Survey of Local Government Law Cases

Police Immune For Failing to Prevent Mentally Unstable Grandson From Murdering His Father

A grandfather sued the Madison County Sheriff's Department and its dispatcher after his grandson was released from custody and subsequently murdered his father. The plaintiff alleged that the defendants were liable for failing to provide adequate police protection by retaining the grandson in custody, failing to prevent the commission of his crime, and for releasing the grandson. The plaintiff argued that the failure to detain the grandson pursuant to a mental health warrant and orders for detention, examination, and diagnostic mental evaluation was a statutory violation which created a cause of action outside the scope of the Tort Immunity Act. The Illinois Appellate Court Fifth District disagreed and held that the Sheriff's Department and dispatcher were absolutely immune from liability under the plain language of sections 4-102 and 4-107 of the Tort Immunity Act which provides absolute immunity for failures of police activities (4-102) or failing to arrest or release a person in custody (4-107). *See*, 745 ILCS 10/4-102, 107. Any attempt to distinguish the cause of action by claiming the nature of the action was not the failure to provide police protection but to enforce a mandatory mental health warrant was mere "semantics" that did not overcome the Tort Immunity Act.

Prough v. Madison County, 2013 IL App (5th) 110146.

Principal Has Discretionary Immunity in Carrying Out and Enforcing School Board's Anti-Bullying Policy

The mother of a fourth-grader sued a school district, superintendent and principal for failing to appropriately respond to the child being bullied at school. The defendant school district had enacted a district policy which required the superintendent or her designee to "act in response to reports of bullying," and thus the plaintiff argued that how the principal (and superintendent) responded to the incident was ministerial in nature and not an act of discretion. When applicable, discretionary immunity provides total immunity to public employees for what is alleged to be willful and wanton or negligent conduct, and the special duty exception does not apply. The Illinois Appellate Court Fourth District held that while the School Board had adopted a general policy for the creation of an Anti-Bullying procedure, there was no specific instructions or response mandated. Thus the acts and omissions alleged were discretionary acts and policy determinations for which the defendants had immunity under Sections 2-201 and 2-109 of Tort Immunity Act. *See*, 745 ILCS 10/2-201, 109.

Hascall v. Williams, 2013 IL App (4th) 121131.

Village Board Meeting Twenty-Six Miles From Village is Not "Convenient and Open" to the Public and Violates the Open Meetings Act

The Illinois Attorney General recently concluded that a special meeting involving the Board of Trustees (Board) of the Broadlands-Longview Fire Protection District (District) violated the Open Meetings Act (OMA), 5 ILCS 120/2.01, as the location was not "convenient and open" to the public.

The District's headquarters is located in the Village of Broadlands, in southeastern Champaign County. The Board normally holds its regular meetings at the fire station in Broadlands at 7:00 p.m. However, the special meeting at issue was held at 9:00 a.m. in Champaign, approximately 26 miles from Broadlands and some distance outside the corporate boundaries of the Fire Protection District. Consequently, attendance at this special meeting would have required traveling to Champaign on a weekday morning which is likely to have discouraged attendance by persons who might otherwise have attended a meeting held within the District. The Attorney General also pointed out that there had been no suggestion that the fire station, or another suitable facility within the District was not available for the meeting.

Section 2.01 of the OMA provides that "[a]ll meetings required by [OMA] to be public shall be held at specified times and *places which are convenient and open to the public*." (emphasis added.) The Attorney General pointed to *Gerwin v. Livingston County Bd.*, 345 Ill. App. 3d 352 (4th Dist. 2003), where citizens filed a complaint

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alleging that they were improperly precluded from attending a county board meeting because the size of the meeting room was inadequate to accommodate the number of attendees. *Gerwin*, 345 Ill. App. 3d at 354. Accordingly, the Attorney General's Office concluded that the Broadlands District Board violated section 2.01 of the OMA by holding its April 16, 2013 special meeting at a location that was not "convenient and open" to the public.

The Attorney General's Office went on to note that it did not matter that no action was taken at the special meeting. During the meeting, the Board discussed tax levies, referenda, and a possible bond issuance to fund two new fire stations, as well as the need to garner community support for those expenditures. The Attorney General's Office went on to note that:

> The possibility of incurring debt and the impact of that debt on taxes are matters of substantial interest to residents of the District and should take place at a location that encourages public attendance. In this instance more publicly accessible alternatives to holding the meeting in Champaign were available.

