AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

February 2009

WELCOME LETTER

Dear Friends:

Welcome to the third edition of our quarterly newsletter. Fire Protection Districts are vital to the safety of us all, so in this edition we'll take a look at a new law aimed to help protect firefighters and a potential trend in Good Samaritan laws.

Local officials are busy people. Time is often split between two jobs. To help, we started this newsletter which has covered topics ranging from cleaning up cemeteries, sign reflectivity, the Prevailing Wage Act, and the Freedom of Information Act. This quarter, are topics that everyone can appreciate: firefighter safety and Good Samaritan laws.

Our next seminar will be held February 9, and will be directed at one of the 600-lb. gorillas of local public entities law: The Open Meetings Act. If you're a local public official this seminar will benefit you, whether you're an old hat or new at the trade. The seminar will begin at 9:00 a.m. in West Peoria. Our special guest for the seminar will be Mike Luke of the Illinois Attorney General's Office, who will give you their perspective. Our attorneys will also be on hand to answer your questions and give you the nuts and bolts (and those pesky subtle nuances) of this very important law.

If you have future program ideas you think will be valuable, please let us know.

Andy

Andrew J. Keyt is an associate with the firm of Heyl, Royster, Voelker & Allen. He concentrates his practice on both governmental affairs and in the defense of asbestos and toxic tort claims arising from environmental and occupational exposures, including products and premises liability claims. Andy represents and assists in the representation of public entities as their counsel. As counsel for local public entities, Andy attends all monthly meetings, board meetings and provides counsel on all legal issues.

CALENDAR OF EVENTS

Monday, February 9, 2009, 9:00 a.m. - 11:00 a.m.
West Peoria Township Meeting
"The Open Meetings Act: Concerns with Electronic Communications"
West Peoria City/Town Hall
2506 Rohmann Ave., West Peoria, IL

Tuesday, February 10, 2009,
8:00 a.m. - 11:00 a.m.
IDOT Seminar
"Traffic Control for Incident Management"
Folepi Center
2200 E. Washington St., East Peoria, IL

Friday, May 1, 2009
Illinois Township Attorneys Association
Seventh Annual Combined Spring Educational Seminar
Bloomington, IL
(Agenda & registration forms available in February)

Date and time to be announced
Heyl Royster Spring Township Seminar

IN THIS ISSUE

GOOD SAMARITANS IN CALIFORNIA MAY THINK TWICE BEFORE RENDERING AID TO THE INJURED: COULD THE SAME HAPPEN IN ILLINOIS?

By Andy Keyt
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Ever heard of Good Samaritan laws? Nearly every state has a statute on the books providing immunity from a lawsuit for medical aid rendered during the course of an emergency. In other words, if Andy falls off a ladder and his friend John walks by, and finding him unconscious and not breathing, renders chest compressions to revive him, Andy cannot turn around and sue John because John broke Andy's ribs while attempting to rescue him. Why? Our laws want us to help each other. Our laws do not want someone to perish because another was afraid of being liable. Instead, most states have enacted Good Samaritan Laws which protect those who come to the aid of others. The laws have subtle variations. In fact, in Illinois if you help someone you only have immunity if you have a job which involves rendering medical aid (firefighter, EMT, nurse, police officer, etc.) or a certification (such as a Red Cross certification in cardiopulmonary resuscitation) in rendering emergency care. More on Illinois later, but for now we'll discuss a December 2008 opinion from the California Supreme Court.

On October 31, 2004, a few friends had been out drinking in their California hometown. They left a bar around 1:30 a.m., taking two vehicles. Alexandra Van Horn was a passenger in the first vehicle, while Lisa Torti was a passenger in the vehicle following. When the lead vehicle went out of control and crashed into a light pole, the friends of the following vehicle sprang into action and removed the occupants of the crashed vehicle. One the "good samaritans" was Lisa Torti. Torti recalled smoke and liquid coming from the lead vehicle and feared the vehicle would catch fire or blow up. Torti rushed to the aid of her friend. Torti recalls lifting Van Horn from the vehicle, while Van Horn recounts her removal as being yanked from the car "like a rag doll."

