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ILLINOIS STATE BAR ASSOCIATION

STANDING COMMITTEE ON GOVERNMENT LAWYERS

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

Committee on Government Lawyers presents ethics extravaganza!

The ISBA's Standing Committee on Government Lawyers has a worthwhile and lofty goal ... a goal of making ethics seminars for government lawyers informative, fun, and interesting. Ethics fun? Interesting? What planet are you from?

It is possible. On May 8, 2009, a cast of star performers including James Chipman, Adam Ghrist, Kathryn Kelly, Lynn Patton, and Whitney Wagner Rosen presented the travails of Sherri Arbatrarie as she was faced with a difficult assignment to write a memorandum when she was not sure how the facts could support the legal position her boss wanted her to take; the confusing situation of Timothy Suarez, who was assigned to represent both an employee and the public body in a newly filed discrimination case; and the dilemma of Don Diligentts, who worked for and was a friend of a high-ranking elected official who asks him for help with a campaign finance issue and is subsequently questioned by an Assistant U.S. Attorney. After each skit, James Grogan, Deputy Administrator and Chief Counsel of the Attorney Registration and Disciplinary Commission, led the group in a discussion of the potentially applicable Illinois Rules of Professional Conduct, particularly in light of the nuances of real life day-to-day practice. The acting was tops, the audience was interactive, and a valuable and fun learning experience was had by all. Participants completing the entire program were rewarded with 4 hours of Professional Responsibility MCLE credit.

So, yes, ethics can be fun and interesting! We are working on all new scenarios faced by government attorneys for future performances. So, stay tuned and join us for our next presentation.

IN THIS ISSUE

Parolee search: Is hindsight reasonable?

By Adam W. Ghrist[1]

On February 7, 2008, the Illinois Supreme Court decided *People v. Wilson*, 228 Ill.2d 35, 885 N.E.2d 1033, 319 Ill. Dec. 353 (2008), upholding suspicionless searches of parolees by law enforcement officers. This decision left no question that officers may subject those individuals on Mandatory Supervised Release (MSR)[2] to suspicionless searches. However, the Court did not address whether such a search would be reasonable if the searching officer had no knowledge of the individual's status on MSR at the time of the search. This article addresses that question.

In *Wilson*, the Court reviewed a search of defendant's bedroom conducted by defendant's parole officer and two police officers. In doing so, the Court also measured the effect of the defendant's MSR agreement on his expectation of privacy.[3] MSR agreements are signed by all criminal defendants placed on MSR prior to their release to MSR and provide, in part, that the defendants "shall consent to a search of [their] person, property, or residence under [their] control."[4] While

Illinois law is clear that such an agreement does not amount to prospective consent,[5] the Court in *Wilson* did give this agreement substantial weight in finding that a parolee has a reduced expectation of privacy.[6] Weighing the diminished expectation of privacy against the State's legitimate interest in monitoring parolees, the Court balanced these competing interests and held the Fourth Amendment does not prohibit a suspicionless search of a parolee's residence.[7]

In *Wilson*, the searching officers did know that Wilson was on parole. However, now that *Wilson* has unequivocally expanded searches of those on MSR to regular law enforcement officers, the question is sure to arise: Would a search of a parolee, otherwise lacking individualized suspicion, be reasonable if the officer realized the individual was on MSR only *after* the search was concluded? Whether this were to take place on a traffic stop, traditional *Terry* stop, or while on a residential call, this situation is not beyond comprehension and has certainly happened already. In this situation, a prosecutor is left with the decision whether to argue that, in retrospect, the search was valid due to the individual's status on MSR.

The retrospective argument seems to have been left open by the strong language the *Wilson* Court used when addressing the privacy interest half of the balancing test. The Court cited *People v. Moss*, 217 Ill.2d 511, 842 N.E.2d 699, 299 Ill. Dec. 622 (2006), stating that the search condition in the MSR agreement has no "limitation on what government agent may perform that search or what purpose they may have."[8] The Court also noted that a parolee is on notice that a law enforcement officer may ask for consent to search with or without suspicion of wrong doing.[9] If this is the case, what reason would there be for an officer to have knowledge the person is on MSR? The parolee would have no reason to believe such knowledge is required. Additionally, the *Wilson* Court cited a federal Ninth Circuit decision stating that "a parolee has *no* expectation of privacy."[10] Furthermore, an officer's lack of knowledge plays no role in the parolee's already nonexistent expectation of privacy. Therefore, an officer does not need to have knowledge of the individual's status on parole prior to the search. Right? This must be the case unless an answer is found in the other side of the balancing test.

For a search to be reasonable there must also be a legitimate State interest that outweighs the parolee's privacy interest.[11] While the *Wilson* Court never discussed the legitimate government interest present during the search in question, the Court did discuss other cases that stood for the principle that a state's legitimate interest warrants privacy intrusions on parolees.[12] However, the Court did not discuss the searching officer's knowledge of the MSR and the answer to the question does not seem to be addressed in Illinois jurisprudence.

