Emotional support animals on campus

BY ROBERT L. MILLER

A change is occurring at many university campuses across the country. Over the last few years, students have been requesting, with increasing frequency, permission from campus authorities to bring an emotional support animal to live in their residence hall or university owned apartment. Such requests have included dogs, guinea pigs, iguanas and snakes. For students who have emotional difficulties or anxieties, the benefits of having an assistance animal are real, and so are the challenges for universities.

Continued on next page

Some interesting blawgs for the Illinois government lawyer

BY BARBARA GOEBEN

For the uninitiated, a “blawg” is a legal blog maintained by “blawggers,” a legal blogger. The following are some blawgs which are of particular interest to government lawyers practicing in Illinois. Because there are so many interesting blawgs, future newsletters will feature other blawgs grouped around particular topics.

- Illinois Lawyer Now (iln.isba.org). The Illinois State Bar Association’s official blawg, this is a good resource for breaking news and practice tips. Jim Covington, ISBA Director of Legislative Affairs, provides brief video reviews of pending Springfield legislation which keeps one in the loop during the often changing legislative process.
- 2Civility (www.2civility.org/category/blog) is the Illinois Supreme Court Commission on Professionalism’s blawg. Some recent posts include a two part series on where our legal profession is heading, judges controlling their

Continued on page 3

Emotional support animals on campus

1

Some interesting blawgs for the Illinois government lawyer

1

Save the Date:

1

How substantial is substantial? Conflicts of interest and government attorneys

4

Upcoming CLE programs

6

Save the Date:

The ISBA’s Committee on Government Lawyers has created a new CLE program focusing on the Open Meetings Act. The program is scheduled for presentation in Springfield on October 13, 2016, and will use the Committee’s popular skit and small break out group format. Watch this newsletter and your mailbox for more information.
Emotional support animals on campus

CONTINUED FROM PAGE 1

Many universities have enforced longstanding “no pet” policies in campus housing with the possible exception of tropical fish. Housing officials often have concerns animals may damage rooms and apartments, trigger allergies or phobias of other students, escape and multiply, or bite someone. However, these policies may not be in alignment with the needs of some students to have an emotional support animal in their living space.

There are two important legal questions that universities must consider. The first is whether the Fair Housing Act (FHA) applies to campus housing, and an equally important question is whether the Rehabilitation Act of 1973 provides students the accommodation of having an emotional support animal on campus. If the answer to the first question is yes, then the living space issue is resolved because the Federal Department of Housing and Urban Development has stated that reasonable accommodation requests may include emotional support animals.1 If the answer to the second question is yes, then entities subject to the Rehabilitation Act may see requests for emotional support animals in the workplace and common areas.

University and college students are able to seek reasonable accommodations for their disability under section 504 of the Rehabilitation Act of 1973 (Rehab Act).2 The Rehab Act, which prohibits acts of discrimination by programs that receive federal financial assistance, aligns in many ways with a more well-known disability law, the Americans with Disabilities Act (ADA), which prohibits discrimination by a public entity.3 However, as it pertains to emotional support animals, there appears to be some daylight between these two laws which creates some uncertainty.

The ADA is clear enough in that it requires public entities to immediately make under the ADA.9 The Rehabilitation Act of 1973 (Rehab Act).2 The Rehab Act, which prohibits acts of discrimination by programs that receive federal financial assistance, aligns in many ways with a more well-known disability law, the Americans with Disabilities Act (ADA), which prohibits discrimination by a public entity.3 However, as it pertains to emotional support animals, there appears to be some daylight between these two laws which creates some uncertainty.

The ADA is clear enough in that it requires public entities to immediately accommodate persons who utilize trained service animals.4 Under the ADA, “[s]ervice animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.”5 There are only two exceptions that permit a public entity to refuse to accept a service dog: (1) when the animal is out of control and the handler cannot control it, or (2) the animal is not housebroken.6

The ADA expressly excludes all animals other than dogs (and miniature horses) from the definition of service animals. If it did not, society would be left to deal with very serious and complicated questions. For example, if a boa constrictor served as a service animal under the ADA, places of public accommodation—restaurants, theaters, trains, etc.—must permit the animal to accompany its owner. The ADA exceptions may not be useful because some animals do not appear unruly or dangerous at first glance.