Van Horn was severely injured, with a lacerated liver, and injury to her spinal cord, rendering her a paraplegic. Van Horn claimed that when Torti yanked her from the car it caused the minor vertebrae damage to become a severe injury to her spinal cord, rendering her a paraplegic, and that she was not in need of assistance at the time. She disputed that the car was about to ignite or, worse, blow up since it never did and other witnesses denied seeing any smoke or liquid coming from the car.

In California (just like almost every other state) one has no duty to come to the aid of another. However, if you elect to do so, you must render the aid with due care. California has carved out an exception to the due care rule and allows for immunity from suit for those rendering emergency care at the scene of an emergency. *See California Health and Safety Code §1799.102.*

Van Horn brought suit against Torti, alleging Torti's help actually hurt her and seeking compensation for medical expenses and pain and suffering. Torti, meanwhile, claimed immunity under the California Health and Safety Code which provides immunity to any "person who . . . renders emergency care at the scene of an emergency . . ." *California Health and Safety Code §1799.102.*

> *Our laws want us to help each other. Our laws do not want someone to perish because another was afraid of being liable.*

In a 4-3 decision, the California Supreme Court found that Torti could be liable to Van Horn. The decision rested on the definition of an "emergency" as defined in the code. The court stated that the immunity provided by California's Good Samaritan Law only applied to the rendering of emergency *medical care* at the scene of a *medical emergency.* While Torti was attempting to help Van Horn, the aid was not medical in nature; it was merely pulling Van Horn from the vehicle and involved a questionable emergency at best. In particular, the court latched onto the fact that a similar provision in the California Good Samaritan Law provides immunity for trained individuals (such EMTs and firemen) for all medical *and/or non-medical care.* Thus, if the legislature wanted to immunize Torti's actions they could have done so by immunizing emergency non-medical care (such as rescue procedures and transportation of a victim).

A controversial decision for sure. But what about here in Illinois? Many of the people reading this either work in emergency services (EMTs, firemen, police officers) or employ such people. Torti was a cosmetologist. Had she been an EMT, firemen, or police officer she likely would have had immunity.

Could the same result happen in Illinois? Absolutely. However, the application of the *Van Horn* case is limited to when the average citizen attempts to render aid to an injured party. In Illinois there is no Good Samaritan Law protecting untrained citizens when rendering aid to another (unless the victim is choking). Illinois has a Good Samaritan Law, but it's limited to those that have specific training or have a profession where rendering emergency care is part of the job (such as a firemen, police officer or EMT).

In Illinois the immunity is always hinged on the provision of free services, as opposed to services for a fee. Keep in mind that there may be other immunities provided (particularly for firefighters) in other parts of the Illinois statutes. However, this discussion is solely about the so-called Good Samaritan Laws, which at their heart require aid without compensation. Also, you cannot willfully or wantonly injure someone. Meaning, you will not be liable for simple negligence (i.e . . . you pushed a little too hard when performing the chest compressions and broke the person's rib). A narrow definition of willful and wanton negligence is difficult to come by. It lands somewhere between simple negligence (a mistake) and an intentional act (where you intended harm). Generally, however, if you mean well, the courts will not punish you.

In Illinois the class of person rendering aid is one of the definitive elements of immunity. For example, a person wholly untrained in rendering medical care has no immunity whatsoever (unless they are aiding a choking victim at a restaurant), and may be liable for their kind acts in helping others if they fail to exercise due care. Should this deter you if you render aid to an accident victim? Hopefully not, although perhaps the legislature should consider allowing immunity (like many other states do) for the kind acts of strangers in helping their fellow man, even when the rescuer does not have any formal training.

