

# Education Law Report

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ANCEL, GLINK, DIAMOND, COPE & BUSH, P.C.

## School Violence Issues Take Center Stage

**T**he 1998-99 School Year rocked the nation from Littleton, Colorado to Washington, D.C. This year, school officials have come face to face with school violence issues, asking questions like, "How do we protect students from each other? And how do we protect students' rights in the process?" This volume of the Education Law Report focuses on a review of legal principles relating to school violence, as well as recent developments in this arena.

### Addressing Student Aggression and School Safety

As the recent events in Decatur, Illinois demonstrate, school officials must strike a delicate balance between students' constitutional rights and maintenance of a safe and secure learning environment. The law is clear that students do not "shed" their rights to speak or express themselves, or their protections against unreasonable searches and seizures, at the "schoolhouse gate." Also, students who face disciplinary action are entitled to procedural and substantive due process. At the same time, school discipline is an area in which school officials are cloaked with broad statutory and common-law discretion.

Illinois courts have been reluctant to overturn decisions to suspend or expel students, particularly in

matters affecting student safety, and recent trends in judicial decisions seem to indicate the courts' increasing deference to school boards' discretion in dealing with these issues. As one Illinois Judge put it, "school officials are trained and paid to determine what form of punishment best addresses a particular student's transgression. They are in a far better position than is a black robed judge to decide what to do with a disobedient child at school." *Donaldson v. Board of Education of Danville School District No. 118*.

For example, remember that Section 10-22.25b of the Illinois School Code gives school boards the power to adopt school uniform or dress code policies "necessary to maintain the orderly process of a school function or prevent endangerment of student health or safety." 105 ILCS 5/10-22.25b. A district exercised this type of power by adopting a school policy prohibiting male students from wearing earrings which demonstrated gang affiliations. The Illinois court upheld the district's actions. *Olesen v. Board of Education of School District No. 228*. Similarly, a California court upheld a ban on professional sports insignia for high school students because of demonstrated connection to gang activity; however, the same policy was found unconstitutional as applied to middle and elementary schools be-

cause the school district could not prove a direct relation to gang activity at that educational level. *Jeglin v. San Jacinto Unified School District*. (Note: High school students do not hold a monopoly on gang activity. Attorneys from our firm have been involved in gang-related expulsion hearings

***"Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."***

***—Justice Fortas, Tinker v. Des Moines Independent Comm. School District (1969).***

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for students as young as first grade.)

Another historical tool used by districts to combat student aggression in their schools are locker, automobile and body searches. These searches may implicate students' fourth amendment protections against unreasonable searches and seizures. "Fourth Amendment rights \*\*\* are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required [to do a variety of things]. \*\*\* '[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally.'" *New Jersey v. T.L.O.* Thus, in balancing the competing interests of a school's need to maintain a proper educational environment and the schoolchild's legitimate expectations of privacy, teachers and school officials do not need a warrant before searching a student and are not subject to the strict probable cause standard. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

The recent infusion of police and safety officers into schools presents new issues. Where school officials initiate a search or police involvement is minimal, most courts have held that such searches must merely satisfy the "reasonable suspicion" test. *Martens v. District No. 220*. The same is true in cases involving school police or liaison officers acting on their own authority. However, where outside police officers initiate a search, or where school officials act as "agent" of law enforcement agencies, the search must meet the higher "probable cause" standard applicable to searches in criminal investigations. To illustrate the distinction, in *People v. Dilworth*, a liaison police officer on the staff of an alternative school conducted a search on his own initiative and authority in furtherance of the school's attempt to maintain a proper educational environment. Under those circumstances, the court held that the lesser "reasonable suspicion" standard applied.

Another arrow in school officials' quivers is their *in loco parentis* ("in place of the parent") status. While some recent cases may have diminished protections to school officials acting *in loco parentis*, the doctrine still provides some protection against liability. Acting *in loco parentis* extends "parental immunities" to school officials. This type of immunity extends only as far as actual parental immunity, and educators are therefore not statutorily immune from liability for conduct outside the scope of parental discretion in discipline, supervision, and care of a child. *Henrich v. Libertyville High School*. The preservation of order and a proper educational environment requires close supervision of schoolchildren, as

well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. However, "what so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct." Buss, *The Fourth Amendment and Searches of Students in Public Schools*.