This topic of officer knowledge was addressed by the United States Supreme Court in *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193 (2006). While addressing the fear of arbitrary and/or capricious searches, the Court in *Samson* noted that under California precedent "an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee."[13] Essentially, under California law, if an officer does not have knowledge of the individual's status on parole there is no legitimate state interest being pursued in searching the individual.

A similar requirement is well established in Illinois probable cause jurisprudence. Illinois law is clear that an officer's assessment of probable cause to arrest must be based on facts known to the officer at the time of arrest.[14] Given that reasonableness to search is also based on the totality of facts and circumstances known to the officer at the time of a search, it logically follows that an officer would need to know that the individual being subjected to a search is on MSR and therefore subject to suspicionless searches.

Despite this precedent, it is hard to escape the firm language used in *Wilson* that "a parolee has *no* expectation of privacy."[15] If a court is to truly balance the competing interests, it would not take much for the State's interest to outweigh a nonexistent privacy interest. However, as is understood in California, the officer should be serving a state interest at the time of the search. Whether it is knowledge of the individual's status on MSR or the otherwise required level of suspicion, as law enforcement officers continue to train and work under the authority of Wilson, they would be well advised that in the absence of the individualized suspicion to make sure the individual in question is on MSR. Otherwise, we may find that hindsight is not reasonable.

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1. Adam W. Ghrist is an Assistant State's Attorney in the McLean County State's Attorney's Office. Any opinions expressed in this article are solely those of the author and not those of the McLean County State's Attorney's Office.

2. MSR was previously and still remains commonly referred to as "Parole" in Illinois.

3. 730 ILCS 5/3-3-7.

4. 730 ILCS 5/3-3-7(a)(10).

5. *People v. Moss*, 217 Ill.2d 511, 842 N.E.2d 699, 299 Ill. Dec. 622 (2006).

6. *Wilson*, 228 Ill.2d at 53 (The *Wilson* Court relied heavily on the United States Supreme Court's holding in *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193 (2006), which reviewed a search of a parolee subject to a similar California search agreement. The *Samson* Court found the similar agreement salient to the parolee's diminished expectation of privacy. 547 U.S. at 852, 126 S.Ct. at 2200.

7. *Wilson*, 228 Ill.2d at 53.

8. *Moss,* 217 Ill.2d at 532.

9. *Wilson*, 228 Ill.2d at 50 (citing *Moss*, 217 Ill.2d at 532).

10. Id. at 51(emphasis added) (citing *United States. v. Lopez*, 474 F.3d 1208 (9th Cir.2007)).

11. Id. at 41.

12. Id. at 50-51.

13. *Samson*, 547 U.S. at 857 n. 5 (citing *People v. Sanders*, 31 Cal.4th 318, 331-332, 2 Cal.Rptr.3d 630, 73 P.3d 496, 505-506 (2003) (Supreme Court of California holding that "such a search cannot be justified as a parole search, because the officer is not acting pursuant to the conditions of parole")); *see also Moreno v. Baca*, 431 F.3d 663, 641 (9th Cir.2005)("[P]olice officers cannot retroactively justify a suspicionless search * * * on the basis of an after-the-fact discovery of * * * a parole condition").

14. *People v. Nash*, 78 Ill.App.3d 172, 177, 397 N.E.2d 480, 484 (1979) (holding that an otherwise illegal arrest of defendant for one offense could not be justified when, in retrospect, it was discovered that probable cause existed to arrest defendant for another offense); *see also People v. Harris*, 352 Ill.App3d 63, 815 N.E.2d 863 (2004).

15. *Wilson*, 228 Ill.2d at 50 (citing *Moss*, 217 Ill.2d at 532).

It's okay to expunge things….really

By Kathleen deGrasse and Wil Nagel[1]

Introduction

Most states' legislatures have created statutory schemes for the expungement of arrest records and convictions for minor offenses. Illinois's expungement statute specifically provides for the expungement of an individual's "record of arrest" for certain, enumerated offenses.[2]

Despite the varied nature of arrest records across law enforcement agencies, the General Assembly did not provide a technical definition for the term "record of arrest" within the expungement statute. This article will provide a working definition of "record of arrest" and set forth the procedures Illinois criminal justice agencies should take when they are served with a petition for and order of expungement.

