competing interest be reconciled? For instance:

- What if that official has received a note on their personal email address from a neighbor who is concerned about possible code violations at another neighbor's house or who believes that the city should support a controversial policy and is telling their elected official neighbor as much? Should the fact that the elected official is subject to FOIA mean that their neighbor has no right to communicate their private concerns to their elected representative and have them remain private?
- What if a public body's member responds to emails from her local school board members who are opposed to a TIF at the same time that the Chamber of Commerce head emails answers to

her questions explaining how the TIF project could help the local industrial community? Should that be public?
- What if that same public body member is approached by their religious leader to urge them to expand services for the homeless or to support a variance for a food bank or housing for the disabled? Is that equally public?
- What if that same public body member gets a text from their teenage daughter asking that she consider approving a puppy adoption program in a local park one weekend a month? Is that also public?
- What if the public body member gets an offer from a local business to pay $1000 to their favorite charity or to their spouse if the official will consider voting to let the business expand or get a government contract? Is that something that the public has a right to see?

In each of these cases the communication may be on a private device or a private address, and in each case the public body member acting alone cannot make public policy. But what should the public have a right to know about how individual policy positions are arrived at? That the official listens to and is concerned about the privately expressed opinions of their neighbors but might not wish to subject their neighbors to the same public scrutiny as the elected official has signed up for? That the official is seeking the opinions of interested parties or that the official is carefully studying a controversial topic? That the official has deeply held religious beliefs that influence their decision making? That the official cares about what their adolescent daughter believes is important? That local businesses believe the public official can be corrupted? And do any of the answers to these same questions change if the same communications are directed to a Mayor or other official with independent authority to act?

There are privacy, first amendment, policy formulation and other considerations that all play into these questions. While Illinois' public policy may be based upon the belief that open records laws protect that public, it is worth considering at what point the public has a right to know everything and at what point the public interest is perhaps compromised by unlimited openness. For instance, is the public, in fact, protected if elected officials feel that every action—even the collection of information to help educate themselves about a policy matter before them—will be subject to public scrutiny and challenge even before they have arrived at a decision? Will an elected official be afraid to ask questions or learn about an issue if that research is public? Will elected officials avoid using efficient communication like email and texts if they fear that every communication will become a public one? Should, at a minimum, the FOIA exemption for records in which opinions are expressed, or policies or actions are formulated[21] be expanded to make it clear that pre-decision-making communication of non-executive public body members should be exempt from public scrutiny to ensure that this education and analysis process is not compromised? While public policy in Illinois currently holds that the actions of a public body should be open to scrutiny, before this policy is expanded to reach into the communications of elected members of public bodies who do not have the authority to speak or act alone for the public body, each of these questions deserve careful consideration.

In the meantime, what's a poor FOIA officer to do?

As a practical matter, what is a poor FOIA officer to do when asked to respond to FOIA requests for communications of the body and its members if not all of the correspondence or work is readily accessible on government servers or through a search of the body's emails. And is the FOIA officer required to undertake this nuanced analysis or consult with their lawyers for every FOIA request? Do they need to ask elected officials for "public records" on their private devices each time a request is received and rely on the elected officials to undertake this complicated and detailed analysis for each of their own emails or communications or documents? Is simply asking for the records—regardless of the response—a reasonable search? Will the public be assured that FOIA is being properly implemented if this is what must happen for each FOIA request? Or will the uncertainty around these issues result in greater skepticism about government transparency?

A public body can and should set up clear parameters for maintaining and producing public records. Ideally bodies can provide every employee and official with their own email address and require that those be used for all public body communication. And ideally they might be able to provide municipally owned phones, computers or tablets to make it easy to get access to those records. But that is not the reality for many public bodies today. Many officials keep their own email addresses or have public-related communications forwarded to their personal email addresses. Moreover, it is not realistic to assume that every public body has the resources to provide every official with their own government issued electronic device and to support such devices. Nor, is it realistic to expect officials to use one device for public communications and a different one for their private work. It would be naïve and unenforceable to expect that this alone would avoid the confusion around communications from private devices or private addresses. Any policy should reflect the reality that 21st Century communications take place across multiple platforms and often are intermingled with officials' personal and professional communications. Creating a system for reaching/archiving public communications must not become so overly burdensome that elected officials, most of whom have other fulltime jobs or commitments outside their civil roles, are forced to shy away from public service because of such burdens.