The effect of *in loco parentis* was profound in one recent case, where a high school counselor was found not liable for failing to respond to information that a student had threatened suicide. Both the counselor and the school district were entitled to immunity under section 24-24 of the School Code in an action brought by the mother after the student committed suicide, where the counselor had contacted the boy's mother and advised her to take the student to the hospital, albeit for a drug overdose. According to the court, while the counselor's failure to disclose the suicide threat may have been negligent, the district could not be found liable where there was no showing of conscious disregard or indifference for student's safety. *Grant v. Board of Trustees of Valley View School Dist. No. 365-U*.

In addition to more favorable court rulings, school districts are getting renewed support through legislative initiatives. Both the federal and state legislatures have enacted laws to give school officials additional tools for addressing school violence issues, including the Gun Free Schools Act of 1994 (federal), and the Safe to Learn Program (state).

As school officials continue to use traditional and contemporary "pounds of cure" vehicles to respond to destructive student behavior, they must also investigate and establish effective "ounce of prevention" strategies to make their school buildings safer, and to better train staff members on intervention techniques. According to the United States Department of Education in its "Guide to Safe Schools," effective prevention, intervention, and crisis response strategies operate best in school communities that, among other factors, involve families in meaningful ways; develop links to the community; emphasize positive relationships among students and staff; treat students with equal respect; promote good citizenship and character; and support students in making the transition to adult life and the workplace.

In addition, school personnel should receive training on behavior intervention techniques for proper verbal and nonverbal reactions to calm situations before they get out of hand. Proper training gives staff the knowledge and confidence when confronted by an escalating student. For instance, staff are advised to focus on what the student is actually saying or doing, rather than becoming fearful and distraught.

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# Metal Detectors: Coming Soon to a Kindergarten Near You?

**M**etal detectors in schools may assuage the public outcry for improved safety. However, before rushing to install metal detectors, school districts need to weigh the costs, both to public finances and to personal freedoms, against the perceived safety benefit.

The Department of Education estimates that four percent of the country's twenty-five thousand public schools use metal detection. Illinois, as well as other states, is likely to be pressured to provide funding for metal detection technology, and school districts will no doubt line up to participate. But how much does metal detection technology really cost?

Hand held metal detectors, *i.e.*, "wands" start at around two-hundred dollars each. Floor style metal detectors similar to the ones used in airports and courthouses cost upwards of three thousand dollars. A four camera video surveillance system also costs around three thousand dollars. In addition to the hardware costs are the expenses of training personnel to administer the metal detection technology. The cost of such technology does not appear to be discouraging sales. One California-based security equipment company spokesman estimated his company took orders from forty-seven schools in twenty-three states within one month of the Columbine High School shootings.

Beyond the financial aspect, the use of metal detection technology may cause some school boards to wonder whether the danger justifies turning schools into public institutions more akin to a courthouse, than to the little red school house they

remember. When metal detectors are installed, students' fourth amendment rights against unreasonable search and seizure are tested. The question becomes, what is reasonable?

Schools' use of metal detectors has withstood a recent challenge in the Illinois courts. In *People v. Pruitt*, the school was conducting a random metal detector search which was administered by the Chicago Police Department and involved all students entering the building. (Metal detectors are now installed at all Chicago public high schools.) A student passed through a metal detector which led to the confiscation of a .38 caliber handgun. The student claimed the use of the metal detector was an unreasonable search.

The court reasoned that an individualized reasonable suspicion of wrongdoing is not necessary before a metal detection search is made. The court held that school safety is a compelling state interest which outweighs the burden of the relatively minor privacy invasion involved in metal detector searches. The purpose of the random search of all the entering students was to protect and maintain a proper educational environment for all students, not to investigate or secure evidence of a crime.

No statistics are yet available which track any documented decrease of violence in schools with metal detectors in place. As time passes, and public sentiment calms in the wake of the Columbine High School incident, school districts will have the opportunity to assess whether metal detection technology is an effective component of a well thought out safe school plan.