Record of Arrest

Although the Illinois General Assembly has defined "criminal history record information" as data identifiable to an individual and consisting of, inter alia, "descriptions or notations of arrests,"[3] it did not define the term "record of arrest." Thus, in order to give effect to the true intent of the legislature, it is appropriate to rely on the plain and ordinary meaning of the phrase "record of arrest."[4]

Given the common nature of the term, it is not surprising that the phrase "record of arrest" is not defined elsewhere in Illinois law. In the absence of a formal definition, however, the dictionary may be used to ascertain the meaning of statutory language. Merriam-Webster dictionary defines "record" as "the state or fact of being recorded" or "a body of known or recorded facts about something or someone especially with reference to a particular sphere of activity that often forms a discernible pattern." It further defines "arrest" as "the taking or detaining in custody by authority of law." Thus, the plain meaning of "record of arrest" is any written statement that an identifiable individual was taken into police custody on suspicion of having committed a crime.[5]

Similarly, the General Assembly did not define the term "expunge"; the dictionary may also be consulted to determine the ordinary meaning of that term. The Merriam-Webster dictionary defines "expunge" as, *inter alia*, striking out, obliterating, effacing or destroying completely. More meaning can be inferred from the expungement statute's distinction between sealing records and expunging them.[6] The General Assembly would not have distinguished between destroying records of arrests and sealing records if the intent of an expungement order was to retain some evidence of the underlying arrest.

Thus, any document or written statement containing personally identifying information and indicating that the individual was arrested would constitute a record of arrest and would be subject to destruction or obliteration pursuant to an order granting a petition brought under the Illinois expungement law.

Handling petitions for expungement

Individuals seeking to expunge their criminal records of arrest must file a petition in the appropriate circuit court. Under the expungement law, notice is required to be served on the Illinois State Police, the arresting police department, as well as the State's Attorney and city attorney in the jurisdiction in which the arrest occurred.[7] This notice is in the form of a copy of the petition which includes a court date. Objections to the petition, if any, must be raised prior to the court date by written pleading or in person at the court hearing.[8] The court is required to rule on petitions to expunge within 90 days of notice, absent any objections.[9]

Upon receipt of the petition, agencies must determine if they are going to raise objections. In order to do this, each agency should review its records concerning the subject of the petition. Specifically, agencies should ensure that the crime for which the petitioner was arrested and/or convicted is eligible for expungement under the law. This review may include verifying the section of the Criminal Code that served as the basis for the arrest or conviction, as well as identifying any aggravating factors that might counsel against deleting the record of petitioner's conduct.

The Illinois State Police (ISP) has a

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unique role in the realm of expungements. The ISP is the primary repository for criminal history record information; therefore, every properly-served petition finds its way to ISP's Bureau of Identification (B of I). In some instances, ISP is also the arresting agency. As it is unlikely that a petitioner is familiar with the organizational structure of the ISP, the B of I should take steps to determine whether ISP was the arresting agency. This may be done by examining the petition to determine if another arresting agency has been named. If an arresting agency is not immediately apparent, B of I should forward a copy of the petition to the ISP Information Resources Bureau to determine if ISP was also the arresting agency.

Handling expungement orders

After a hearing on the merits of the individual's petition to expunge, the court may enter an order requiring law enforcement agencies to expunge the record of arrest. The circuit clerk's office is responsible for serving copies of the court's expungement order on any party subject thereto.[10] The court has broad discretion in ruling on petitions to expunge records of arrests and in what relief is contained in the court order. For example, the court may require an arresting agency to file with the circuit clerk an affidavit of compliance with the order; the court may require ISP B of I or the arresting agency to send notification to the petitioner that the expungement is complete; and the court might require additional criminal justice agencies who have not received notice of the petition to expunge their records of arrest.[11] It is axiomatic that law enforcement agencies must comply with a court's order or otherwise seek timely appeal of that order.[12]

The expungement statute's lack of clarity has caused some confusion and has resulted in inconsistent handling of expungement orders by police agencies. A "record of arrest" can take many forms, including but not limited to, a fingerprint card including a statutory charge, a form documenting the custodial arrest of an individual, or a police incident report containing a narrative description of the alleged offense and the subsequent arrest of an individual. Law enforcement agencies are sometimes reluctant to destroy an entire incident report pursuant to an expungement order because they want to retain information that may be useful in future investigations. In these instances, agencies may comply with a court's order by obliterating a petitioner's personally identifying information from such a report. Furthermore, an agency may not maintain a database or other form of record-keeping system containing the records of arrest that have been expunged.

Conclusion

The expungement law is not based upon whether the record would ever be disclosed to the public. This is evidenced, in part, by the General Assembly's providing for the sealing of records. Expungement is the destruction of the record, regardless of who may have proper access to it. The policy behind the expungement statute is that the offense was minor and there is no need to keep a record of its having occurred. Not only is it okay to expunge records, in some cases it is mandatory.

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1. Lieutentant Kathleen deGrasse is the Illinois State Police Privacy Officer. Wil Nagel is Transportation Counsel with the Illinois Commerce Commission and is formerly an Integration Analyst with the Illinois Criminal Justice Information Authority. The opinions expressed herein are those of the authors and do not reflect the positions of the Illinois State Police or the Illinois Commerce Commission.

2. 20 ILCS 2630/5.

3. *See* 20 ILCS 2635/3(G) for the definition of "criminal history record information."