Although no effective remedial action to cure this violation was possible, the Attorney General's Office directed the District to ensure that all future Board meetings were to be held at places that are "convenient and open" to the public in accordance with the requirements of the Open Meetings Act.

Public Access Opinion 13-014, 2013 PAC 24845 (Sept. 5, 2013).

Electronic Transmissions During Public Meetings May Be Subject to Freedom of Information Act Disclosure

The Fourth District recently narrowed but upheld a trial court's finding that texts and emails concerning city council business that were transmitted via a city council member's personal electronic device during public meetings are public records subject to the Freedom of Information Act (FOIA).

In July 2011, a reporter sent a FOIA request to the City of Champaign (City) demanding all electronic communications sent and received by the city council during meetings. The City partially denied the request by asserting that personal communications on privately owned electronic devices are not within the scope of FOIA, even when they relate to City business, because individual city council members are not themselves the "public body."

To the consternation of many government attorneys, the Public Access Counselor (PAC) then issued an opinion finding texts and emails sent or received from a council member's personal electronic device during public meetings, regarding city council business, are by definition public records and thus subject to FOIA. The City disagreed and sought administrative review of the PAC's decision in the circuit court which affirmed the PAC's decision, awarded the staff reporter $7,500 in attorneys' fees and entered an injunction requiring the City to release the records in question. The City appealed to the Fourth District Appellate Court asserting that the communications were not "public records."

> While the electronic age has improved accessibility and communications, it has led to gray areas and challenges in the law. The law is struggling to keep up with developments in technology.

The appellate court noted that a communication is only a "public record" under FOIA if (1) it pertains to the transaction of public business, and is (2) either prepared by, prepared for, used by, received by, possessed by, or controlled by a public body. This lead to a discussion of the definition of "public body" and a significant difference of opinion between the PAC and the appellate court. The PAC deemed that each individual council member was a "public body" under FOIA. Under the PAC's interpretation, any electronic communication received by any individual council member that relates to public business is subject to FOIA because it is within the possession of a "public body." However, the appellate court disagreed. The appellate court held that the governing board, not its individual members, is the "public body" for purposes of FOIA. Individual members cannot conduct public business by themselves—they cannot convene a meeting, pass an ordinance or approve a contract for the city. Rather, a quorum is necessary.

Consequently, the appellate court went on to discuss examples of what turns a communication into a "public record":

- A message from a constituent "pertaining to the transaction of public business" received at home by an individual board member on her personal electronic device would not be subject to FOIA—whereas the PAC's position had been that it would be subject to FOIA.
- The very same message would be subject to FOIA if it was forwarded to enough board members to constitute

a quorum, regardless of whether a personal electronic device was used.

- A message received by an individual board member on his publicly issued electronic device would be subject to FOIA because such a device would be "under the control of a public body."
- Likewise, a message received from a constituent on a council member's personal electronic device and then forwarded to that council member's publicly issued device would be subject to FOIA.
- If a communication regarding the transaction of public business was transmitted during the time a city council meeting was in session, *i.e.*, during the time the individual city council members were functioning collectively as the 'public body,' then the communication is a 'public record' subject to FOIA.

Consequently, there are several ways that an individual member of a public body can transform a communication received on a personal electronic device into a "public" record. Responding to FOIA requests may be more complicated by this court's ruling—determinations will have to be made as to "who" sent "what" and "when" and whether it was sent or received on a personal or public device. While the electronic age has improved accessibility and communications, it has led to gray areas and challenges in the law. The law is struggling to keep up with developments in technology. For instance, it will be interesting to see how courts deal with "Snapchat," a photo messaging application which allows a "snap" to be reviewed for a few seconds before it self-deletes.

City of Champaign v. Madigan, 2013 IL App (4th) 120662.

Homeowner Association's Private Security Force Permitted to Enforce Speeding Laws and Temporarily Detain Offenders

A homeowner association member filed a fourteen count lawsuit after he was stopped for driving 34 m.p.h. in a 25 m.p.h. zone by the association's private security contractor. The trial court granted summary judgment in favor of the defendants, but the appellate court partially reversed on the issue of false imprisonment. On review, the Illinois Supreme Court determined that the trial court had properly declined to interfere in the internal affairs of the association and that regulating and enforcing traffic rules of the association were reasonably necessary to maintain the roadways under 805 ILCS 105/103.10(r). Furthermore, and pursuant to 625 ILCS 5/11-209.1(d), the association retained the right to enforce its own traffic rules and regulations. By enforcing these regulations, the "officers" were not unlawfully asserting police powers. Next, the association's private security vehicles fit within the framework intended by the amendments to 625 ILCS 5/12-215(b)(13), and therefore, the association did not improperly use amber oscillating lights on its security vehicles. Finally, the fact that the officer had probable cause to believe that the member had committed an offense was an absolute bar to the false imprisonment claim.