Here is a general overview of the class of persons having immunity from suit for their emergency aid:

1. emergency telephone operators (only for their rendering of instructions over the telephone), 745 ILCS 49/5;
2. persons certified in cardiopulmonary resuscitation (only when attempting a cardiopulmonary resuscitation), 745 ILCS 49/10;
3. persons trained in the use of an automated external defibrillator (only when using such a device), 745 ILCS 49/12;
4. dentists providing emergency care, 745 ILCS 49/15
5. physicians and others licensed to practice the treatment of human ailments, 745 ILCS 49/25;
6. advanced practice nurses, 745 ILCS 49/34;
7. nurses, 745 ILCS 49/35 and 40;
8. optometrists, 745 ILCS 49/42;
9. physical therapists, 745 ILCS 49/45;
10. physician assistants, 745 ILCS 49/46;
11. podiatrists, 745 ILCS 49/50;
12. respiratory care practitioners, 745 ILCS 49/55;
13. veterinarians, 745 ILCS 49/60;
14. persons certified in first aid, 745 ILCS 49/67;
15. law enforcement officers, firemen, EMTs and First Responders, 745 ILCS 49/70;
16. engineers, architects, land surveyors, and structural engineers (only for professional services rendered in response to a disaster or catastrophic event and for any professional services rendered for 60 days thereafter), 745 ILCS 49/72;

Finally, anyone (even the untrained) can help a choking victim at a food-service establishment (although you are not obligated to do so) in removing or attempting to remove the food blockage. 745 ILCS 49/65.

What does this mean for the public safety sector employee? Hopefully, this puts your mind at ease when you are off duty and someone needs assistance. As long as you perform your emergency care for free and in good faith, you should have immunity. Meanwhile, hopefully, the legislature provides protection for those not licensed in emergency care for their lifesaving attempts.

As long as you perform your emergency care for free and in good faith, you should have immunity.

THE SMOKE FREE ILLINOIS ACT: HOW (OR) CAN YOU USE IT?

By John M. Redlingshafer
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We have all seen the signs posted at our favorite shops, restaurants, and places of employment. They all say (with varying degrees of legalese): "No smoking within the building or within 15 feet of this entrance under the Smoke Free Illinois Act." This Act went into effect on January 1, 2008, since the one-year anniversary of the much-heralded legislation, we are left to ponder what can actually be done on a local level to follow and enforce it.

The basic premise behind the Act is just that. "No person shall smoke in a public place or in any place of employment or within 15 feet of any entrance to a public place or in any place of employment." 410 ILCS 82/15. Section 15 also prohibits smoking in indoor "public places and workplaces" unless exempted under the Act, and in vehicles that are "owned, leased, or operated by the State or a political subdivision of the State." With these prohibitions in mind, "no smoking" signs are to be "clearly and conspicuously posted" where smoking is banned under the Act by the individual or entity in control of the relevant public place. 410 ILCS 82/20(a). This includes signs at "every entrance" and the removal of "all ashtrays" from any area where smoking is banned. 410 ILCS 82/20(b), (c).

The premise is certainly respectable. There is unequivocal, scientific evidence of the dangers of tobacco use, and to those around tobacco users. However, good intentions do not always equate to good laws. Two major issues are already apparent with the Act: 1) are we actually in a "public place" and 2) how does a local government body enforce the Act?

Definition of "Public Place"

The definition of "public place" (appearing at 410 ILCS 82/10) is longer than most menus at your favorite restaurant. To give you a somewhat "brief" run-down, a "public place" is a "portion of any building or vehicle used by and open to the public" regardless if privately or state-owned, wholly, or in part, and no matter if a fee is charged for admission, including a minimum distance of 15 feet from the entrances, exits, opening windows, and ventilation intakes serving an enclosed area. The definition also includes "commercial establishments," including restaurants (which has its own, separate definition under the Act), retail stores, offices, and indoor theaters, and the more art-related gathering spots, such as museums, libraries, and concert halls. It also extends to medical and recreational facilities, such as hospitals, nursing homes, auditoriums, "enclosed or partially enclosed sports arenas," schools, exhibition halls, conventional facilities, private clubs, and gaming facilities. We note it also applies to elevators at these locations, polling places, all government owned vehicles and facilities, and then, in case the above definitions did not cover them, "shopping centers, retail service establishments, financial institutions, education facilities, ticket areas, public hearing facilities, public restrooms, waiting areas, lobbies, bars, taverns, bowling alleys, skating rinks, reception areas, and no less than 75% of the sleeping quarters within a hotel, motel, resort, inn, lodge, bed and breakfast, or other similar public accommodation that are rented to guests, but excludes private residences." Oh, and lest we forget, the definition of "public place" does **not** include private residences ***unless*** they are used for child care, foster care, or other similar social services.