4. *See Solich v. George & Anna Portes Cancer Prevention Center of Chicago*, 158 Ill. 2d 76, 81 (1994) (holding that the "primary rule of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the true intent of the legislature"); *Kraft v. Edgar*, 138 Ill. 2d 178, 189 (1990) (explaining the prose must be assigned its plain and ordinary meaning); *Jordan v. O'Fallon Township High School District*, 302 Ill. App. 3d 1070 (5th Dist., 1999) (holding that where the plain language of the statute provides a clear statement of the legislature's intent, that stated intent must prevail).

5. Law enforcement computer-aided dispatch systems may contain records that include a petitioner's personally identifying information but do not rise to the level of a "record of arrest" because they do not affirmatively indicate that the petitioner was taken in to custody.

6. 20 ILCS 2630/5(c-5), (g).

7. 20 ILCS 2630/5(d).

8. 20 ILCS 2630/5(d) (requiring that objections must be raised within 30 days).

9. 20 ILCS 2630/5(h)(7)(D).

10. 20 ILCS 2630/5(d); /5(h)(7)(F).

11. 20 ILCS 2630/5(d).

12. The expungement statute is silent as to a time-frame within which an agency must comply with the court order. Absent a deadline provided in the court order, the agency must comply within a "reasonable time."

News you can use...

By Patricia M. Fallon*

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Judge Wayne Andersen shares practice tips with government attorneys

By Kevin Lovellette*

On December 2, 2008, the Office of the Attorney General was honored to have the Honorable Wayne Andersen of the United States District Court for the Northern District of Illinois speak as part of the Office's Distinguished Speakers Program. Judge Andersen has been on the District Court bench since 1997. Prior to his appointment to the Federal bench, he was a Cook County Circuit Court judge, and he served as the Supervising Judge in the Chicago Traffic Court. Before rising to the bench, Judge Andersen was a Deputy Illinois Secretary of State and the administrative assistant to Henry Hyde when he was the majority leader of the Illinois House of Representative. He also was appointed as a Special Assistant Attorney General in several condemnation cases.

Judge Andersen is in a unique position to comment on the work of public service attorneys. He has both worked for the public and presided over many cases prosecuted or defended by governmental attorneys. Judge Andersen commented that though the rewards of public service can be great, financial wealth is not among them. He elicited several groans of longing from the crowd when he mentioned one of his former law clerks received a $50,000 signing bonus from a private firm upon leaving the clerkship.

Judge Andersen presented several practice tips for governmental attorneys. He suggested that when we first appear before a new judge, sit up front, listen, and get to know how the judge works. Our knowledge of the judges is part of our profession. Some judges may treat governmental attorneys differently than private attorneys, for good or ill, but all judges are different. Judge Andersen mentioned that in spite of the differences, all judges believe they are doing the job the right way. Because we cannot change a judge's personality, we should get to know them and work with what we learn about them. Some judges are frustrated by governmental attorneys because we do not have large staffs or resources to

meet quick deadlines. Judge Andersen suggested that we calmly explain our situation to these judges, but do not complain or get upset. Even if the judge does not accept our explanation, it is on the record. We can only do the best with what we have, and eventually most judges will accept this.

Judge Andersen is one of a handful of judges that will let jurors ask questions during a trial. He tells the jury that they may submit any question they want in writing, but if the question is not asked, they will not be told why the question was not asked until after the trial. After the questions are submitted, any objections by counsel are argued outside the presence of the jury. Sometimes he may change the language of the question but leaves the spirit of the question intact. Both parties' attorneys are permitted to ask follow-up questions after the witness answers the jury's question. Judge Andersen mentioned that attorneys can be frustrated by jury questions because the jurors can disrupt a plaintiff or defense theory of the case by getting to the actual truth of the matter.

The Judge provided a few practice tips to keep attorneys from aggravating the judge or jury: (1) after 3:00 p.m., do not ask the same question more than twice; (2) understatement is more powerful than overstatement for both juries and judges; and (3) jurors do not like it when an attorney "dings" a witness. Judge Andersen also does not like it when an attorney does this. Again, understatement is more powerful than a forceful accusation.

Judge Andersen spoke about the differences between bench and jury trials. He stated that with a bench trial, the judge is often more interactive, asking questions of the witnesses. Judge Andersen stressed that opening statements in a bench trial should almost always be under five minutes long. The judge already knows the issues through motions *in limine*, settlement conferences, etc. Also, Judge Andersen indicated that jurors notice more irrelevant things during trial than a judge notices. After one case, a juror mentioned to Judge Andersen that he saw one of the attorneys start the trial with a wedding ring but by closing, the ring was gone. The juror was wondering why, even though it had nothing to do with the issues in the lawsuit.

When opposing a *pro se* plaintiff, as many public sector attorneys do, Judge Andersen suggests whittling the case down legally as much as possible and quickly advising the court which defendants do not belong in the case. Judges, in general, do not like to see governmental attorneys beat up on *pro se* individuals. We should always be professional, but an extra dose of professionalism and civility in *pro se* matters may raise our credibility with the judge.