Poris v. Lake Holiday Property Owners Ass'n, 2013 IL 113907.

Teacher's Failure to Prevent Student From Slipping Not Willful and Wanton Conduct

In *Bielema v. River Bend Community School District*, the Illinois Appellate Court Third District affirmed the trial court's decision granting summary judgment in favor of the defendant in a case where the plaintiff claimed that the School District had committed willful and wanton conduct by failing to warn her of a pool of liquid, which failure caused plaintiff to slip and fall injuring herself. The principal of the school observed a spilled liquid on the gym floor and asked a basketball and track coach to "stand guard" over the spill while the principal went to find supplies to clean the floor. The coach stationed himself two feet from the spill, but was not focused on the spill. The plaintiff, seeing the coach, ran-up to greet him and slipped on the spill. The Third District held, despite the plaintiff's contention that the common law definition of willful and wanton conduct should apply, that the statutory definition of willful and wanton should apply exclusively in Tort Immunity matters. Applying the statutory definition of willful and wanton conduct, the Third District held that the District's conduct was not willful and wanton as it took some action to remedy the danger posed by the spilled liquid and reduced the risk of harm to others.

Bielema v. River Bend Community School District, 2013 IL App (3d) 120808.

Temporary Flooding Can Constitute a Taking Under the Fifth Amendment

In *Arkansas Fish & Game v. United States*, the United States Supreme Court held that, under certain conditions, temporary flooding may be a compensable taking under the takings clause of Fifth Amendment to the United States Constitution. From 1994 through 2000, the United States Army Corps of Engineers developed and implemented a temporary flooding plan that directly impacted a wildlife management area. The plan was intended to prolong the fall harvest period for farms downstream of a dam. The flooding

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plan caused flooding across the region encompassed by the wildlife management area, which restricted access to, and destroyed or degraded, thousands of timber trees worth millions of dollars. The Supreme Court held that there was no exception to the takings clause for temporary flooding, and pointed to several instances in which temporary governmental interference with property rights was a compensable taking. Drawing on earlier precedent, the Court discerned several factors to be taken into consideration when determining whether temporary flooding would constitute a taking. The Court held that it must consider more than just the length and severity of such flooding. In so holding, the Court noted a relevant inquiry into whether a taking occurred must also include (1) the degree to which the invasion is intended or is the foreseeable result of authorized government action; (2) the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use; and (3) the frequency of the takings in sufficient number and over a sufficient time. On remand, the Federal Circuit is to decide whether the facts set forth in this case constituted a compensable taking under the Fifth Amendment.

Arkansas Fish & Game v. United States, 113 S.Ct. 511 (2012).

City Has No Notice of Sidewalk Defect in Absence of Evidence of Defect's Duration

Zameer v. City of Chicago considered on appeal the trial court's grant of the city's motion for summary judgment. The motion had been granted because there was no evidence that the city had either actual or constructive notice of an uneven section of sidewalk upon which the plaintiff tripped and fell. Thus, the trial court held the city was immune under 745 ILCS 10/3-102(a), which affords units of local government immunity for defective conditions of their properties unless there is actual or constructive notice to the unit of local government of the defective condition of the property. On appeal, the plaintiff argued that there were genuine issues of material fact presented at trial which were sufficient to support both actual and constructive notice. At trial, evidence of prior complaints about the sidewalk five years before the plaintiff's fall was presented. The plaintiff argued the prior complaints constituted sufficient evidence of actual notice to the city, but the court rejected that argument because the prior complaints, although on the same block where the plaintiff fell, referenced adjacent addresses, but not the address number where the plaintiff fell. Thus, because the specific defect at the specific place was not mentioned in the earlier complaints, the court held it was inadequate circumstantial evidence of actual notice to the city. The plaintiff further argued the city had constructive notice based upon some post-fall photographs that showed the height difference between the two sidewalk slabs which the plaintiff suggested a jury could infer had existed for more than two years. However, where the city's engineer testified there was no way to know how long the variation in height had existed, where the plaintiff and her companion testified they had no idea how long the defect had existed and where there was testimony that many factors are involved in how a sidewalk ages, including weather, traffic pattern, trees in the area and sidewalk materials, the court held it would be purely speculative for a jury to consider how long the defective condition had existed based on the photographs. In affirming the judgment of the trial court, the First District concluded there was no genuine issue of material fact regarding either actual or constructive notice and held the city was immune under §3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act. *See*, 745 ILCS 10/3-102

Zameer v. City of Chicago, 2013 IL App. (1st) 120198.

