

Governing and Elections During COVID-19: Public Meetings, FOIA Compliance, and an Early Look at Potential Impacts on the 2021 Election

Webinar
May 6, 2020

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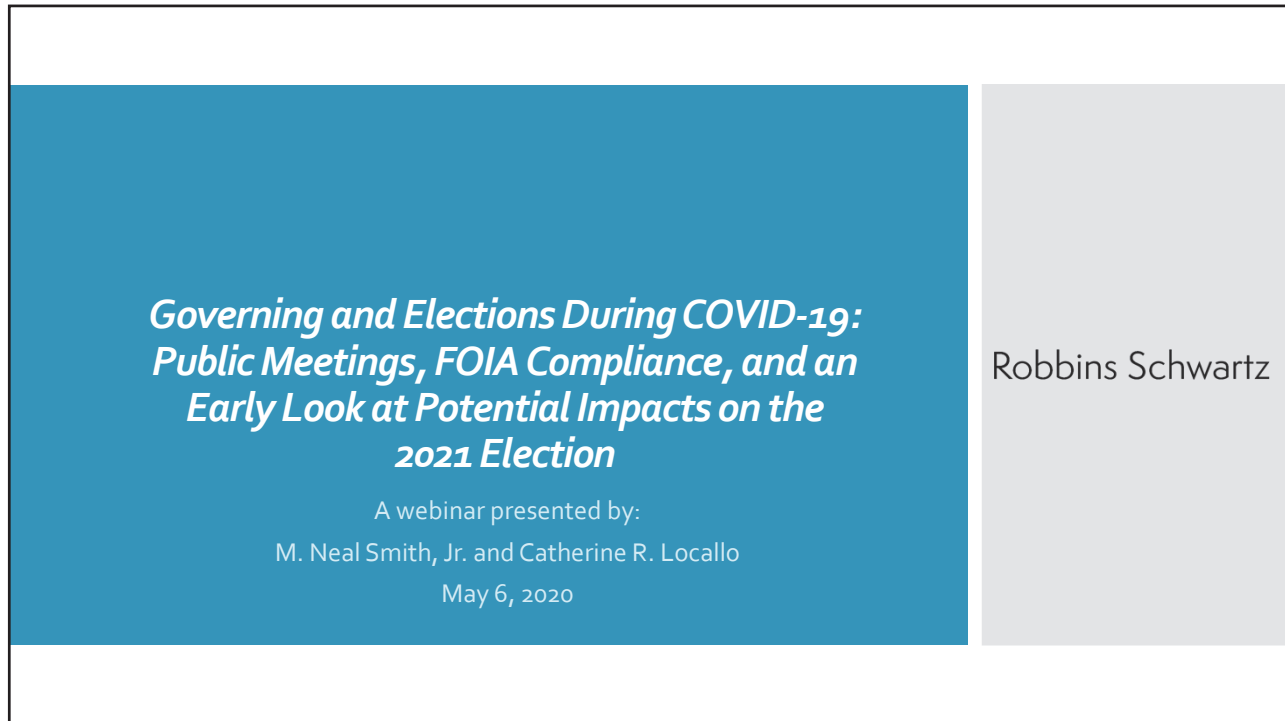
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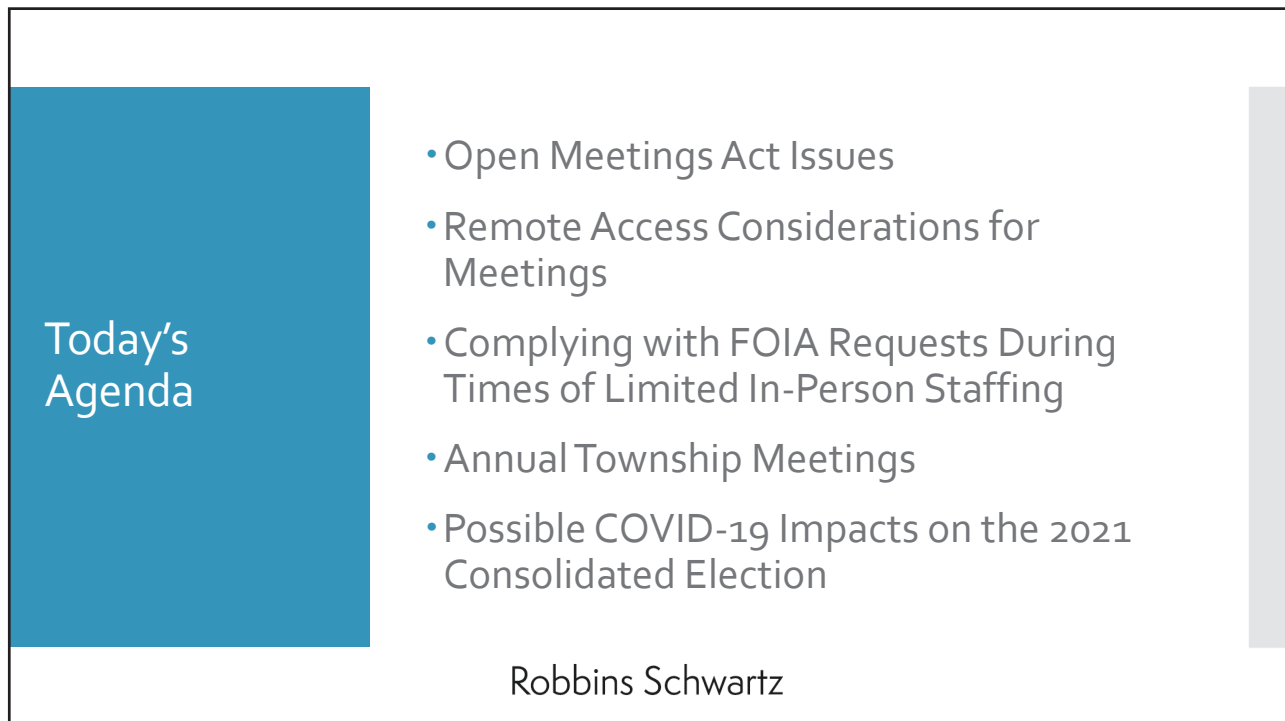