There is unequivocal, scientific evidence of the dangers of tobacco use, and to those around tobacco users.

Anyone in control of a public place or workplace can also designate a "non-enclosed area" on these sites, "including outdoor areas," as places where smoking is prohibited provided the same "conspicuous" signs are placed. 410 ILCS 82/30.

One would think that this definition covers everything, but it does not. The General Assembly later discusses those places exempt from the Act, but further blurs the line. The four major places where smoking is allowed in Illinois are:

(1) Private residences, except (as noted above, when there is child care present) OR (now we add) "any

other home-based business open to the public;"
(2) Retail tobacco stores;
(3) Private and semi-private rooms in nursing homes and long-term care facilities; and
(4) Hotel/motel rooms rented and designated as smoking rooms (keeping in mind the 75% smoke-free requirement above). 410 ILCS 82/35.

So it looks like someone in control of a non-exempted public place is left with the idea that they can ban smoking wherever they want. But let's think about a possible example for a local government unit: a park. There is no question its main meeting hall or even its vehicles are covered, but does a park count as a "public place?"

Using more of the definition of "public place," it includes "that portion of any building or vehicle used by and open to the public," including "all governmental owned vehicles **and facilities**." 410 ILCS 82/10 (emphasis added).

The local government could argue that park shelters, restrooms, and other structures/ "facilities" within a park are "public places," but it is difficult to assume all of the open-air space (not within 15 feet of these structures) falls into the definition. That is, unless the unit can justify the posting of "conspicuous" signs in a "non-enclosed" area of a public place as described in 410 ILCS 82/30. At that point, it could try to ban smoking in the entire park. Would this count as THE "non-enclosed area," or can you only get one such area in a certain location of the park?

Enforcement of the Act

Let's assume that a park, in its entirety, is covered by the Act. (Again, this is arguably true). How does a local government unit (or any other owner/controller of a public place) enforce the Act?

The Act grants the Department of Public Health, local health departments, and local law enforcement the power to enforce it, and these bodies may assess fines. 410 ILCS 82/40(a). Anyone can register a complaint with the Department (through its required hotline number), local health department, or local law enforcement. 410 ILCS 82/40(b). There is a fine structure in place that allows for penalties against individuals for not less than $100, nor more than $250; those that control public places that violate the Act can be fined in higher amounts. 410 ILCS 82/45. Repeat offenders can face action in the circuit court, where they (in theory) could receive an injunction from partaking in their smoking activities. 410 ILCS 82/50.

Practical application means that by the time a local government official sees someone smoking at a ball game, for example, they can call one of three agencies, and then have a representative come to the park. By this time, the offender has snuffed out the evidence, finished smoking, and/or left anyway. I suppose if this person keeps showing up and smoking, the government body could have its lawyer try to get an injunction barring this person from coming to the park, but that would not be feasible. What if someone tried to be creative and wanted to bring a lawsuit against a different kind of "repeat offender:" the township that keeps allowing this kind of behavior at its park? There is no prohibition in the Act against such a scenario. *See* 410 ILCS 82/45. Even if tort immunity applies, and the case gets dismissed, the body has already incurred costs in defending the lawsuit.