Class of One under Equal Protection Clause Based Only on Animus

The plaintiff purchased a home in Chetek, Wisconsin neighboring the home of the Mayor of Chetek. The plaintiff decided to remodel his home and obtained a "remodel-repair" permit. He also erected a three-foot high fence on the property line between his house and the Mayor's house. The Mayor apparently did not like this arrangement, and used his position to harass the plaintiff. The harassment included: repeatedly telling a building inspector that he should not have issued the remodeling permit; repeatedly entering the plaintiff's home without permission; using his influence to cause a second building inspector to block (or at least delay) the grant of a fence permit; telling the fence building contractor that the plaintiff was a drug dealer and unlikely to pay for the work; and initiating the prosecution of the plaintiff in municipal court for the construction of the fence in violation of a five-foot setback requirement (a prosecution that was frivolous).

The plaintiff sued the City of Chetek and the Mayor personally under 42 U.S.C. § 1983 for violating the Equal Protection Clause (among other state law claims). He alleged that he was a "class of one," that there was evidence of animus, and that a "similarly situated" neighbor was treated more favorably than he was treated. The magistrate judge granted defendants' motion for summary judgment, finding that the second neighbor was not "similarly situated" to the plaintiff, and thus the plaintiff could not maintain a class-of-one claim. The United States Court of Appeals Seventh Circuit reversed, finding that where "animus is readily obvious, it seems redundant to require that the plaintiff show disparate treatment in a near exact, one-to-one comparison to another individual." The appellate court held that because the "direct showing of animus was very strong,"

that the plaintiff need only show that the actions taken against him were against the norm, and that a near identical, one-to-one comparison was not necessary. The court noted that, hypothetically, where direct evidence of animus is less strong but still significant, circumstances of a comparator could be invoked as additional support for a direct showing of animus.

Swanson v. City of Chetek, 719 F.3d 780 (7th Cir. 2013).

Pedestrian Crossing Intersection Lacking Crosswalk not an Intended User of Village Street

In *Dunet v. Simmons*, the Illinois Appellate Court First District affirmed summary judgment in favor of the defendant Village of Oak Lawn and a codefendant power company in a wrongful death and survival action. The plaintiff's decedent was struck and killed while walking across a six-lane street at an intersection on a dark evening. The adjacent streetlights were inoperable during a power outage. The intersection had no designated crosswalk and no traffic signals. The curb was painted yellow and had no cut-outs or slopes for pedestrians. The plaintiff alleged that the village's conduct regarding the inoperable streetlights was both negligent and willful and wanton conduct. The plaintiff also argued that the decedent was in an "unmarked" crosswalk as defined by 625 ILCS 5/1-113(a). The duty of the village was limited by the Tort Immunity Act, which provides there is a duty to exercise ordinary care to maintain property for uses that were both permitted *and* intended. 745 ILCS 10/3-102(a). The court held that summary judgment was proper because the decedent was not an intended user of the subject intersection even if she qualified as a permitted user. The nature of the property itself, including the yellow-painted curbs and absence of a slope for pedestrians, demonstrated that pedestrians were not intended to cross the street where the accident occurred. The court also considered that nearby intersections, in contrast, had marked crosswalks complete with traffic lights and sloped curbs. The court was not persuaded by plaintiff's argument that the decedent was walking in an unmarked crosswalk pursuant to 625 ILCS 5/1-113(a) because, at best, this would show that the decedent was merely a permitted user of the property. Because the plaintiff failed to show that the decedent was an intended user of the intersection in question, plaintiff failed to show that the decedent was owed a duty.

Dunet v. Simmons and Village of Oak Lawn, 2013 IL App (1st) 120603.

Employee Handbooks and At-Will Employment in Illinois

In a recent case concerning a local government employer, the United States Court of Appeals Seventh Circuit considered one manner by which employee handbooks can potentially disrupt Illinois' presumption of at-will employment.