***Governing and Elections During COVID-19:
Public Meetings, FOIA Compliance, and an
Early Look at Potential Impacts on the
2021 Election***

A webinar presented by:
M. Neal Smith, Jr. and Catherine R. Locallo
May 6, 2020

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**Today's
Agenda**

- Open Meetings Act Issues
- Remote Access Considerations for Meetings
- Complying with FOIA Requests During Times of Limited In-Person Staffing
- Annual Township Meetings
- Possible COVID-19 Impacts on the 2021 Consolidated Election

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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

Relevant Disaster Proclamations and Executive Orders

- March 9, 2020: 1st Disaster Proclamation
- March 16, 2020: Suspension of Physical Presence Requirements Under the OMA
- March 20, 2020: 1st Stay at Home Order
- April 2, 2020: 2nd Disaster Proclamation and Extension of Stay at Home Order
- May 1, 2020: 3rd Disaster Proclamation, Extension of Stay at Home Order (modified, and reissuance of Orders 2020-03 through 2020-31 until May 29

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COVID-19 OMA Compliance Issues



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COVID-19 OMA Compliance Issues

- Postpone or cancel public meetings, if possible
- Suspension of OMA Physical Presence Requirements from March 16 through May 29
 - a public body may convene a properly noticed meeting with any number of members physically present, or no members physically present, as long as the total participating members constitutes a quorum; and
 - No specific reason or vote to allow for remote participation is required.