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It is all too obvious that preventive measures can not always ensure appropriate student conduct. Similarly, the existence of a strong disciplinary code will not always have the desired deterrent effect, and districts must work with their legal counsel and be prepared to mete out disciplinary responses to student misconduct in a lawful manner. Most significantly, prior to suspending or expelling a student from school, sufficient due process (including an opportunity to tell his/her side of the story) must be afforded the student. *Goss v. Lopez*. At a minimum, timely notice of the charges and a meaningful opportunity to respond to them must be provided *Cleveland Board of Education v. Loudermill*. Due process is a flexible concept determined by the nature of the interest affected and the context in which the alleged deprivation occurs. Thus, fundamental concepts of a fair hearing include "the opportunity

to be heard, the right to cross-examine adverse witnesses and to impartiality in rulings upon evidence." *Colquitt v. Rich Township*.

The proliferation of high-profile violent acts on school property requires a re-assessment of how schools should address student aggression and school safety. School districts must maintain the delicate balance of creating a safe and secure learning environment without running afoul of students' constitutional rights. School districts are, indeed, a microcosm of our larger society, and the problems facing schools are symptomatic of larger issues facing our communities as a whole. As such, school board members, administrators, teachers, social workers, and others, including legislators and policy-makers must work together to ensure schools retain the ability to balance individual rights and community values.

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# Special Education Update

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## IDEA Final Regulations Issued

*On March 12, 1999, the U.S. Department of Education issued the final implementation regulations for the Individual with Disabilities Education Amendments of 1997. According to the Department, issuing the regulations is a “part of the effort to strengthen educational opportunities for America’s six million students with disabilities.”*

“The new IDEA focuses on teaching and learning and establishes high expectations for disabled children to achieve real educational results,” said U.S. Secretary of Education Richard W. Riley. “The thrust of IDEA has changed from one that merely provides disabled children access to an education to one that improves quality for all children in our schools,” he continued.

In October 1997, the Department of Education published proposed regulations implementing the substantial revisions to the IDEA enacted into law earlier that year. Nearly 6,000 public comments were submitted to the department from educators, parents, community groups and advocates. A summary of the changes include:

- ◆ requiring that each IEP team include at least one of the child’s regular education teachers if the child is or may be participating in the regular education environment;
- ◆ formalizing that a student’s right to a “free appropriate public education” is terminated upon graduation with a regular high school diploma, but not ended by any other kind of graduation certificate or diploma;
- ◆ authorizing schools to remove a special education student for up to 10 school days for minor disciplinary infractions and for up to 45 days for dangerous behavior involving weapons or drugs and giving schools the ability to ask a hearing officer to remove students who are serious threats to themselves or others;
- ◆ mandating the provision of services to the extent necessary to enable the child to appropriately progress and advance the IEP during suspensions of up to 10 school days.

Generally, the regulations strengthen the role of parents in educational planning and decision making on behalf of their children. It focuses the student’s educational planning process on promoting meaningful access to the general curriculum. The Department of Education estimates that school districts will “realize savings in excess of \$100 million from changes made by the IDEA ’97 that eliminate unnecessary evaluations, every three years, to determine whether a child still has a disability. However, these and other savings would be offset by increased costs associated with such changes as the requirement for the regular education teacher to participate in IEP meetings.”

## School District Responsible for Medically Related Services

The United States Supreme Court recently reaffirmed its position that school districts must administer medically-related services to students under Individuals with Disabilities Education Act. In the case, *Cedar Rapids Community School District v. Garret F.*, the Court held that the term “related services” under the law includes those supportive services that “may be required to assist a child with a disability to benefit from special education,” including such medical services as urinary bladder catheterization, suctioning a tracheostomy as needed, providing food and drink on a regular schedule, repositioning, ambu bag administration if a ventilator malfunctions, ventilator setting checks, and blood pressure monitoring. The Court clarified its decision in *Irving Independent School District v. Tatro*, where it had held that “medical services” that can only be performed by a physician are not school health services.

In the Cedar Rapids case, the school district pointed to the combined and continuous character of the required care, and

proposed a test under which the outcome in any particular case would depend upon. The court rejected the school district’s proposed new standard, and importantly, held that the definition in the statute does not refer to economic factors in its definition of “related services” or excluded “medical services.” Therefore, the court reasoned that if it accepted the district’s cost-based standard as the sole test for determining the scope of the provision, it would be engaging in “judicial lawmaking without any guidance from Congress.”