The good news is that the Act has been tested in Illinois courtrooms. The bad news? The tests have not gone well. A judge in Bureau County recently ruled that circuit courts do not have jurisdiction to decide cases involving violations of the Act. *See* "Judge Snuffs Out State Smoking Ban Cases," Peoria Journal Star, Matt Buedel, September 30, 2008. The news report cites the judge's opinion:

It does appear to the court, based on the filings here, that the Legislature intended for the assessment of the fines to be imposed by an administrative agency…[t]he statute itself does not contain the type of language one would normally find in the criminal code…or motor vehicle code. *Id.*

The report also notes that the rules proposed for enforcement were not approved by the General Assembly's Joint Committee on Administrative Rules in January and the Department of Public Health never followed up in filing amended rules. *Id.*

So now, let's go back to our example. It looks like my local government body can place its "no smoking" signs in an effort to protect its citizens and avoid being sued by someone who suffers from a repeat smoker at its park. The offender will likely not receive any punishment, so what are you to do? Enact its own, stiffer ordinance? That would make too much sense if you are a majority of the smaller units of government.

There is nothing in the Township Code, for example, that specifically grants the power to enact a smoking ordi-

nance. One could argue there are implied powers that help protect the health and safety of its citizens, but the Act seemingly slams shut any such argument.

The General Assembly only allowed select types of government entities to enact stricter regulations. Only home rule units of local government, non-home rule municipalities, or any non-home rule counties can regulate smoking in public places, but they can be no less restrictive than the Act. 410 ILCS 82/65(a). These units can regulate smoking in "**any** enclosed indoor area used by the public or serving as a place of work if the area does not fall within the definition of a 'public place' under this Act." 410 ILCS 82/65(b).

So again, as in many other circumstances, the township and other smaller units of government, in an effort to protect its citizens, is left powerless to do so. There is a lot of work to be done on the Act. In the meantime, I am going to hang out in "public places" with the Department of Public Health hotline on speed dial.

Author's Note: At the time of publication, the Illinois General Assembly is considering Senate Bill 2757, which arguably attempts to amend the Act to include stronger enforcement mechanisms. We will keep you advised.

John M. Redlingshafer is an associate with Heyl, Royster, Voelker & Allen. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. Currently, John is Vice President of the Illinois Township Attorneys' Association, and serves as the Editor of the ITAA's newsletter, the *Talk of the Township*.

PROTECTION FOR EMERGENCY SERVICE WORKERS – SHIB'S LAW

By Sheri Kyle
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On December 23, 2000, recently promoted firefighter Lt. Scott Gillen of the Chicago Fire Department, was preparing to leave the scene of an accident on the Bishop Ford Freeway. Instead of spending the holidays with his wife and five daughters, Scott was crushed between his fire truck and a passing vehicle that allegedly failed to move out of the driver's side lane. Scott later died in an Oak Lawn hospital. This accident spurred to action the passing of "Scott's Law," also known as the "Move Over Law." Similar to Indiana's "Shoulder Responsibility Law," Scott's Law requires drivers to change lanes when they approach an emergency vehicle with flashing lights on the shoulder. If it isn't safe to pass, they must slow down. Scott's Law, House Bill 180, passed in 2001 on a vote of 113-0, and earned praise from Lt. Governor Corinne Wood, feeling it was a "victory for the safety of firefighters, police officers, and emergency personnel across Illinois." Under Scott's Law, emergency vehicles are those that are authorized by law to be equipped with oscillating, rotating, or flashing lights under Section 12-215 of this Code while the owner or operator of the vehicle is engaged in his or her official duties. (625 ILCS 5/11-907(a)). This includes Illinois highway maintenance personnel who are at risk on a daily basis. In 2005, only 74 tickets were issued. In 2007, 3,738 citations were issued. Penalties can range from suspension of driving privileges to fines upwards of $10,000.00.