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COVID-19 OMA Compliance Issues

- 2 PAC Non-Binding Decisions
 - March 27, 2020: The PAC recognized the right of the governing board of a public body to hold remote meetings without a quorum of board members physically present. 2020 PAC 62246.
 - April 6, 2020: The PAC held that a governing board that only allowed public comment by email two hours before a public meeting began was appropriate under the OMA. 2020 PAC 62329

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COVID-19 OMA Compliance Issues

- *Evans, et al. v. City of Joliet*, 20 CH 526 (4/13/20)
 - TRO denied
 - Courts will generally defer to the governing board of a public body as to whether a meeting is "necessary"
 - The public was provided with a reasonable opportunity to participate in the meeting:
 - Notice of the meeting was provided 5 days in advance of the meeting
 - Meeting shown live on public access television, the City's website and social media
 - Meeting was recorded and would be posted to City's website
 - Public comment permitted via telephone and email

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COVID-19 OMA Compliance Issues

- Suspension of Physical Presence Requirements Did **NOT** Change Any of the Following OMA Requirements:
 - timely post agendas for any meeting held under the OMA;
 - include on the posted agenda the general subject matter of any final action to be taken;
 - have a quorum present (in-person or remote) in order to convene a meeting;
 - record members present/absent and by what means they attended;
 - allow an opportunity for public comment;
 - keep, approve, maintain and post minutes; and
 - comply with OMA requirements to convene in closed session and maintain a verbatim recording of closed session.

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COVID-19 OMA Compliance Issues

- Governor Pritzker:
 - encourages public bodies to provide video, audio and/or telephonic access to meetings to ensure that the public may monitor the meeting.
 - also urges that a public body should state clearly on the meeting agenda by what means the meeting will be held and how public comment will be handled.
- No express requirement that a public body first adopt an ordinance or pass a motion in order convene a meeting or allow public comment via remote means.

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COVID-19 OMA Compliance Issues

- Sample #1 Agenda Language – Remote Meeting
 - The _____, _____ County, Illinois, will convene a regular meeting on _____, 2020 at _____ AM/PM in Room _____, _____, Illinois. As permitted by Governor Pritzker’s Executive Orders 2020-07 and 2020-33, some Board members may elect to attend the Board meeting via remote means.
 - In consideration of the COVID-19 pandemic, the Governor’s disaster proclamations and the executive orders, members of the public will not be permitted to attend the meeting in-person, but will be able to view a livestream of all open portions of the meeting at: _____.
 - The meeting will include an opportunity for public comment. Any member of the public that would like to make a public comment, can submit their public comment via email to _____ by _____ AM/PM on _____, 2020. Public comments submitted via email will be announced during the public comment portion of the meeting.

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COVID-19 OMA Compliance Issues

• Sample #2 Agenda Language – Remote Meeting

- As permitted by Governor Pritzker’s Executive Orders 2020-07 and 2020-33, the _____, _____ County, Illinois, will convene a remote, regular meeting on _____, 2020 at _____ AM/PM via teleconference. Board members, citizens and staff may participate in the teleconference by dialing _____, when prompted enter conference ID _____.
- The meeting will include an opportunity for public comment. Any member of the public that would like to make a public comment, can submit their public comment via email to _____ by _____ AM/PM on _____, 2020. Public comments submitted via email will be announced during the public comment portion of the meeting.

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COVID-19 Remote Access Considerations



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COVID-19 Remote Access Considerations

- Identify Platform for Remote Access
- Conduct a Test Run
- Train Governing Board on Use of Platform
- Ensure that IT Administrators are Available During the Meeting
- Determine How to Convene in Closed Session
 - Ensure that closed session is not open to the public
 - Alternative platform
 - Need a verbatim recording
- Notify Public in Advance if Action on an Item is Intended After Closed Session

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OMA Compliance and Bond Issuance



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OMA Compliance and Bond Issuance

- Special Considerations: Meetings Held for Bond Issuance
 - Bond counsel advising public bodies to comply fully with OMA when adopting bond ordinance notwithstanding the Governor's orders
 - Function of bond counsel is to issue opinion that governmental debt was not issued *ultra vires* (i.e., outside the scope of its powers) in order to ease uncertainty among investors and make bonds more marketable
 - If you must issue bonds at this time, you will need to follow advice of bond counsel in order to have the bond opinion issued

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OMA Compliance and Bond Issuance

- Bond counsel writes opinions that issuer processes were lawful for millions of dollars of debt
- Bond counsel advises it is too risky to issue bond opinion without strict OMA compliance

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OMA Compliance and Referendum Questions