On a more general note, the court stated that Congress intended “to open the door of public education” to all qualified children and that the IDEA “require[s] participating States to educate handicapped children with nonhandicapped children whenever possible.” The court concluded that because the student must receive the specific “services” in order to remain in school, the district must fund such “related services” to help guarantee that students are integrated into the public schools.

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## TIF Reform Is the Law

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**T**IF reform legislation, long the subject of negotiations among municipalities, school districts and other taxing bodies, the tax increment financing association and legislators, took effect as P.A. 91-478 on November 1, 1999. Those municipalities that decided to establish new tax increment financing districts (“TIF districts”) in their communities or to amend existing districts or existing redevelopment plans and projects under the old TIF Act have already taken the necessary steps in the notice and hearing process. *Henceforth*, new proposals and amendments are subject to the amended Act.

Among the amendments:

### *Eligibility Criteria*

The standards for establishing “blighted” and “conservation” areas are the same, but now are defined rather than simply being listed. This specificity will permit greater uniformity in the application of the criteria and make it easier to identify the factors. Some definitions are more restrictive.

### *Joint Review Board (“JRB”)*

(a) Township and fire protection districts have been added to the JRB for all new TIF districts; (b) the evaluation of amendments to redevelopment project areas and plans is now part of the JRB’s task, as is the question for newly proposed districts of whether the redevelopment area plan satisfies the objectives of the Act; and (c) although the report remains a non-binding recommendation, the municipality must defer action on creating a TIF district and meet with the JRB within 30 days of its report to “resolve differences” if the JRB rejects the redevelopment plan and the eligibility report. If those efforts fail, the municipality may still proceed to adopt the plan and designate the area but needs a *three-fifths* vote of the corporate authorities to do so.

### *Prohibited TIFs*

Golf courses and recreation areas used for fishing and camping cannot be designated as TIF Districts.

### *Redevelopment Project Costs*

(a) The redevelopment plan must contain an *itemized list* of

estimated costs; (b) by means of certain percentage formulas related to the total tax increment generated by new assisted housing units, overlapping school districts are entitled to receive payments for increased costs resulting from those new units; (c) professional service contracts (except for architects and engineers) cannot exceed three years; (c) municipalities may not be paid for annual administrative costs due to “general overhead” but can be paid for such costs *directly resulting* from the TIF District; (e) at the municipality’s discretion, the costs of “welfare to work” programs of businesses in a TIF district may be added to eligible job training costs; (f) municipalities can use TIF funds for a public building if it replaces one demolished to accommodate private investment; (g) the new rules which govern TIF financing of public works structures are very strict; and (h) no financing is permitted for retail entities relocating from an area within 10 miles, but outside of, the TIF district.

### *Registry*

Municipalities must maintain a registry for “interested parties” entitled to receive various required notices.

### *Annual Reports*

The Act has added substantial new requirements to the already detailed annual reports to be filed and sent to the taxing districts and other designated persons. The reports, now filed with the State Comptroller, must describe JRB activities, and public and private investments in the TIF projects.

### *Feasibility Study*

Specific information must be included in the ordinance or resolution authorizing a feasibility study of any proposed redevelopment project area. Moreover, if the proposed plan anticipates displacement of residents from 10 or more inhabited residential units, a *housing impact study* must be included in the feasibility report.

This summary highlights some of the more significant changes implemented through P.A. 91-478 and is not meant to list every new or revised provision. Due to the length and complexity of the amendments, we recommend that you consult with your attorney or TIF advisor for further information as to the new Act’s impact upon your district.

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# Get the “Bugs” Out of Your Pesticide Policies

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*This summer, two laws outlining pesticide regulation in the schools were signed by the Governor Ryan. The first new law, P.A. 91-99, amends the Lawn Care Products Application and Notice Act and took effect July 9, 1999. The second new law, P.A. 91-525, amends the Structural Pest Control Act and takes effect August 1, 2000. Both laws set notification procedures for broadcast application of pesticides on school grounds, school buildings and other school facilities.*

## **Public Act 91-99—School Grounds**

First, P.A. 91-99 sets notification procedures for broadcast application of pesticides on schools grounds other than school structures. According to this law, school districts must maintain a registry of parents and guardians of students who wish to receive written notice before pesticides are applied on school grounds. Schools may inform parents and guardians of the registry’s presence and the procedure required for registry through newsletters, bulletins, calendars, or other correspondence currently published by the school districts (for example, letters sent home with the students or letters sent directly to the residence of parents and guardians).