Unlike the ADA, the Rehab Act does not define service animal and does not address the possibility that students may need emotional support animals. The Rehab Act does clearly state that students with disabilities cannot be excluded from any program or activity that receives federal financial assistance.7 The Rehab Act further states that campus housing must be accessible to students and cannot result in discriminatory treatment based on a disability.8 Accordingly, because a failure to provide reasonable accommodations can support a claim of discriminatory treatment, and because the Rehab Act does not address or exclude emotional support animals, it is possible that a student is entitled to this accommodation assuming the request is reasonable. At least one court has held that a student may be able to state a failure to accommodate claim under the Rehab Act, even though the claim could not be made under the ADA.9

If the Rehab Act is broader than the
ADA in this instance, students may be able to request the use of an emotional support animal in both their living space and other spaces on campus, including spaces where an ADA defined service animal is permitted. This would include public spaces and the classroom. Each request would be independently assessed so it is unlikely that every classroom would become a menagerie of exotic animals, but with the increasing number of students making such requests, it is timely for state and federal legislators to address the issue of emotional support animals in more detail.

In drafting the Rehab Act, Congress likely did not consider emotional support animals as a potential disability accommodation, and new regulations could serve to identify whether such animals are permitted as an accommodation. If a university must accommodate animals in residence halls, it would be helpful to have a list of permitted animals or additional parameters regarding the suitability of a particular animal. Without this help, universities must assess animals that have been prescribed by a physician or counselor on a case by case basis to determine whether to permit the accommodation. Assuming that a university has discretion to permit or deny exotic animals, trying to determine whether an iguana is too big for a small residence hall room can create inconsistent results and unnecessary turmoil and delay for the student. As seen below, under the Fair Housing Act, a housing provider is likely limited in its assessment regarding the suitability of emotional support animals.

Another important piece of this puzzle is the Department of Housing and Urban Development (HUD) and its application of the FHA to university campuses. The FHA applies to dwellings which includes accommodations that are transitory in nature such as migrant farmworker housing, and while the FHA does not specifically include university housing in its definition of a dwelling, at least one court has ruled that campus housing does fall under the purview of HUD and the FHA.\(^\text{10}\) In addition, HUD has firmly posited that campus housing is subject to its authority.\(^\text{11}\) Consequently, HUD's definition of assistance animal likely determines whether students can have emotional support animals in their residence hall rooms.

When a housing provider is presented with a request for an emotional support animal accommodation, it can consider whether the specific animal, not the breed or variety, is a direct threat to the safety of others, and it can consider whether the specific animal is a threat to cause substantial damage to the property of others.\(^\text{12}\) However, the housing provider must base its determination on actual evidence and not speculation.\(^\text{13}\) Presumably, this means that bad behavior must occur and be observed before a denial can be made. In addition, it is noteworthy that the HUD notice states that there are no size or weight limits on assistance animals.\(^\text{14}\) It is also noteworthy that residence hall rooms are generally not very large.

Consistent with a notice issued to its field offices in 2013, HUD has issued charges of discrimination against universities and against individual employees of those campuses who have refused to permit emotional support animals.\(^\text{15}\) The effect of HUD's enforcement activities has had a substantial impact on campus decision-makers tasked with accommodating students with disabilities while they also try to balance the impact of such requests on the campus community.

While requests for emotional support animals on campuses are not new, the frequency and variety of these requests has been growing over the last several years. Universities are generally very welcoming of students with disabilities, and campuses are trying to navigate this complex issue without the benefit of clear legal guidelines. Having more clearly defined rules would also be very helpful for a young student contemplating leaving home for the first time who wonders whether her hamster, cat, or other beloved and helpful animal will be going with her to college or staying home.

Robert L. Miller is general counsel at Eastern Illinois University.