- Special Considerations: Approving Referendum Questions
 - Check deadlines and consider postponing action to approve referendum question
 - August 17, 2020 – last day for local governing body to adopt resolution or ordinance to allow binding or advisory referendum question
 - Compliance with OMA removes procedural noncompliance as an argument against the referendum question

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OMA Compliance and Tax Levy Ordinance

- Special Considerations: Tax Levy and Truth in Taxation Hearing
 - Failure to comply with strict letter of OMA may open the door for legal challenges to invalidate levy of taxing district

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Forecasting the Future: Legislative and Court Action



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Forecasting the Future: Legislative and Court Action

• Legislative Action

- Legislative action to ratify the Governor's Executive Orders
- Ratification would cure any claims that portions of the Executive Orders were outside of the Governor's powers
- The Illinois Municipal League (IML) reports that it is advocating for the General Assembly to make permanent the changes to the OMA. The proposed changes would formalize remote meeting allowances as provided in the Governor's Executive Orders

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Forecasting the Future: Legislative and Court Action

- The IML reports that it is advocating for the General Assembly to make permanent changes to FOIA to provide additional time for local governments to respond to FOIA requests
- Possible legislation could take the form of specific exemptions relaxing timeframes during time of emergency declarations

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Forecasting the Future: Legislative and Court Action

- Court Action
 - FOIA actions and OMA challenges have happened (see above) and there are likely more to come
 - Based on the rulings to date, courts are not likely to be receptive to claims of OMA violations for remote meetings held in good faith reliance on the Governor's orders (provided other requirements of OMA were complied with)

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Strategies for FOIA Unfairness



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Strategies for FOIA Unfairness

- IML and other organizations made a request in early April to Attorney General Kwame Raoul to issue a formal statement suspending deadlines for Freedom of Information Act (FOIA) responses from public bodies as a result of the stay at home order
- He has declined to do so

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Strategies for FOIA Unfairness

- Instead, response of AG has been that public bodies should continue to comply with FOIA and respond to each request promptly, to the extent they are able to under the circumstances.
- AG reminds that: "both requesters and public bodies should keep in mind that FOIA allows the public body and the requester to come to a mutually agreeable response period to comply with a FOIA request...."
- Members of the public and media are asked to keep these considerations in mind and are strongly encouraged to work with public bodies to agree on reasonable and appropriate response times in light of the public health concerns that we all face."

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Strategies for FOIA Unfairness

- Fact: Not even a pandemic will get you FOIA reprieve
 - Generally, 5 business days for response
 - Timely extend time for response by an additional 5 business days
 - Seek agreement with requester for a further extension of time to respond
 - Timely assert unduly burdensome designation (if applicable) and provide opportunity to narrow
 - Deny, if a request remains unduly burdensome
 - Timely claim voluminous request designation if applicable
 - 21 business days for response to commercial purpose FOIA requests

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Annual Township Meetings



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Annual Township Meetings

- Annual Town Meeting Requirement Suspended by Executive Order 2020-22
- The provisions of the Township Code, 60 ILCS 1/30-5(a) and 30-5(b), requiring that each township's annual meeting for calendar year 2020 be held on either April 14, 2020 or April 21, 2020 are **SUSPENDED** through the duration of the Gubernatorial Disaster Proclamation.
- Annual township meeting is not cancelled but only suspended

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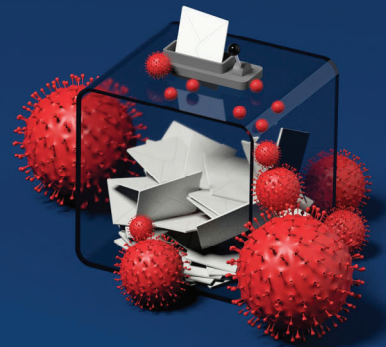
Annual Township Meetings

- When safe to have meeting, notice should be given in the same manner as the regular annual township meeting
- March 1, 2020 deadline for agenda items (from the electors) should not be extended absent legislative intervention
- Township board may add agenda items consistent with the Township Code (i.e. by adopting agenda not less than 15 days before the annual meeting)
- Watch out for possible legislation concerning the Annual Township Meeting