Alternatively, school districts may choose to provide direct, written notification of pesticide application to all parents and guardians.

## **Public Act 91-525—School Buildings and Other School Facilities**

The second new law, P.A. 91-525, requires (no longer simply encourages) schools to adopt an Integrated pest management program if economically feasible. The integrated pest management program must incorporate guidelines developed by the Department of Natural Resources for structural pest control practice at school buildings and other school facilities. If, however, adopting an integrated pest management program

would not be economically feasible because it would result in a substantial increase in the school’s pest control cost, the school district must provide written notification to the Department of Natural Resources. The notification must include projected pest control costs for the term of the pest control program and projected costs for implementing the integrated pest management for that same time period. The Department of Natural Resources will make the notification available to the general public upon request.

According to the new law, school districts must designate an employee to oversee the pest control management program and to complete record keeping requirements.

Like P.A. 91-99, the law mandates school districts to maintain a registry of parents and guardians who wish to receive written notification prior to pesticide application on school property. The same procedure outlined above for registry and notification may be utilized.

Again, prior written notice is not required if there is imminent threat to health or property. If a threat arises, the appropriate school personnel must sign a statement describing the circumstances that gave rise to the health threat and ensure that written notice is provided as soon as practicable. Pesticides that are not subject to notification requirements under P.A. Act 91-525 include: (1) an antimicrobial agent, such as disinfectant, sanitizer, or deodorizer; or (2) insecticide baits and rodenticide baits.

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## An Update On The E-Rate

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**O**n February 7, 1996, President Clinton enacted the Telecommunications Act of 1996. The Act significantly reformed and deregulated television, telephone and cable industries by lifting regulatory barriers preventing these industries from offering services or competing in other segments of the telecommunications marketplace. One exception to the “free market” concept is in the area of education. Section 254(h)(1)(B) provides,

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services . . . provide such services to elementary schools, secondary school, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount ... to ensure affordable access to and use of such services by such entities.

The National Center for Education Statistics recently reported that wealthy schools are two times more likely to have Internet access in classrooms than poor schools. Currently, only around 30% of classrooms are linked to the Internet while 74% of Americans agree that computers improve the quality of education.

On May 7, 1997, the Federal Communications Commission responded by adopting regulations to provide all K-12 schools and public libraries up to \$2.25 billion a year in discounts for telecommunication services ranging from 20%-to-90% on a sliding-scale formula, commonly referred to as the E-Rate. The average discount is about 60%, with the poorest schools receiving discounts of 80%-to-90%. The discount applies to Internet access and internal connections necessary for connecting classrooms and libraries; the E-Rate does not cover computers, software, or other unrelated services. By April 15, 1998, more than 30,000 applications were submitted, requesting total discounts worth \$2.02 billion. Illinois accounted for approxi-

mately 6% of the total requests. In the first year of the program, \$1.66 billion in discounts was distributed to 25,785 school and library applicants.

Under the Telecommunications Act, the Schools and Libraries Corporation (SLC) is charged with reviewing and granting requests for discounted rates. Schools and libraries must certify they have a technology assessment plan demonstrating how discounts will enhance education. The plan must be approved by the Illinois State Board of Education.

The Federal Communications Commission (FCC) reduced year one funding levels by 40 percent and the length of the program’s first year was extended to 18 months. As a result of those cuts, many schools did not receive needed discounts on internal connections to the classroom. In late spring 1999, the FCC voted on funding levels for the E-Rate program for year two (1999-2000) applications. Further information can be found at the FCC website at [www.sl.universalservice.org](http://www.sl.universalservice.org).