4. 28 C.F.R. § 35.136(a) and (b).
5. 28 C.F.R. § 34.104 (emphasis added).
6. Id.
7. 34 C.F.R. 104.4(a).
8. 34 C.F.R. 104.45.
12. Id.
13. Id.
14. Id.
15. U.S. Department of Housing and Urban Development v. Kent State Univ. et al., FHEO Nos. 05-10-0670-8, 05-10-0669-8 (August 1, 2014). (HUD charged the university and four employees with violations of the FHA due to the university's refusal to permit an emotional support animal in a campus-style apartment. HUD seeks $16,000 from each defendant.)
courtroom, and innovations in legal services.

- Election Law Blog (electionlawblog.org). Maintained by Rick Hasen, a University of California-Irvine professor, this blawg covers election law issues, including voting rights, redistricting, and legislation. For those really into election law, this blawg provides links to additional election law resources and election law podcasts.
- Breaking Gov (breakinggov.com) is an excellent resource on recent news concerning federal agencies. The blawg has a specific tab for law issues.

An additional resource for active blawgs in your particular area of practice is the ABA Blawg Hall of Fame (http://www.abajournal.com/magazine/article/2013_blawg_100_hall_of_fame).

How substantial is substantial? Conflicts of interest and government attorneys

BY JOHN R. SCHLEPPENBACH

The Model Rules of Professional Conduct provide that “a lawyer who has formerly served as a public officer or employee of the government . . . shall not . . . represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.” Similarly, the Rules provide that a current government lawyer may not participate in a matter in which he or she “participated personally and substantially while in private practice,” absent a written consent. Illinois decisions interpreting what level of involvement is “substantial” are not numerous, but suggest that even minimal efforts on behalf of a client may later prove disqualifying.

In Wagner v. Lehman Brothers Kuhn Loeb Inc., the Northern District of Illinois determined that an attorney’s participation in two case reviews as an Assistant Regional Administrator at the SEC necessitated his disqualification as counsel for plaintiff in a subsequent class action raising similar claims against the previously-investigated entity. The court applied the predecessor rules to the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, which similarly prohibited government attorneys from subsequently taking private employment regarding matters in which they had “substantial responsibility.” The court noted that an ABA opinion interpreting the rules envisioned “substantial responsibility” as involving a “much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question.” That opinion went on, however, to state that “it is not necessary that the public employee or official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter.” In light of counsel’s important supervisory role in his former position at the SEC, the court concluded that this standard was met and disqualification was required to protect the integrity of that agency.

Other Illinois cases have followed similar logic. In Kadish v. Commodities Future Trading Corp., for example, the Northern District concluded that disqualification was required where an attorney representing parties in a Commodities Future Trading Commission (CFTC) enforcement action had previously worked on a draft complaint related to the investigation that spawned that action while working for the CFTC. This was so even though the attorney’s work had been limited to cutting and pasting legal boilerplate from other complaints and he had not reviewed any of the actual facts relating to the specific investigation. Similarly, in In re M.B., the Illinois Appellate Court, Third District, found that disqualification was required where an attorney representing parties in a juvenile proceeding had previously appeared as an Assistant State’s Attorney in the same matter. The court concluded that no factual findings about whether the attorney actually learned anything about the case or performed any work on it were required; the fact that she had responsibility for all
juvenile cases prosecuted during the time she was at the State’s Attorney’s office was sufficient.11

Cases where Illinois courts have found no substantial involvement, meanwhile, appear to have largely been cases where there was really no prior involvement by the attorney at all. For example, in Illinois Wood Energy Partners, L.P. v. County of Cook, the Illinois Appellate Court, First District, rejected an argument that disqualification was necessary because an attorney for the plaintiffs had been on the Zoning Board of Appeals at the time the permit request at issue was denied.12 The court reasoned that the record did not show the attorney participating in the consideration of the permit, but rather abstaining from any related discussion.13 Similarly, the Northern District of Illinois in Park-N-Shop, Ltd. v. City of Highwood rejected an argument that counsel should be disqualified because he had served on the city council at the time the liquor commissioner granted the plaintiff the license at issue in the dispute.14 The court emphasized that defendant had not shown that the city council, much less counsel personally, ever debated or discussed the granting of plaintiff’s license or even the policies applicable to it.15 In light of the complete lack of connection between the attorney and the prior government involvement in the case, these cases found that disqualification was unwarranted.