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Potential Impact on the 2021 Consolidated Election



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Potential Impact on the 2021 Consolidated Election

- Looming dates amid COVID-19 uncertainty:
 - August 25, 2020—first day to circulate nominating paper for established political party and nonpartisan candidates
 - September 22, 2020—first day to circulate nominating paper for new political party candidates
 - November 16-23, 2020—filing period for offices for the February 23, 2021 Consolidated Primary
 - December 8, 2020—date of Township Caucus (in those townships that have not adopted the primary system)
 - December 14-21, 2020—filing period for officers for the April 6, 2021 Consolidated Election

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Potential Impact on the 2021 Consolidated Election

- Potentially problematic Election Code provisions and issues
 - Signatures supporting candidates petition must be collected “in the presence of the petition circulator”
 - Circulator must personally witness all signatures on a she he/she signs as circulator
 - Since petition signatures can and are often invalidated, prudent candidates often collect 25 to 50 percent more signatures than required
 - Circulator signs certification page in presence of notary

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Potential Impact on the 2021 Consolidated Election

- Petitioning to qualify candidates and parties for the ballot is not defined as an “essential” activity under Executive Orders
- “Stay at home” orders make it unlawful and nearly impossible to gather signatures
- People not congregating and people not opening their doors for strangers
- Gathering signatures in person is unsafe and unhealthy for circulators and potential signers

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Potential Impact on the 2021 Consolidated Election

- Recent case concerning November General Election
 - *Libertarian Party of IL v. J.B. Pritzker*, 2020 cv 2112
 - Action filed April 2 for injunction or modification of signature collection procedures and requirements for independent and third-party candidates given current public health emergency
 - Timeframe for gathering signatures was March 24, 2020 through June 22, 2020
 - Plaintiffs argue allege that, under current circumstances, ballot access requirements impose an unconstitutional burden on their constitutional rights (First Amendment and Equal Protection)

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Potential Impact on the 2021 Consolidated Election

- Before filing suit, plaintiffs sought relief from IL State Board of Elections and Governor to have signature requirements waived or modified
- Governor Pritzker did not respond
- IL State Board of Elections said it did not have authority/jurisdiction to grant the relief requested

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Potential Impact on the 2021 Consolidated Election

- April 23 Opinion and Order of Judge Pallmeyer
 - In determining whether a ballot access restriction survives constitutional scrutiny, courts first “consider the character and magnitude of the asserted injury and then a court “must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” A court must consider the extent to which those interests make it necessary to burden the plaintiff's rights

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Potential Impact on the 2021 Consolidated Election

- April 23 Opinion and Order of Judge Pallmeyer

- Federal courts usually refrain from “micromanagement of state regulation of elections.” Still, a district court has broad equitable authority to fashion appropriate relief when an election procedure violates the Constitution.
- “The district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply To the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield.”

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Potential Impact on the 2021 Consolidated Election

- April 23 Opinion and Order of Judge Pallmeyer

- “The combined effect of the restrictions on public gatherings imposed by Illinois’ stay-at-home order and the usual in-person signature requirements in the Illinois Election Code is a nearly insurmountable hurdle for new party and independent candidates attempting to have their names placed on the general election ballot”

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Potential Impact on the 2021 Consolidated Election

- April 23 Opinion and Order of Judge Pallmeyer
 - Court fashioned relief that reduced the signature requirement to 10 percent of normal threshold for independents and new party candidates
 - Court ordered that physical or electronic copies of signatures allowed (instead of original signature requirement)
 - Court extended deadline from June 22 to August 7

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Takeaways on 2021 Consolidated Election Impacts



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Takeaways on 2021 Consolidated Election Impacts

- If current stay-at-home restrictions remain in place in current or modified form:
 - Legislative solutions would be preferred outcome including guidance concerning Township Caucus and ability to have a virtual Caucus
 - In the absence of legislative fixes, lawsuits similar to Libertarian Party v. Pritzker can be expected for races at the local level