Given the many competing privacy, policy and administrative implications, it is time for a robust statewide consideration of these issues. It is not enough for one side to claim that the

administrative burden is too high or for the other side to dismiss legitimate policy concerns as efforts to withhold information from the public. Nor is it sufficient to have these questions addressed in a piecemeal and haphazard fashion in Springfield or by courts being forced to carve out exception after exception to define the parameters of which communications are properly subject to public scrutiny. Instead, it is time for the municipal bar, the media, public leaders and sunshine activists to engage in a respectful but thoughtful examination of these policy questions. ■

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1. 5 ILCS 120/1 *et. seq.*

2. 5 ILCS 140/1 *et. seq.*

3. See, e.g. Michael S. Schmidt, New York Times, Hilary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules, available at <http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html?_r=0>.

4. See e.g., Potential FOIA Compliance Issue Discovered and Reviewed at <http://uofi.uillinois.edu/emailer/newsletter/77321.html>.

5. *Chicago Tribune Co. v. City of Chicago Office of the Mayor and Mayor Rahm Emanuel*, 2015 CH 14058 (Cook County Circuit Court) filed Sept. 24, 2015. See also Steve Mills, Chicago Tribune, Tribune Sues Emmanuel Over Use of Private Email, available at <http://www.chicagotribune.com/news/local/breaking/ct-chicago-tribune-sues-rahm-emanuel-met-20150924-story.html>; Foia Issue of Emails on Private Devices Goes Back to Court, The State Journal Register, Oct. 11, 2015 available at <http://www.sj-r.com/article/20151011/news/151019933>.

6. See e.g., Karl Vick, Washington Post, Palin had another private e-mail account, Company Says, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/30/AR2008093002699.html>.

7. A situation receiving a great deal of attention in Philadelphia that arose out of an investigation into the Sandusky matter did not involve private devices but did involve the use of government e-mail by several government officials including members of the Pennsylvania Attorney General's office who used their work emails to exchange pornographic and racist emails. See, e.g., Kathleen Kane, Pennsylvania Attorney General, Is Suspended From Practicing Law at http://www.nytimes.com/2015/09/22/us/kathleen-kane-pennsylvania-attorney-general-is-suspended-from-practicing-law.html?_r=0; Union County Prosecutor Mixed Up in Kane Email Mess, available at <http://wnep.com/2015/09/01union-county-prosecutor-mixed-up-in-kane-email-mess/>.

8. 5 ILCS 140/1.

9. 140 ILCS 2(c).

10. 5 ILCS 140/2(a) ("Public body" means all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School Code. "Public body" does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act, or a regional youth advisory board or the Statewide Youth Advisory Board established under the Department of Children and Family Services Statewide Youth Advisory Board Act.").

11. This is not to suggest that there are not legitimate privacy and control questions related to this question. It is just that this notion appears not to have been formally challenged or much disputed in Illinois. For an interesting though non-binding discussion of this issue, see City of san Jose v. Superior Court, 225 Cal App. 4th 75 (2014) (not citable; superseded by Grant of Review).

12. Similarly, FOIA makes clear in the definition of "public records" that documents prepared by third parties for a public body are also subject to FOIA. 5 ILCS 140/2(c).

