



**ILLINOIS STATE
BAR ASSOCIATION**

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Steven M. Waggoner
Acting Executive Director
Property Tax Appeal Board
Stratton Office Bldg, Room 402
401 South Spring St.
Springfield, IL 62706

Re: Public Comment
Practice and Procedure for Appeals before the Property Tax Appeal Board

Dear Executive Director Waggoner:

On behalf of its more than 28,000 members, the Illinois State Bar Association (“ISBA”) files these comments to the Property Tax Appeal Board’s (“PTAB”) proposed amendments to Title 86, Part 1910, seeking to prohibit lawyer-legislators, and potentially others, from appearing in a representative capacity before PTAB. These proposed amendments were published in the Illinois Register on March 2, 2018. The ISBA’s comments are as follows:

1. **The proposed amendments violate the separation of powers between the judicial and executive branches of Illinois government.** The Illinois Constitution Article II, sec. 1 provides simply: “The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.” There is no debate that regulation of lawyers and the practice of law is within the sole authority of the Illinois Supreme Court. *E.g. Downtown Disposal Services v. City of Chicago*, 2012 IL 112040. Further, statutes or rules that conflict with the Court’s authority are invalid. The importance of the separation of powers doctrine is to preserve judicial independence. Because the proposed amendments seek to prohibit a specific class of duly licensed and registered Illinois lawyers (those who happen to also be legislators) from practicing law before PTAB, the proposed amendments are invalid as a violation of the separation of powers doctrine. In addition, the proposed amendments’ apparent attempt to impute a prohibition of a lawyer-legislator practicing law before PTAB to a lawyer-legislator’s

lawfirm similarly violates the separation of powers doctrine. The determination of whether a lawyer's "conflict" is imputable to other lawyers is clearly a matter for the Court's lawyer regulation – not PTAB's. Finally, although the ISBA is primarily focused on an analysis relating to lawyers and the judiciary, it should be noted that the separation of powers issue is equally implicated between the legislative and executive branches, especially given the legislature's sole authority to regulate its members' conduct.

2. **The proposed amendments are unnecessary.** First, the Illinois Supreme Court already regulates the conduct of lawyers who are public officials, such as lawyer-legislators, when they appear before public bodies like PTAB. For example, Illinois Rule of Professional Conduct 1.11 addresses the applicability of conflicts of interest to public officials. Ill. S. Ct. Rules of Prof. Cond. 1.11(d). Comment [1] to that Rule specifically references the primacy of the Court's Rules: "A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7." Rule 8.4(k) prohibits a lawyer who holds public office from, among other things, using the office to influence a tribunal. Ill. S. Ct. Rules of Prof. Cond. 8.4(k). The Court has also issued opinions interpreting these types of situations. *E.g. In re Vrdolyak*, 137 Ill.2d 407 (1990). This comprehensive scheme of lawyer regulation by the Court demonstrates its long established, active, and preemptive role in this area.

Second, it appears that the conduct of legislators appearing before certain administrative agencies has been addressed, and is currently regulated, under the Illinois Governmental Ethics Act. 5 ILCS 420 et seq.

Third, there has been no demonstration that the proposed amendments are designed to accomplish any specific purpose, such as fostering greater public protection, access to PTAB, or the efficient administration of PTAB procedures. Neither has any public harm or administrative inefficiency been identified to support the amendments. The Notice's "Statement of Statewide Policy Objective" provides no explanation or guidance on this point. It merely provides: "These proposed amendments neither create nor expand any State mandate on units of local government, school districts or community college districts." Of course, the ISBA is fully aware of the politically charged context of these proposed amendments. In this regard, the ISBA's comment is that this political disagreement between the legislative and executive branches of government should not be borne on the backs of Illinois lawyers representing legitimate interests of clients in need of legal help.

3. **The proposed amendments unreasonably restricts the public's choice of counsel as well as limiting the benefits of retaining experienced counsel.** By attempting to prohibit certain lawyers and lawfirms from practicing law before PTAB, the public's access to lawyers and lawfirms that have expertise in the taxation area is diminished. This in turn may increase a client's cost in seeking PTAB relief, as well as potentially resulting in less rigorous client

advocacy. PTAB itself may be impacted by excluding lawyers with knowledge and experience of PTAB procedures. Having inexperienced counsel appear before PTAB may result in delayed or more cumbersome proceedings as well as the possibility of more appeals. Finally, PTAB itself recognizes the value and importance of lawyer representation. Its own rules provide that only lawyers can represent petitioners. 86 Ill. Adm. Code 1910.70. The proposed amendments' effect of excluding certain lawyers from practicing before it is inconsistent with PTAB's own policy, procedures, and longstanding history.

4. **The proposed amendments are impermissibly vague and ambiguous.** The proposed amendments seek to prohibit a lawyer-legislator from participating in a representation case. "Participation" is not defined in the proposed amendments, and as a result the level of participation that might trigger the amendments' prohibition is entirely speculative. The proposed amendments' definition of "representation case" (borrowed from the Illinois Governmental Ethics Act) is similarly vague. That definition places emphasis on a state agency's "action or non-action ... [involving] the exercise of substantial discretion." No agency discretion is involved in filing a PTAB complaint. Can a targeted lawyer-legislator do that? No agency discretion is involved when a lawyer-legislator advises a client about PTAB processes and procedures. Can a targeted lawyer-legislator do that? No agency discretion is involved in conducting discovery or marshalling facts for a PTAB case. Can a targeted lawyer-legislator do that? These, but even more, questions are raised when the "representation case" definition is sought to be applied to a lawyer-legislator's lawfirm. The bottom line is that the proposed amendments do not apprise anyone of what conduct is prohibited. This vagueness is a fatal flaw that makes the amendments invalid. *E.g. Granite City v. Illinois Pollution Control Board*, 155 Ill.2d 149 (1993)("A law or regulation is impermissibly vague and violates due process if it leaves the regulated community unsure of what conduct is prohibited or fails to provide adequate guidelines to the administrative body charged with its enforcement.")

5. **The proposed amendments exceed PTAB's statutory authority.** An administrative agency, like PTAB, is a creature of statute, and any authority it exercises must be found in the statute that created it. *E.g. Estate of Slightom v. Pollution Control Board*, 2015 IL App (4th) 140593, par. 24, citing *Granite City v. Illinois Pollution Control Board*, 155 Ill.2d 149 (1993). As statutory authority for these proposed amendments, PTAB's Notice of Proposed Amendments references various portions of the Property Tax Code. However, none of the cited statutory sections support, or even imply, any PTAB authority to restrict the ability of lawyers, lawyer-legislators, or lawyer-legislators' law firms, to practice law before it. (And, as noted in comment 1 above, any attempt to exercise such authority would be invalid as violating the Supreme Court's exclusive power to regulate the practice law.) In addition, the proposed amendments are clearly inconsistent with the legislature's limited grant of authority in the Illinois Governmental Ethics Act to restrict lawyer-legislators' participation in certain administrative proceedings. Under the authority of that Act, legislators are prohibited from appearing only before the Court of Claims and the Illinois Workers' Compensation Commission. 5 ILCS 420/2-

104. Of additional significance is that the Governmental Ethics Act specifically provides that business or professional associates of legislators are not subject to regulation, unlike PTAB's proposed amendments.

For all of the above reasons, the ISBA does not support PTAB's proposed amendments to Part 1910. The ISBA further urges PTAB not to adopt the proposed amendments.

Thank you for the opportunity to provide these comments.

Very Truly Yours,



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General Counsel

cc: steve.waggoner@illinois.gov
Vicki Thomas, JCAR