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Takeaways on 2021 Consolidated Election Impacts

- Cases challenging signature requirements
- Could be different outcomes for each contest and judges in different parts of state could have differing views

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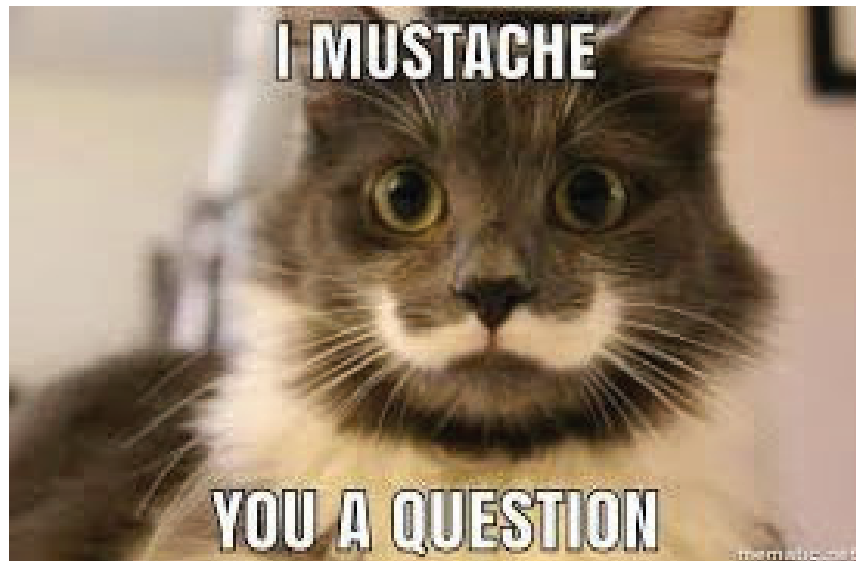
Takeaways on 2021 Consolidated Election Impacts

- What not to expect:
 - Executive Orders concerning elections unlikely because of the political nature of the relief involved
 - Gov. Pritzker has already declined to be involved in connection with the November 2020 General Election
 - Executive Order would also not stop challenges to nominating papers and the resulting convening of local electoral boards
 - Action from IL State Board of Elections, as it has already indicated it does not have jurisdiction

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Questions?



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Catherine Locallo's practice focuses on labor and employment law and board governance matters. She counsels employers in all aspects of employment law including hiring, employment contracts, employee discipline issues, terminations and reductions in force, collective bargaining and labor relations, nonimmigrant worker visas and employment discrimination matters. She also counsels public bodies on compliance with Illinois' Freedom of Information Act and Open Meetings Act. Catherine has extensive experience representing clients in court and administrative agency proceedings involving discrimination, retaliation and harassment claims.

Catherine is approved by the Illinois State Board of Education to provide school board member training.

AWARDS

Illinois "Rising Star," Employment & Labor Law (2015-2018)

RECENT PUBLICATIONS

"First Amendment Protections Get Broader for Government Employees," *Chicago Daily Law Bulletin* (2016)

"Regulatory Changes to the Illinois Wage Payment and Collection Act," *Justinian Society Newsletter* (2015)

"New FOIA Amendments to Ease Burden on Public Bodies," *Justinian Society Newsletter* (2015)

"Illinois Supreme Court Determines Arbitration Award Ordering Reinstatement of a Paraprofessional was Binding Because the Award 'Drew Its Essence' from the CBA," *Justinian Society Newsletter* (2014)

"When the Music Stops, Why Not Require Certain Title VII Plaintiffs to Find a Chair on Which to Rest Their Complaint," *The John Marshall Law Review*, (2009)

RECENT PRESENTATIONS

Is PERA Dead?? Implementation of a Local Appeals Process for Unsatisfactory Ratings, IASPA Annual Conference (January 2020)

A Workshop on Compliance with the Open Meetings Act and Illinois Freedom of Information Act, LUDA Annual Conference (October 2019)