Judge Andersen listed what he often sees as lawyers' biggest mistakes. First, lawyers usually advise their clients to not say they are sorry. Many lawsuits would likely never see the light of day with only an apology. In some situations, this is the right thing to do, and attorneys should not be fearful of it. Second, Judge Andersen sees lawyers get caught up in the daily litigation struggle so much that they take their focus off the reason for the litigation, i.e., to resolve the dispute. Parties sometimes refuse to settle because they "want justice." Judge Andersen will pointedly ask, "If the jury decides against you, is that justice? The opposing party certainly will think so." This can give a party pause, and the case can proceed to settlement.

Finally, when bringing a post-trial motion or raising an issue when a case has been off the judge's radar for some time, feel free to use a sentence or two to refresh the judge's recollection of the case. According to Judge Andersen, judges have "erasure brain," meaning that once a case is over, or an issue is decided, the judge forgets the matter. This allows the judge to remain neutral in the next case involving similar issues or the same attorneys. A sentence or two mentioning the main issue or something that occurred during the case is all is generally required to bring the case to the forefront of the judge's mind.

The Office of the Attorney General very much enjoyed Judge Andersen's program, and the crowd appreciated his willingness to answer a variety of questions, from general legal issues to specific matters. Judge Andersen concluded his remarks reminding all governmental attorneys that we have a high moral calling, and we need to conduct our business with a sense of humility. We have extremely important jobs, and we should always remember to keep the public good at the forefront of our practice.

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*Kevin Lovellette is an Assistant Illinois Attorney General. He wishes to thank Judge Andersen for allowing him to share the Judge's comments in this article. Any mistakes made are solely the author's and should not be attributed to Judge Andersen or the Office of the Attorney General.

Summary of recent decisions

By Edward Schoenbaum*

Illinois Cases

Animal Control Act

***Wilson v. City of Decatur*, No. 4-08-0566 (4th Dist., April 28, 2009). Reversed and remanded.**

Trial court erred when it dismissed plaintiff's complaint for injuries she sustained when city's police dog got loose from its handler and bit her. Section 16 of the Animal Control Act imposes strict liability on city as owner of the dog, which is not subject to the Tort Immunity Act.

Civil Procedure

***Walsh v. Metropolitan Water Reclamation District of Greater Chicago*, No. 1-08-3167 (1st Dist., March 20, 2009). Affirmed.**

In trial for preliminary injunction in which plaintiff alleged that defendant, municipal corporation, wrongfully rejected its low bid for construction project because it failed to sign Project Utilization Plan, as required by the defendant, trial court's allowance of defendants' section 2-1110 motion for dismissal at the close of plaintiff's case is not against the manifest weight of the evidence. Section 2-1110 motion requires the trial court to first determine whether, as a matter of law, the plaintiff has made a *prima facie* case, which decision is

reviewed *de novo*. If it concludes that plaintiff has made a *prima facie* case, then trial court must weigh the evidence and determine whether sufficient evidence remains to prove the plaintiff's case. Requirement of signature on Utilization Plan is material to bidding process and was repeatedly and consistently communicated to potential bidders.

Counties

***Adames v. Sheahan*, No. 105789 & 105851 cons. (Ill. S. Ct., March 19, 2009). Appellate court reversed.**

Appellate court erred when it concluded that evidence was sufficient to find that police officer's negligent storage of his service weapon at home, resulting in the death of a child who was shot by the officer's son, was committed in the course of his employment. It was not the kind of conduct officer was employed to perform, incident to his employment, or for the benefit of his employer. Therefore, the appellate court should have affirmed the summary dismissal of plaintiff's complaint against the sheriff alleging *respondeat superior*. In addition, count against gun manufacturer for failure to warn and design defect is barred by the provisions of Protection of Lawful Commerce in Arms Act.

***Burnette v. Stroger*, No. 1-08-2908 (1st. Dist., March 30, 2009). Certified questions answered.**

Public Defender of Cook County has standing to contest decisions by President of Cook County Board to order layoff of specified personnel of public defender's office and to order designated employees in that office to take unpaid furlough. Further, the president of the county board exceeded his authority when he sent letters of termination to employees of public defender's office and ordered certain employees to take unpaid furlough.

Municipal Law

***Raintree Homes, Inc. v. The Village of Long Grove*, No. 2-06-1105 (2d Dist., April 15, 2009). Affirmed.**

Trial court correctly held that non-home-rule municipality exceeded its statutory authority when it enacted ordinance imposing impact fees, for schools and open lands, on builders when they applied for permit to build new residences because ordinances were not uniquely and specifically targeted to the developer's activity. Further, the trial court did not err when it rejected the village's voluntary payment defense; because business compulsion forced the plaintiff to pay the impact fees, without protest, under duress; and its finding that the plaintiff did not pass on the impact fees to its customers is not against the manifest weight of the evidence. However, because the village did not commit fraud in enacting the ordinance, or withhold an essential service, the trial court did not err when it refused to impose prejudgment interest.