Thus, government attorneys who do not have even nominal involvement in a matter handled by their office or agency need not fear future disqualification. The threshold for “substantial” involvement allowing such disqualification is not high, however, and non-substantive work not implicating confidential information may suffice. ■

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

1. Model Rule of Professional Conduct 1.11(a) (2016).
4. Id. at 664 (applying Disciplinary Rule 9-101(b)).
5. Id (citing ABA Formal Opinion 342).
6. Id.
7. Id. at 664-69,
9. Id. at 1032.
11. Id. at ¶ 9.
12. 864 F. Supp. 82, 84 (N.D. Ill. 1994).
13. Id.

**THE BOOK THE JUDGES ARE READING!**

### Turner on Illinois Mechanics Liens

“Turner on Illinois Mechanics Liens is the most noteworthy publication in recent years for Illinois construction lawyers. It will take its place next to the First and Second Editions of *Love on Mechanics Liens*. Every Illinois construction lawyer should have this book on their desk.”

– Stanley Sklar, Esq., *Dispute Resolution Services, Northbrook, Illinois*

Published with the cooperation of the Society of Illinois Construction Attorneys (SOICA), *Turner on Illinois Mechanics Liens* is sure to be the new authoritative text on the law of Illinois mechanics liens. It is authored by mechanics lien expert Howard M. Turner, who has been practicing, teaching, writing, and drafting legislation on mechanics lien law for over 50 years.

The book is user-friendly, comprehensive, and straightforward. Chapter II, Practical Considerations, covers matters judges believe lawyers often get wrong. There are seven checklists, including: how to prepare a lien; how to defend against a lien; how to draft a pleading; and how to make payments so an owner only pays once. Order your copy today! Published April 2016, 312 pages.

Order at http://www.isba.org/store or call Janet at 800-252-8908 or email Janet at Jlyman@isba.org

$50.00 Members/$75.00 Non-Members (includes tax and shipping)
Upcoming CLE programs

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

July

Thursday, 07/07/16- Teleseminar— What Business Lawyers Need to Know About Licenses, Part 1. Presented by the ISBA. 12-1 pm.

Thursday, 07/07/16- 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, 07/08/16- Teleseminar— What Business Lawyers Need to Know About Licenses, Part 2. Presented by the ISBA. 12-1 pm.

Tuesday, 07/12/16- Teleseminar— Income Tax Issues for Estate Planners, Part 1. Presented by the ISBA. 12-1 pm.


Thursday, 07/14/16- 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.

Friday, 07/15/16— The Ethics of Creating Attorney-Client Relationships in the Electronic Age. Presented by the ISBA. 12-1 pm.

Tuesday, 07/19/16- Teleseminar— Tricks and Traps in the Assumption of Liabilities in Transactions. Presented by the ISBA. 12-1 pm.

Thursday, 07/21/16- Teleseminar— Drafting Sales Agents’ Agreements. Presented by the ISBA. 12-1 pm.

Thursday, 07/21/16- 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.

Friday, 07/22/16- Teleseminar LIVE REPLAY— Ethics of Going Into Business With Clients. Presented by the ISBA. 12-1 pm.

Tuesday, 07/26/16- Teleseminar— Buying and Selling Distressed Real Estate, Part 1. Presented by the ISBA. 12-1 pm.

Wednesday, 07/27/16- Teleseminar— Buying and Selling Distressed Real Estate, Part 2. Presented by the ISBA. 12-1 pm.

August

Tuesday, 08/02/16- Teleseminar— Due Diligence in Real Estate Acquisitions. Presented by the ISBA. 12-1 pm.

Wednesday, 08/03/16- Teleseminar LIVE REPLAY— 2016 UCC Update – Secured Transactions, Notes, Leases, Sales & More. Presented by the ISBA. 12-1 pm.

Thursday, 08/04/16- Webinar— Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Monday, 08/08/16- Teleseminar LIVE REPLAY— Post-Closing Adjustments & Issues in Business Transactions. Presented by the ISBA. 12-1 pm.