PRACTICE AREAS

Education Law
Labor & Employment
Litigation

EDUCATION

J.D., *cum laude*, The John Marshall Law School,
Order of John Marshall

B.S., Southern Illinois
University

ADMITTED TO PRACTICE

U.S. Court of Appeals for
the Seventh Circuit

U.S. District Court for the
Central District of Illinois

U.S. District Court for the
Northern District of Illinois

Supreme Court of Illinois

Community College Trustees Training Session, ICCTA (June 2019)

Community College Trustees Training Session, ICCTA (June 2017)

ORGANIZATIONS

Chicago Bar Association

Illinois Council of School Attorneys

Illinois State Bar Association

Justinian Society of Lawyers; Scholarship Committee, Co-Chair

National Council of School Attorneys

UNICO National

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Neal represents municipalities, school districts, community colleges and other local governmental clients as well as companies and individuals in a wide range of complex legal matters. In addition to representing clients in tort and commercial litigation, Neal represents clients in several unique areas of the law including land use and zoning litigation, construction litigation and election law and campaign finance matters. Neal has represented clients in state and Federal Court and before administrative agencies such as the Illinois State Board of Elections, the Illinois Commerce Commission and the Illinois Labor Relations Board.

Neal advises clients in contract drafting and review. For local governmental clients, he prepares and reviews ordinances, resolutions and intergovernmental agreements, attends board and committee meetings and advises elected and appointed officials and employees on all types of legal issues that concern local governmental clients.

AWARDS

Illinois Leading Lawyer, Election, Political & Campaign Law; Governmental, Municipal, Lobbying & Administrative Law; Land Use, Zoning & Condemnation Law; and School Law

RECENT PUBLICATIONS

Co-author, "High Court Gives Detailed Account on Torts, Discretionary Immunity," *Chicago Daily Law Bulletin* (2020)

Author, "Campaign Finance and Disclosure Requirements in Illinois" *DCBA Brief* (2020).

Co-author, "Alarm Contractors' Argument Gets Green Light to Challenge Ordinance," *Chicago Daily Law Bulletin* (2019)

Author, "Police Officers' and Firefighters' Pension Boards" *Municipal Law: Financing, Tax and Municipal Property, IICLE* (2018)

Co-author, "1st District Refuses to Sanction 'Side Letter' Pension Spike," *Chicago Daily Law Bulletin* (2018)

"Settlement Crumbles; Appeals Court Declines to Put Pieces Back Together," *Chicago Daily Law Bulletin* (2015)

"On Public Display: Advertising in Schools," *UPDATE Magazine, Illinois ASBO* (2015)



PRACTICE AREAS

Commercial Law
Construction Law
Litigation
Municipal Law
Real Estate Development
Zoning, Planning & Land Use

EDUCATION

J.D., *cum laude*, Northern Illinois University College of Law

B.A., Hampden-Sydney College

ADMITTED TO PRACTICE

U.S. District Court for the Central District of Illinois

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

American Bar Association
Chicago Bar Association

DuPage County Bar Association

Illinois Bar Association

Will County Bar Association

“Could Your Township Benefit From the Work of a Committee?” Township Perspective, Township Officials of Illinois (2013)

“What to do when Unsafe Properties Pose a Threat to the Welfare of the Citizens in your Township,” Township Perspective, Township Officials of Illinois (2012)

RECENT PRESENTATIONS

Legal Issues Impacting Not-for-Profit Corporations in Illinois, Bolingbrook Area Chamber of Commerce Nonprofit Coalition (February 2020)

Statutory Requirements and Ethical Considerations for Public Officials, Illinois Government Finance Officers Association (September 2019)

Intervening in Pension Board Disability Hearings, 106th Annual Conference of the Illinois Municipal League (September 2019)

Community College Legal, Legislative and Ethics Updates, Illinois Community College Trustees Association (November 2018)

When an Involuntary Annexation becomes a “Sham” Transaction, Illinois Local Government Lawyers Association, Fall Seminar (October 2018)

Case Law Updates: Tort Immunity Act, DuPage County Bar Association Local Government Committee (February 2018)

Construction, Bidding and Purchasing in Township Government, Township Official of Illinois 110th Annual Education Conference (November 2017)