13. *See City of Champaign*, 2013 IL App (4th) 1202662 ¶40 ("In this case, we agree with the First District's view in *Quinn* an individual alderman is not a "public body" under FOIA. We recognize the Attorney General argues on appeal *Quinn* only answers the question of who is a proper defendant in a FOIA action. However, even in reading *Quinn* solely for the proposition individual aldermen cannot properly be served with FOIA requests, the underlying reasoning, i.e., an individual alderman is not himself the public body, cannot be ignored. Indeed, an individual city council member, alone, cannot conduct the business of the public body. For example, a city council member is unable to individually convene a meeting, pass ordinances, or approve contracts for the city. Instead, a quorum of city council members is necessary to make binding decisions. See *Village of Oak Park v. Village of Oak Park Firefighters Pension Board*, 362 Ill. App. 3d 357, 367 (2005) ("A 'quorum' is the number of assembled members that is necessary for a decision-making body to be legally competent to transact business.")" citing *Quinn v. Stone*, 211 Ill. App. 3d 809 (1991)).

14. 5 ILCS 120/1.02.

15. 2013 IL App (4th) 120662.

16. *Id.* at ¶44.

17. *Id.* at ¶41 ("Under this interpretation, a message from a constituent 'pertaining to the transaction of public business' received at home by an individual city council member on his personal electronic device would not be subject to FOIA. However, that communication would be subject to FOIA if it was forwarded to enough members of the city council to constitute a quorum for that specific body, regardless of whether a personal electronic device, as opposed to a publicly issued electronic device, was used. At that point, it could be said the communication was 'in the possession of a public body.' However, as the City conceded, a communication to an individual city council member's publicly issued electronic device would be subject to FOIA because such a device would be 'under the control of a public body.' Thus, if that same individual city council member who received a message from a constituent on his personal electronic device forwards it to his publicly issued device, that message would be subject to FOIA as it would now be 'under the control of a public body.'").

18. *Id.*

19. *See supra*, n. 5.

20. *See* City of Chicago Municipal Code, Title 2, Chapter 2-4.

21. 5 ILCS 140/7(1)(f).

7th Circuit E-Discovery Pilot Program: Mediation Program

At a time when discovery issues concerning ESI (electronically stored information) are at an all-time high, the Seventh Circuit E-Discovery Pilot Program is once again ready to help. The Pilot Program has a new mediation program, free to litigants and specializing in e-discovery issues in small civil cases.

The Pilot Program was formed in 2009 and was led by retired judges Jim Holderman and Nan Nolan, now both with JAMS. The group of volunteer attorneys and experts in the e-discovery world developed new principles for handling e-discovery issues, drafted a model discovery plan and model case-management order, and provided exciting and timely free educational programming.

Now, the Pilot Program is offering free, trained mediators to civil cases. The mediators are Program members from the plaintiff's bar, defense bar, government, in-house and public interest sector. A mediator is assigned randomly to a case and must run a conflicts checks. Criteria for selecting cases for the program include disputes in smaller civil cases where the parties and their counsel lack the experience and resources to resolve the discovery issues themselves.

If both parties to a dispute are interested in using the mediation program, each party must submit a Submission Statement Form and a Mediation Agreement jointly executed by the parties.

For more information about the program, visit www.discoverypilot.com ■

Juvenile offenders in the adult system—How Public Act 99-258 changed when minors are prosecuted under the criminal laws of Illinois

BY JI UN SAW

Did you know that prior to 2010, one was considered an adult at the age of 17 for purposes of criminal proceedings? It was not until 2014 that the age was raised to 18 for all offenses. More precisely, between 2010 and 2014, whether one was considered an adult at 17 or 18 for purpose of criminal proceedings depended on the class of offense with which the person was charged.[1]

On August 4, 2015, the governor approved House Bill 3718, which as enacted became Public Act 99-258, effective January 1, 2016. Public Act 99-258 further changed when an offense committed by a minor may be prosecuted under the criminal laws of Illinois.