Tuesday, 08/09/16- Teleseminar— Charging Orders in Business Transactions. Presented by the ISBA. 12-1 pm.

Wednesday, 08/10/16- Teleseminar— Role of Public Benefits in Estate Planning. Presented by the ISBA. 12-1 pm.

Thursday, 08/11/16- 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.

Tuesday, 08/16/16- Teleseminar— Real Estate Finance, Part 1. Presented by the ISBA. 12-1 pm.

Wednesday, 08/17/16— Teleseminar— Real Estate Finance, Part 2. Presented by the ISBA. 12-1 pm.

Tuesday, 08/23/16- Teleseminar— Drafting Employment Separation Agreements. Presented by the ISBA. 12-1 pm.

Wednesday, 08/24/16- Teleseminar— Sales of Family Businesses: An Interdisciplinary Approach, Part 1. Presented by the ISBA. 12-1 pm.

Thursday, 08/25/16- Teleseminar— Sales of Family Businesses: An Interdisciplinary Approach, Part 2. Presented by the ISBA. 12-1 pm.

Thursday, 08/25/16— Webinar— Lawyer Ethics and Disputes with Clients. Presented by the ISBA. 12-1 pm.

September

Thursday, 09/01/16- 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, 09/08/16- 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, 09/08/16- Webcast** — Monetizing Intellectual Property. Presented by IP. 12:30 p.m. – 2:15 p.m.

**Wednesday, 09/14/16- Webcast** — Hot Topic: Union Dues/Fair Share—Friedrichs v. California Teachers Association. Presented by Labor and Employment. 11:00 a.m. – 12:30 p.m.

**Monday, 10-10-16** — CRO and Fairview Heights, Four Points Sheraton—What You Need to Know to Practice before the IWCC. Presented by Workers Compensation. 9:00 a.m. – 4:00 p.m.

**Thursday, 10/06-16** —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, 10-06-16—Webcast** — Nuts and Bolts of EEOC Practice. Presented by Labor and Employment. 11:00 a.m. – 12:30 p.m.

**Thursday, 10/13/16— 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.

**Wednesday, 10-19-16— CRO and Live Webcast** — From Legal Practice to What’s Next: The Boomer-Lawyer’s Guide to Smooth Career Transition. Presented by Senior Lawyers. 12:00 p.m. to 5:00 p.m.

**Thursday, 10/20/16— 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.

**Friday, 10/21/16— Galena, Eagle Ridge Resort** — Obtaining a Judgement and Collections Issues. Presented by: Commercial Banking, Collections, and Bankruptcy. 8:50 am - 4:30 pm.

| **Friday, 10-28-16** | CRO —Solo and Small Firm Practice Institute Series. Title TBD. Presented by GP, SSF. ALL DAY. |
|---------------------|-------------------------------------------------------------------------------------------------
| **November**        | Wednesday, 11-02-16—Linder Conference Center, Lombard—Real Estate Law Update 2016. Presented by Real Estate. 8:15 a.m. – 4:45 p.m. |
| **November**        | Thursday, 11/03/16— Webinar— Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm |
| **November**        | Thursday, 11/10/16— 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 |
| **November**        | Friday, 11-11-16—CRO and live Webcast—Motion Practice from Pretrial through Post Trial. Presented by Civil Practice and Procedure. 8:50 a.m. - 4:00 p.m. |
| **November**        | Thursday, 11/17/16— CRO—Family Law Table Clinic Series (Series 2). Presented by Family Law. 8:30 am – 3:10 pm. |
| **November**        | Thursday, 11/17/16— 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 |
| **November**        | Thursday, 11-22-16— Linder Conference Center, Lombard—Real Estate Law Update 2016. Presented by Real Estate. 8:15 a.m. – 4:45 p.m. |

**Now Every Article Is the Start of a Discussion**

If you’re an ISBA section member, you can comment on articles in the online version of this newsletter

Visit [WWW.ISBA.ORG](http://WWW.ISBA.ORG) to access the archives.