Noting the receipt of 32,000 applications seeking over \$2.4 billion in e-rate discounts for this year, on March 12, 1999, William E. Kennard, chairman of the Federal Communications Commission (FCC), announced his recommendation to the Commission to fund the second year of the e-rate to the established \$2.25 billion cap. “With the increase in demand, funding to the cap will enable us to continue the work of this past year,” Chairman Kennard said. “Just as in Year One, all schools and libraries that apply this year will receive funding for Internet access and telecommunications services. And just as in Year One, we are keeping the focus on funding for internal connections on the poorest and most rural schools. By following this course, we will be able to wire over 528,000 classrooms to the Internet. If we meet this high demand, we will be able to help schools that teach 40 million American children.”

The E-Rate is crucial to ensure that every schoolchild and community has access to needed technology tools for learning.

# FIRMNews

**W**e are pleased to announce that **Todd A. Osbron, Lucy B. Bednarek, Adam Simon and Dan Wellner** have become associated with the firm.

In June, **Sharon Eiseman** was installed as President of the Women's Bar Association of Illinois.

**Tom DiCianni and Rob Bush** spoke on Violence in Our Schools at the 1999 Summit-Apex Lawyers Advisory Conference on July 29, 1999 in Charlottesville, Virginia. Rob gave a presentation June 15 on the State Gift Ban Act to the South Suburban Park & Recreation Professional Association in Frankfort, Ill. and an update on tort law at the Illinois Association of School Board Officials conference in Peoria on April 22, 1999.

**Tim Guare** spoke on Fair Labor Standards Act issues at the IIT Chicago Kent Public Employment Law Seminar on November 5. Tim will also be speaking before the Illinois Community Colleges Association Annual Conference in Decatur, on November 18. Tim also was a presenter at the Illinois Public Employer Labor Relations Association Annual Conference in Galena on October 25, where he discussed the Abuse of Sick Leave and Other Entitlement Benefits.

On November 20, **Bill Kling** will speak on "Educating Children in Predominantly Minority Communities" with of the Prairie Hills School District Board

President and Superintendent at the IASB-IASA-IASBO Joint Conference in Chicago. He has also conducted administrative in-service programs for several of the firm's clients, and presented at the 4th Municipal District Clerk's seminar on a school's response to family violence in October. Bill spoke November 5 on "Workplace Violence and Public Education" at the 15th Annual Public Sector Labor Relations Program in Chicago. On November 1, Bill provided a legal update at the Illinois Council of Community College Administrators Annual Conference in Decatur.

On September 8, **Keri-Lyn Krafthefer** participated in a Chicago Bar Association seminar on how to get on an election ballot. On July 10, Keri-Lyn spoke at the seminar for the Township Clerks of Illinois in Galesburg and recently completed three chapters for the organization's handbook. She also provided a legal analysis of Mayor Daley's litigation against the handgun industry for the BBC radio program "Crossing Continents."

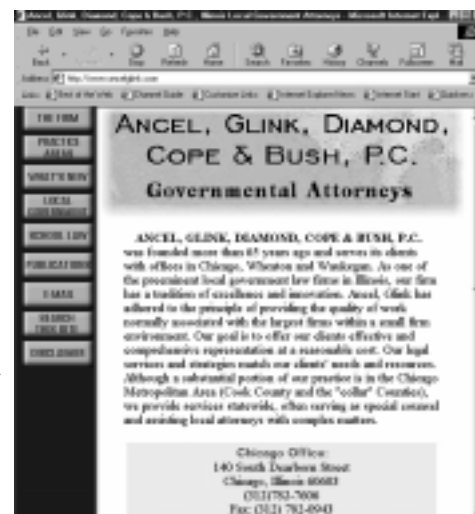
**Ronald Cope** recently completed an article entitled "Special Purpose Infrastructure Financing" to be published in the Illinois Municipal Review.

**Darcy Proctor** has been appointed to serve on the WBAI's Board of Directors for 1999-2000. Darcy was also appointed a member of the ISBA's Tort Law Section Council and is a co-chair of the WBAI's Public Office

Committee. On September 14, 1999, Darcy moderated a forum co-sponsored by the WBAI and the Chicago Council of Lawyers addressing the issue of merit selection versus election of judges.

**Sharon Eiseman** recently completed a portion of the update for the "County Government Law—A Reference Guide," published by the Taxpayers Federation of Illinois. The revision project was undertaken by the ISBA Local Government Law Section Council. Sharon has been appointed by the ISBA to several committees, including the Legislative Committee; the Committee on Bar Leadership; and the Women and the Law Committee.

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