Introduction

Anyone under 18 years of age, who violates any federal, state, county or municipal law or ordinance may be proceeded against under the Juvenile Court Act of 1987 (705 ILCS 405/1-1 et seq.). And, no one under 18 years of age may be prosecuted under Illinois' criminal laws except pursuant to provisions of concurrent jurisdiction, excluded jurisdiction, transfer of jurisdiction, or extended jurisdiction juvenile prosecutions.[2] Let us look at each provision in turn as it existed prior to, and the changes that were made by, Public Act 99-258.

Concurrent Jurisdiction (705 ILCS 405/5-125)

Under concurrent jurisdiction, both the juvenile court and the criminal court have jurisdiction over persons under 18 years of age for violations of any:

- Traffic law (defined to include reckless homicide and driving under the influence);
- Boating law;
- Fish and game law; or
- County or municipal ordinance.

No change was made by Public Act 99-258 to the concurrent jurisdiction provisions of section 5-125 of the Juvenile Court Act of 1987 (705 ILCS 405/5-125).

Excluded Jurisdiction (705 ILCS 405/5-130)

Prior to the enactment of Public Act 99-258, persons 15 years of age or older were excluded from the jurisdiction of the juvenile court for the following offenses:

- First degree murder;
- Aggravated criminal sexual assault; Aggravated battery with a firearm[3];
- Armed robbery with a firearm;
- Aggravated vehicular hijacking with a firearm; and
- Certain unlawful use of weapons offenses committed on school property.[4]

Further, first degree murder committed during aggravated criminal sexual assault, criminal sexual assault, or aggravated kidnaping by those 13 years or older were prosecuted in criminal court. The first degree murder charge could not be based on accountability.

Persons under 18 who committed escape[5] or violation of bail bond[6] while being prosecuted as an adult per concurrent or excluded jurisdiction for first degree murder, aggravated criminal sexual assault, aggravated battery with a firearm[7] or armed robbery with a firearm were not eligible for proceedings in juvenile court.

Public Act 99-258 raised the age to 16 from 15 for those excluded from the jurisdiction of the juvenile court for the offenses of first degree murder, aggravated criminal sexual assault, and aggravated battery with a firearm.[8] The Public Act also removed all other previously excluded offenses.

Prior to the enactment of Public Act 99-258, once one was prosecuted and convicted as an adult pursuant to a mandatory or discretionary transfer or extended jurisdiction juvenile prosecutions (each discussed below), any subsequent offenses were ineligible for proceedings in juvenile court regardless of the age of the offender. This portion of the excluded jurisdiction section is no longer in effect per Public Act 99-258.

Transfer of Jurisdiction (705 ILCS 405/5-805)

There were three types of transfers: mandatory; presumptive; and discretionary. Public Act 99-258 eliminated mandatory transfers altogether and significantly changed presumptive transfers.

Mandatory Transfers

Mandatory transfers to adult court occurred upon motion of the State's Attorney and a finding of probable cause that the offender committed a forcible felony[9] in furtherance of criminal gang activity and had a prior adjudication or conviction for a non-forcible felony, or that the offender committed a non-forcible felony in furtherance of criminal gang activity and had a prior adjudication or conviction for a forcible felony. Further,

offenses enumerated in the presumptive transfer provisions committed by persons with a prior adjudication or conviction for a forcible felony and aggravated discharge of a firearm committed within 1000 feet of school property, at a school related activity, or while on, boarding, or departing any conveyance used to transport students to and from school or school related activities were transferred in the same manner. The minimum age for mandatory transfers was 15.

Presumptive Transfers

With regard to presumptive transfers, a probable cause determination as to the State's Attorney's petition alleging commission of certain crimes by persons 15 years of age and over creates a presumption that the case may be transferred to criminal court. This presumption may be rebutted by clear and convincing evidence based on an evaluation of statutory factors that "the minor would be amenable to the care, treatment, and training programs available through the facilities of the juvenile court."[10]

Public Act 99-258 eliminated the enumerated list of offenses previously subject to presumptive transfer.[11] As of January 1, 2016, only forcible felonies committed in furtherance of illegal gang activity by one 15 years of age or older with a prior adjudication or conviction for a forcible felony may be presumptively transferred.