On January 1, 2009, the State of Illinois will take the safety of emergency personnel a step further. On July 27, 2007, 43-year-old, 22-year veteran of the Sesser Fire Department, James "Shib" Miller, was rolling up a fire hose following a semi-trailer fire on I-57 when he was struck by a Greyhound bus and killed. The driver of the bus allegedly failed to slow down for the roadside emergency scene that was identified by safety cones and flashing lights. The driver of the Greyhound was later sentenced to 24 months of probation and fined $2,000.00. Senator Gary Forby and Representative John Bradley sponsored Shib's Law and on August 12, 2008, House Bill 2488 was signed with the House and Senate's unanimous approval of the bill. The bill is two-fold: 1) It allows fire fighters to close traffic lanes when responding to an emergency; and 2) further increases the penalties for the offense of reckless homicide if the offense is committed as a result of failing to follow the procedures required when approaching a stationary authorized emergency vehicle. (625 ILCS 5/11-213), (720 ILCS 5/9-3) While this law does not apply to highways under the jurisdiction of the Illinois State Toll Highway Authority, it is anticipated that Shib's Law will increase the safety of Emergency Service Workers and highway personnel. Shib's Law will take effect on January 1, 2009.

Sheri Kyle is a paralegal with Heyl Royster. She focuses in assisting with governmental practice and general litigation, and has assumed responsibility for assisting in the preparation of various cases for deposition and trial. Sheri is the pro bono coordinator for cases handled by the firm on behalf of Prairie State Legal Services.

Quick Q & A

By John Redlingshafer
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Q: My township has no candidate running for a particular office. How does our local election official (township clerk) notify the county clerk?

A. The Illinois Election Code requires a local election official to certify the candidates appearing on the ballots to the supervising election official (in most instances, the county clerk). See 10 ILCS 5/7-60.1 and 10 ILCS 5/10-15, as to Consolidated Elections, for example. This method is the formal way for the local officials to notify supervising officials as to what candidates (and public questions) will appear on the ballot. While nothing in the Election Code appears to address our specific question here, it would be best to err on the side of the proscribed method of communication between the local official and supervising official. Therefore, if the local official certifies to the county clerk that "no candidate" for the relevant party(ies) are certified, they have fulfilled their statutory duty of certifying the individuals that should appear on the ballot (in this instance - no one). This is very similar to the situation where one party in a consolidated election has a candidate certified (while another does not) - you would simply have to alter that method to show that neither has a candidate. That way, you have also preserved the opportunity for the voters to have that office listed on the ballot with the right to insert a write-in candidate.

If you have further questions, we are happy to answer them, but do not hesitate to confer with your county's clerk or the Illinois State Board of Elections at (217) 782-4141.

For More Information

If you have questions about this newsletter, please contact:

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The statutes and other materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.

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Upcoming Seminar

Heyl, Royster is continuing its regular series in legal seminars for public officials. Join us on **Monday, February 9, 2009**, for a discussion on one of those major issues that everyone should beware of: **The Open Meetings Act**. This seminar will have a special focus on electronic communications.

Our special guest for this seminar will be **Mike Luke** of the Illinois Attorney General's office. Mike has been a friend of ours for many years and his experience and insights on the Open Meetings Act will be a benefit to you. Our attorneys will also be present to give you the nuts and bolts of the law and help answer your questions.

The seminar will take place on Monday, February 9, 2009, at 2506 W. Rohmann Avenue, West Peoria. Those interested in attending should contact Sheri Kyle at (309) 677-9548 or skyle@heylroyster.com to reserve a spot.

Newsletter Available Via E-mail

Want to receive the Heyl Royster Governmental Newsletter electronically? Just send an e-mail request to skyle@heylroyster.com. You'll be able to enjoy the most cost-effective environmentally-friendly way of receiving our governmental news! (Please note: the electronic version will arrive in PDF format.)

New Attorney Joins Heyl Royster's Practice Group

We are pleased to announce our Heyl Royster governmental practice group has grown! Associate **Jesse Placher** (also of our Peoria office) joined our practice group as of December 2008. He concentrates his practice in governmental law, commercial litigation, and insurance defense. Jesse represents municipalities, townships, and other governmental agencies. He focuses primarily on liquor hearings and appeals.