Public Administrators

***Grimes v. Saikley*, No. 4-08-0336 (4th Dist., March 10, 2009). Affirmed.**

Because public administrator would not have been involved in decedent's estate were he not public guardian, complaint alleging that he negligently performed his duty as administrator is barred in circuit court by sovereign immunity. Further, legal malpractice claim against public administrator's attorney was properly dismissed because: attorney for estate owes no duty to estate's beneficiary; legal malpractice claims cannot be assigned; and complaint fails to allege facts sufficient to conclude that defendant attorney actively assisted in purported wrongful acts or was regularly aware of alleged wrongful acts on part of former executor and her family.

School Law

***Garlick v. Oak Park and River Forest High School District #200*, No. 1-08-2017 (1st Dist., March 30, 2009). Reversed and remanded.**

Trial court erred when it dismissed parent's complaint alleging that defendant school district violated School Records Act when it refused to allow him to have copy of his daughter's Advanced Algebra test booklet, containing his daughter's name, notes and calculations, but only allowed him to review and hand copy a redacted copy of the test booklet. The entire test booklet qualifies as a student record subject to disclosure within meaning of Act.

Taxes

***In re Application of the County Treasurer and County Collector of Cook County, Illinois*, No. 1-08-0092 (1st Dist., March 31, 2009). Reversed.**

After plaintiff purchased taxes for 2000 and 2001 on subject property at a tax sale in 2003 and applied for tax deed, it was not entitled to have taxes for 11 years, spanning years both before and after the years sold to plaintiff, sold at 2005 tax sale, merged into its tax deed, without first redeeming the taxes sold to a third party at the 2005 sale, pursuant to the provisions of section 22-40(a) of Property Tax Code. Therefore, trial court erred when it entered order merging taxes for those years into tax deed.

***In re The Application of the County Treasurer and Ex Officio County Collector of Cook County Illinois v. Dunn*, No. 1-08-1445 (1st Dist., April 30, 2009). Reversed.**

Trial court erred when it granted property owner an equitable redemption of property and refused to quash tax buyer's petitions to quash tax redemption, because property owner failed to make any payment within extended time for redemption but instead challenged clerk's computation of estimate. Owner could have taken advantage of the remedy set forth in section 21-380 of the Property Tax Code and paid the estimate under protest.

Federal Cases

Eminent Domain

***City of Joliet, Ill. v. New West, L.P.*, Nos. 08-3032 & 08- 3033 Cons. (4/9/09). Appeal, N.D. Ill., E. Div. Affirmed.**

Dist. Ct. did not err in denying defendants-landowners' request to dismiss plaintiff-city's condemnation action that had been removed to federal court where said request was based on allegation that certain provisions of National Housing Act and Multifamily Assisted Housing Reform Act precluded plaintiff from using its eminent domain powers to condemn subject apartment complex that contained section 8 housing units. Fact that defendants had entered into section 8 contracts with HUD did not preclude plaintiff's use of its condemnation powers since said powers did not conflict with any rule of law established by either statute. Moreover, while plaintiff's use of its condemnation power might reduce number of low-income housing units, neither federal statute contained "clear statement" of national decision to displace eminent domain powers of local entity.

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*These summaries were prepared by Adrienne W. Albrecht for the ISBA Illinois E-Mail Case Digests, which are free e-mail digests of Illinois Supreme and Appellate Court cases and which are available to ISBA members soon after the decision is released, with a link to the full text of the slip opinion on the Illinois Reporter of Decision's Web site. These summaries have been downloaded and reorganized according to topic by Ed Schoenbaum for Government Lawyers, with permission.

Attorney General issues opinions

By Lynn Patton

Under section 4 of the Attorney General Act (15 ILCS 205/4 (West 2007 Supp.)), the Attorney General is authorized, upon request, to furnish written legal opinions to State officers and State's Attorneys on matters relating to their official duties. The following is a summary of official opinion Nos. 08-001 through 08-004 and informal opinions I-08-023 through I-08-030 that may be of interest to the government bar.

Copies of an opinion may be requested by contacting the Opinions Bureau in the Attorney General's Springfield office at (217) 782-9070. Copies of official opinions may also be found on the internet at <http://www.illinoisattorneygeneral.gov/opinions/index.html>.

Opinion No. 08-001 Issued August 7, 2008

Redistricting After a Special Census

A municipality must immediately redistrict if the results of an "official census" show that it has the requisite number of inhabitants to authorize it to increase the number of aldermen. While the number of aldermen per municipality is generally based on the number of inhabitants in the municipality, certain exceptions apply. Subsection 3.1-20-10(b) of the Illinois Municipal Code authorizes certain municipalities which have redistricted pursuant to a "new federal decennial census" to adopt ordinances or resolutions restricting the number of aldermen to one step below the normally required number. Because subsection 3.1-20-10(b) is limited to Federal decennial census results, a municipality which has redistricted pursuant to a special census may not adopt such a resolution or ordinance. 65 ILCS 5/3.1-20-10(b) (West 2006); 65 ILCS 5/3.1-20-25(c) (West 2007 Supp.).