Discretionary Transfers

Unlike the first two types of transfers, discretionary transfers remain the same. The State's Attorney may petition the juvenile court to allow prosecution in criminal court for violations of state criminal law by a person 13 years of age and over. The court must find, after considering a number of factors, that "it is not in the best interests of the public" to proceed in juvenile court.[12]

Extended Jurisdiction Juvenile Prosecutions (705 ILCS 405/5-810)

The State's Attorney may file a petition to have a case designated as an extended jurisdiction juvenile prosecution for a felony offense committed by a person 13 years of age or older. A finding of probable cause to believe the allegations in the petition are true creates a rebuttable presumption that the case be so designated. This presumption will be overcome by clear and convincing evidence, based upon examination of the listed factors, that a sentence under the criminal sentencing statutes is inappropriate for the minor.

An extended jurisdiction juvenile prosecution case remains in juvenile court. However, at sentencing, the court imposes a juvenile sentence as well as an adult criminal sentence. The adult sentence will not be imposed, absent a violation of the juvenile sentence, and will be vacated upon successful completion of the juvenile sentence.

Public Act 99-258 did not change how cases are designated under this section of the Juvenile Court Act.

Summary

As of January 1, 2016, there are no mandatory transfers, and no offenses are excluded from the jurisdiction of the juvenile court for anyone under 16 years of age. For those who are at least 16 years old, only first degree murder, aggravated criminal sexual assault, and aggravated battery with a firearm[13] are excluded from the juvenile court's jurisdiction. Further, presumptive transfers are only available for forcible felonies committed in furtherance of illegal gang activity by those 15 years or older with a prior adjudication or conviction for a forcible felony. Last, the processes for discretionary transfers and extended jurisdiction juvenile prosecutions remain the same. ■

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1. Prior to January 1, 2010, only persons under 17 years of age were eligible for proceedings under the Juvenile Court Act, subject to exceptions discussed in this article. Persons under 18 years of age became eligible for proceedings under the Juvenile Court Act for misdemeanor offenses committed on or after January 1, 2010, and for felony offenses committed on or after January 1, 2014. *See* Public Act 95-1031, effective February 10, 2009; Public Act 98-61, effective January 1, 2014.

2. 705 ILCS 405/5-120.

3. The person being prosecuted must have personally discharged the firearm. Also, generally speaking, it does not include aggravated battery with a machine gun or firearm equipped with a silencer. *See* 705 ILCS 405/5-130(1)(a); 720 ILCS 5/12-3.05(e)(1)-(4).

4. Subsections (1), (3), (4) and (10) of 720 ILCS 5/24-1 only.

5. 720 ILCS 5/31-6.

6. 720 ILCS 5/32-10.

7. *See* footnote 3 *supra*.

8. *See* footnote 3 *supra*.

9. "Forcible felony" is defined in 720 ILCS 5/2-8 as "treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual."

10. 705 ILCS 405/5-805(2)(b).

11. Prior to Public Act 99-258, the offenses for presumptive transfer included: Class X felonies (but only under specified circumstances if the Class X felony was armed violence); aggravated discharge of a firearm; and select drug offenses. *See* 705 ILCS 405/5-805(2) (West 2012).

12. 705 ILCS 405/5-805(3).

13. *See* footnote 3 *supra*.

Upcoming CLE programs

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

May

Tuesday, 05/03/16- Webinar—Top 10 Technology Mistakes Your Firm Cannot Afford to Make! Practice Toolbox Series presented by the ISBA. 12-1 pm.

Wednesday, 05/04/16- CRO—US and IL Supreme Court Case Updates/Ethical Considerations for Your Practice and Post Judicial Years. Co-Sponsored by the ISBA and the Illinois Judges Association. 9:00 am – 11:45 am (CLE). 1:00 pm - 4:00 pm (Benefits).