In *Cromwell v. City of Momence*, the Seventh Circuit considered a district court's dismissal of a former police lieutenant's lawsuit against the city for failure to state a cause of action. The former officer complained that his discharge was procedurally deficient under the Due Process Clause of the Fourteenth Amendment. The complaint alleged that the Momence Police Department Rules and Regulations, a handbook adopted by city ordinance, created a constitutionally protected property interest in his continued public employment. During an investigation into the misconduct, Cromwell, a police lieutenant, allegedly lied to his superiors and was insubordinate. Several months later, Cromwell received a letter from the City Council informing him that it would convene a hearing with the Police Committee regarding the allegations against him and recommend that he be discharged. The city offered Cromwell

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the opportunity to attend the hearing and address the allegations. When Cromwell and his attorney arrived at the hearing, they were denied entry because the Committee was in executive session. After the session ended, and without any word from the former officer, the council voted to terminate him.

Cromwell brought a procedural due process lawsuit based upon two asymmetrical provisions in the department handbook. The handbook provided that non-probationary officers could be disciplined when they violated the law or disobeyed any order of the police chief. The handbook also described the procedures by which the non-probationary officers could be administered discipline. There was no disclaimer that asserted non-probationary employees could be discharged without cause. Cromwell argued the contrast in language vested non-probationary officers like him with a constitutionally protected right to continued employment in the absence of cause for termination.

The trial court granted defendants' motion to dismiss the complaint for failure to state a cause of action. The Seventh Circuit noted that a public employee who can only be terminated for cause has a property interest in continued employment. However, because employment relations are presumed to be at-will in Illinois, establishing an expectation of continued employment requires a clear statement in some substantive state-law predicate. Generally, the terms of employment must express that termination will only be for cause or otherwise evince mutually explicit understandings of continued employment. The statement cannot be a mere procedural guarantee.

The Court of Appeals held that the handbook did not set forth a clear promise that gave Cromwell a protected property interest in his job with the City of Momence Police Department, stating that "something more than inference from silence is required" to overcome the presumption of at-will employment in Illinois. As the Police Department Rules and Regulations, contained no explicit references to tenure or permanent employment, it was insufficient to constitute a clear promise of continued employment for non-probationary officers. Further, the language that conferred to non-probationary officers a right to certain procedures prior to discipline did not amount to a property right in the employment itself as it lacked the requisite substantive predicate. Finally, the absence of a disclaimer asserting that non-probationary employees could be terminated without cause could not create any substantive entitlement because where the handbook made no clear promise of continued employment, there was no reason for the city to include a disclaimer (however prudent that might have been).

Cromwell v. City of Momence, 713 F.3d 361 (7th Cir. 2013).

About the Authors

Benjamin M. Jacobi is an associate at *O'Halloran Kosoff Geitner & Cook, LLC*, where he concentrates his practice on municipal defense, employment law, and general commercial litigation. He has represented a variety of municipal clients in every phase of litigation and on appeal. He previously served as judicial law clerk for Magistrate Judge P. Michael Mahoney in the United States District Court for the Northern District of Illinois. He obtained his J.D., with distinction, from the University of Iowa Law School in 2008, where he also served as Managing Editor for the *Journal of Corporation Law*.

Scott D. Spears is a shareholder at *Robbins, Salomon & Patt, Ltd*. Mr. Spears has represented municipalities, townships, park districts and school districts throughout Illinois on a wide range of issues including taxation, elections, zoning, construction, economic development, labor and employment, litigation and regulatory affairs. He also uses his knowledge of governmental affairs to represent private clients in their affairs with government. His practice includes general business transactions, as well as construction and mechanics lien litigation.

R. Sean Hocking is a Partner at *Craig & Craig, LLC* located in Mattoon, Illinois. He practices in a variety of areas including products liability, civil tort litigation, municipal law and local government, and intellectual property. In addition to these areas of practice, he is admitted as a patent attorney before the U.S. Patent & Trademark Office and holds an engineering degree from the University of Illinois. A Member of the Coles-Cumberland Bar Association, Illinois State Bar Association and American Bar Association, Mr. Hocking is also the current Chairperson for the IDC Events Committee, responsible for putting on the Spring Seminar and other CLE functions.

James L. Craney is a partner in the Madison County office of *Lewis Brisbois Bisgaard & Smith, LLP*, where his practice focuses upon general liability litigation. During his career, he has defended numerous governmental entities, in actions ranging from employment discrimination and wrongful termination, to civil rights violation and personal injury. He earned his B.S. from the University of Illinois in Champaign-Urbana, and his M.S. from Southern Illinois in Carbondale. He earned his J.D. from St. Louis University, where he also obtained the program's Health Law Certificate. He is a member of the IDC Employment Law Committee, and is a regular speaker before bar association and industry groups.