Opinion No. 08-003 Issued December 23, 2008

Relocation of a "Retail Tobacco Store" under the Smoke Free Illinois Act

If an existing business that qualifies for the retail tobacco store exemption under section 35 of the Smoke Free Illinois Act relocates after January 1, 2008, the business will be subject to the same limitations as a retail tobacco store that begins operating after that date. 410 ILCS 82/35 (West 2007 Supp.).

Opinion No. 08-004 Issued December 31, 2008

Payment of Unexpended Proceeds from Sale of Medical District Property into State Treasury

For purposes of section 10 of the Illinois Medical District Act (the Act), the term "expended" means paid out or actually spent. Consequently, section 10 of the Act requires that, by July 10 of each year, the Illinois Medical District Commission transmit to the State Treasury all proceeds from the sale of property on hand as of June 30, in excess of $350,000, that were neither paid out nor necessary to satisfy revenue bond obligations. Although the Commission may additionally retain funds necessary to pay enforceable contractual obligations existing as of June 30 that will be paid no later than September 30 of that year, any such funds not actually paid out by September 30 must be transmitted to the State Treasury for deposit no later than October 10. 70 ILCS 915/10 (West 2006).

Informal Opinion No. I-08-023 Issued August 7, 2008

Restrictions on City Council Members Who Own Property Located Within a TIF District

Subsection 11-74.4-4(n) of the Illinois Municipal Code prohibits city council members who own property located in an existing redevelopment project area from voting on or taking any other official action in connection with matters concerning a redevelopment plan, a redevelopment project, or the redevelopment project area, unless one of the statutory exceptions applies. 65 ILCS 5/11-74.4-4(n) (West 2006).

Informal Opinion No. I-08-024 Issued August 14, 2008

Procurement of and Accounting for Contracts for Consulting Services

The Statewide Accounting Management System (SAMS) and the Illinois Procurement Code serve different purposes; the classification of a transaction in one does not control or mandate any particular treatment of a transaction in the other. Consulting services generally constitute "professional and artistic services" under the Procurement Code. Only qualifying "professional and artistic services" are required to be procured in accordance with article 35 of the Procurement Code. The treatment of a particular contract as "professional and artistic" for purposes of the SAMS procedures of the Office of the Comptroller does not require that services be procured in accordance with article 35 of the Procurement Code. 30 ILCS 500/1-1 *et seq.* (West 2006); 44 Ill. Adm. Code §1.2035 (Conway Greene CD-ROM June 2003).

Informal Opinion No. I-08-025 Issued August 28, 2008

County Sheriff's Authority to Impose a Surcharge on Municipalities to Cover Expenses Associated with Providing Dispatch and LEADS Services

Absent a statutory grant of authority, a sheriff may not unilaterally impose a surcharge or similar type fee on a municipality to cover the costs associated with providing dispatch and LEADS services to municipalities. A county and a municipality, however, may enter into an intergovernmental agreement for the provision of authorized services. Under the terms of that contract, a municipality could agree to compensate a county for the costs of providing dispatching and LEADS services. A sheriff is under no statutory duty to provide non-emergency dispatch and LEADS services to a municipality, and he or she may discontinue the provision of those services at any time. 55 ILCS 5/4-5001 (West 2007 Supp.).

Informal Opinion No. I-08-026 Issued September 25, 2008

Applicability of Statutory Public Defender Malpractice Immunity and Indemnification to Private Court-appointed Counsel for the Indigent

Neither section 5 of the Public and Appellate Defender Immunity Act nor section 5-1003 of the Counties Code is applicable to attorneys who are appoint-

ed by the court to represent indigent defendants or minors in cases in which a public defender is deemed to have a conflict of interest. Therefore, neither statute provides immunity to, or indemnification from, malpractice claims brought against a court-appointed private attorney. 55 ILCS 5/5-1003 (West 2006); 745 ILCS 19/5 (West 2006).

Informal Opinion No. I-08-027 Issued October 2, 2008

Compatibility of Offices – County Board of Health Member and City Council Member

Because of a potential conflict in duties, the offices of city council member and county board of health member are incompatible. 55 ILCS 5/5-25013 (West 2006).

Informal Opinion No. I-08-028 Issued October 30, 2008

Authority of the State Board of Elections to Collect Monetary Penalties Assessed Against Political Committees

Pursuant to rules promulgated by the State Board of Elections, the Board must collect past due accounts in accordance with the Illinois State Collection Act. Pursuant to the Collection Act, each State agency is responsible for collecting past due accounts "through all reasonable means." The phrase "all reasonable means" is limited to collection actions which are either specifically prescribed by law and/or administratively reasonable. Because the Collection Act delegates contracting with private collection agencies to the Debt Collection Bureau, and because the State Board of Elections is not otherwise authorized to contract with private collection agencies, the Board may not contract with private collection agencies to collect outstanding fines. 10 ILCS 9/10 (West 2007 Supp.); 30 ILCS 210/3 (West 2006); 30 ILCS 210/5, 10 (West 2007 Supp.).