Wednesday, 05/04/16- Sangamo Club—Miranda: It's More Than Words. Presented by the Sangamon County Bar Association; co-sponsored by the ISBA. 12:30-1:30 pm.

Wednesday, 05/04/16- Teleseminar—Ethics and Drafting Effective Conflict of Interest Waivers. Presented by the ISBA. 12-1 pm.

Thursday, 05/05/16- Friday, 05/06/16—CRO—15th Annual Environmental Law Conference. Presented by Environmental Law. Thursday- 8:45 am – 4:45 pm. Thursday reception- 4:45 – 6:00 pm. Friday – 8:30 am – 1:15 pm.

Monday, 05/09/16- Teleseminar LIVE REPLAY—Health Care Issues in Estate Planning. Presented by the ISBA. 12-1 pm.

Tuesday, 05/10/16- Teleseminar—Ethics and Establishing and Ending an Attorney-Client Relationship. Presented by the ISBA. 12-1 pm.

Wednesday, 05/11/16- Teleseminar—Adding a New Member to an LLC. Presented by the ISBA. 12-1 pm.

Thursday, 05/12/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Friday, 05/13/16- Lombard, Lindner Conference Center—A Construction Project Gone Awry: Construction Escrow and Litigation Issues. The Construction Industry: Shortcuts to Disaster. Presented by the Real Estate Law Section Council. Co-sponsored by Construction Law and Commercial Banking, Collections and Bankruptcy.

Tuesday, 05/17/16- Webinar—How to Build a Technology Plan for Your Firm. Practice Toolbox Series presented by the ISBA. 12-1 pm.

Wednesday, 05/18/16- Webcast—ADR Options in the Illinois Federal District Courts. Presented by ADR. 1:00-2:00 pm.

Thursday, 05/19/16- Teleseminar—2016 Retaliation Claims in Employment Law Update. Presented by the ISBA. 12-1 pm.

Thursday, 05/19/16- Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 05/19/16- CRO—Civil Practice Update: Review on E-Discovery. Presented by Civil Practice and Procedure. 8:45 am – 4:45 pm.

Friday, 05/20/16- Teleseminar—Ethics and Virtual Law Practices. Presented by the ISBA. 12-1 pm.

Friday, 05/20/16- CRO and Webcast—Practical Skills for Attorneys New to Estate Planning. Presented by Trusts and Estates. ALL DAY.

Tuesday, 05/24/16- Teleseminar—Joint Ventures in Businesses, Part 1. Presented by the ISBA. 12-1 pm.

Wednesday, 05/25/16- CRO and Webcast—Program title TBD. Presented by Business and Securities Law. 1:00-4:00 pm (end time may change).

Wednesday, 05/25/16- Teleseminar—Joint Ventures in Businesses, Part 2. Presented by the ISBA. 12-1 pm.

Thursday, 05/26/16- Webinar—Introduction to Boolean (Keyword) Searches for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm

June

Thursday, 06/02/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 06/02/16- Teleseminar—Choice of Entity in Real Estate. Presented by the ISBA. 12-1 pm.

Thursday, 06/02/16- Webcast—Developments in Illinois Insurance Law – 2015 in Review and a Look Forward. Presented by Insurance Law. 9:00 am – 11:15 am.

Thursday, 06/02/16 and Friday, 06/03/16—CRO—The GAL Program: Attorney Education in Parental Allocation – Spring 2016. Presented by Bench and Bar. Thursday: 1:00 pm – 5:15 pm; Reception: 5:15-6:15 pm. Friday: 9:00 am - 4:30 pm

Monday, 06/06/16- Teleseminar—2016 Estate Planning Update. Presented by the ISBA. 12-1 pm.

Tuesday, 06/07/16- Webinar—Starting a New Law Firm - What You Need to Know. Practice Toolbox Series presented by the ISBA. 12-1 pm. ■