Matthew J. Hammer is an associate at *Donohue Brown Mathewson & Smyth, LLC* in Chicago. He concentrates his practice in product liability, professional negligence, and commercial litigation. Mr. Hammer joined the firm following

two years with the Office of the Illinois Attorney General where he concentrated his practice in labor and employment and civil rights litigation.

Howard L. Huntington is a member of *Mahoney, Silverman & Cross, LLC*, with offices in Joliet, Oswego, and Chicago. He focuses his practice on commercial, business, construction, product liability, public entity, civil rights and transportation litigation. He has extensive experience defending a wide variety of high-stakes matters in Illinois and Indiana. He serves on the IDC Local Government Committee and is a member of various other associations, including Defense Trial Counsel of Indiana. Mr. Huntington has defended municipalities and public entities in Title VII discrimination cases, Section 1983 public employee cases, employment contract and other matters. He received a B.A. in political science from the University of Illinois at Urbana-Champaign, and his J.D. from Chicago-Kent College of Law. He is AV rated by Martindale-Hubbell. In 2012, he was selected by the *Chicago Daily Law Bulletin* as one of the "40 Illinois Attorneys Under 40 to Watch".

John M. O'Driscoll is a partner based out of *Tressler LLP's* Bolingbrook and Chicago offices. His practice includes representing companies and individuals in business disagreements and providing general counsel services to local governmental bodies such as municipalities, school districts, library districts and park districts. Mr. O'Driscoll handles day to day government operations issues as well as a wide variety of areas such as business litigation, breaches of contract, construction issues, employment disputes, ordinance violations, "sunshine laws" compliance, internet defamation, and complex litigation. He has been selected for inclusion in *Illinois Super Lawyers®* for 2012 and 2013 and in *Illinois Super Lawyers Rising Stars®* from 2008-2011. He has also been recognized as a "Leading Lawyer" by the *Leading Lawyers®* Network. He has received the Illinois Association of Defense Trial Counsel's President's Award and also the Meritorious Service Award for his outstanding service as co-chair of the IDC Commercial Litigation Committee. He is the Chair of the IDC's Local Governmental Law Committee. John is co-author of the Municipal Litigation chapter of the *Illinois Municipal Law Series* and co-author of the Park District chapter of *Illinois Special District Series* published by the Illinois Institute for Continuing Legal Education.

Deborah Ostvig is an associate at *Judge, James and Kujawa, LLC*, concentrating her practice in insurance coverage, municipal liability, toxic tort and appeals. She previously served as a Judicial Law Clerk in the Circuit Court of Cook County, Chancery Division to the Honorable Stuart E. Palmer.

Dustin S. Fisher is an associate at *Judge, James & Kujawa, LLC*. Dustin concentrates his practice on civil litigation defense and has successfully defended municipalities, school districts, park districts, housing authorities and railroads in a wide variety of cases including premises liability, sexual abuse defense, section 1983 actions, FELA, defamation, administrative reviews and insurance coverage.

Keith E. Fruehling of *Heyl, Royster, Voelker & Allen, P.C.* is a highly successful litigator in many civil practice areas, including the defense of tort litigation, complex civil rights, medical malpractice, employment, construction, product liability and toxic tort/asbestos claims in federal and state courts. He has taught, lectured and published on federal and state civil practice issues. He currently serves on the Illinois State Bar Association's Board of Governors (ISBA), is the immediate past chair of the ISBA's Task Force on the Unauthorized Practice of Law and has recently been appointed by the President of the Illinois State Bar Association (ISBA) to the Future of the Courts Special Committee to coordinate the ISBA's efforts to identify and publicize threats to fair and impartial courts from lack of funding and education, and to consider measures to address this problem.

LOCAL GOVERNMENT LAW COMMITTEE

John M. O'Driscoll, Chair
Tressler LLP, Chicago
312-627-4000
jodriscoll@tresslerllp.com

Dustin S. Fisher, Vice Chair
Judge, James & Kujawa, LLC, Park Ridge
847-292-1200
dfisher@judgeltd.com

MEMBERS

Julie Bruch	*O'Hallaron, Kosoff, Geitner & Cook, P.C.*
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