Informal Opinion No. I-08-029 Issued November 20, 2008

Circuit Court Judge's Authority to Solemnize Marriages Statewide

A judge for the Circuit Court of Cook County is authorized to solemnize marriages anywhere within the State of Illinois. 750 ILCS 5/209 (West 2006).

Informal Opinion No. I-08-030 Issued December 11, 2008

Offense Relating to Parking or Registration under Section 3-707 of the Illinois Vehicle Code

An "offense relating to parking or registration" refers to, among other things, an offense connected to or having to do with the registration certificates, registration plates, or registration stickers issued to motor vehicles. A violation of section 3-707 of the Illinois Vehicle Code, which generally prohibits the operation of an uninsured motor vehicle on the State's public highways, does not constitute "an offense relating to parking or registration," as that phrase is used in subsection 5-9-1(c) of the Unified Code of Corrections. As a result, a person convicted of violating section 3-707 is not exempt from the additional penalty authorized by subsection 5-9-1(c) of the Unified Code of Corrections. 625 ILCS 5/3-707 (West 2007 Supp.), as amended by Public Act 95-876, effective August 21, 2008; 625 ILCS 5/7-601 (West 2006).

Upcoming CLE programs

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

June 2009

Thursday – Saturday, 6/18/09 – 6/20/09, Chicago, ISBA Regional Office—CLE Fest Classic. Presented by the Illinois State Bar Association.

Thursday, 6/25/09 – webcast—Ethical Considerations in Estate Planning and Trust Administration. Presented by the Illinois State Bar Association. 12-1:30

Friday, 6/26/09 - Lake Geneva, WI—LESSONS IN PROFESSIONAL RESPONSIBILITY. Learned from the Illinois Law Practice of Abraham Lincoln. A Master Series Video Production Presented by the Illinois State Bar Association.

July 2009

Wednesday, 7/01/09 – Webinar—Conducting Legal Research on Fastcase. Presented by the Illinois State Bar Association. **An exclusive member benefit provided by ISBA and ISBA Mutual. Register at:* https://www1.gotomeeting.com/register/960228025.

August 2009

Monday, 8/03/09 – Webinar—Conducting Legal Research on Fastcase. Presented by the Illinois State Bar Association. **An exclusive member benefit provided by ISBA and ISBA Mutual. Register at:* https://www1.gotomeeting.com/register/648690400.

Monday, 8/24/09 – Chicago, ISBA Regional Office—Distributions from Qualified Retirement Plans. Presented by the ISBA Employee Benefits Section.

September 2009

Tuesday, 9/01/09 – Tinley Park, Odyssey Country Club—Day-to-Day Ethical Dilemmas, What Every Attorney Should Know About Ethics and ARDC Complaints. Presented by the ISBA Young Lawyers Division Section.

Thursday, 9/03/09 – Chicago, ISBA Regional Office—Mentor Training. Presented by the ISBA Standing Committee on Mentoring.

Thursday, 9/10/09– Chicago, ISBA Regional Office—Franchising Issues under New State and Federal Requirements. Disclosure, Laws, Rules and Forms. Presented by the ISBA Corporation, Securities, and Business Law Section.

Friday, 9/11/09 – Chicago, Kirkland & Ellis LLP—Rambus is Final: Where do we go From Here? Presented by the ISBA Antitrust & Unfair Competition Law Section, Co-Sponsored by the ISBA Intellectual Property Section. 11-1:15.

Friday, 9/11/09 – Chicago, ISBA Regional Office—Tackling Family Law Conundrums. Presented by the ISBA Family Law Section.

Tuesday, 9/29/09 – Chicago, ISBA Regional Office—Recent Developments in State and Local Tax 2009. Presented by the ISBA State & Local Tax Section. 9-12.

October 2009

Friday, 10/02/09 – Champaign, I Hotel and Conference Center—Divorce Basics for Pro Bono Attorneys - 2009. Presented by the ISBA Standing Committee Delivery of Legal Services. 12-5.

Friday, 10/16/09 – Fairview Heights, Four Points Sheraton—Tackling Family Law Conundrums. Presented by the ISBA Family Law Section.

Thursday - Saturday, 10/22/09 - 10/24/09 – Springfield, President Abraham Lincoln Hotel—5th Annual Solo & Small Firm Conference. Presented by the Illinois State Bar Association.

Monday - Friday, 10/26/09 – 10/30/09 – Chicago, ISBA Regional Office—40 hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30 – 5:45 daily.

November 2009

Monday - Friday, 11/09/09 - 11/13/09 – Grafton, Pere Marquette Lodge and Conference Center—40 hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. *8:30-5:30 each day.*

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