Representing the Revoked or Suspended Driver Before the Office of the Secretary of State

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REPRESENTING THE REVOKED OR SUSPENDED DRIVER BEFORE THE OFFICE OF THE SECRETARYOF STATE

I. The Administrative Hearing Process Generally

The Secretary of State's Office has undergone sweeping changes over the last 25 years as a result of increased enforcement of DUI laws and a consequent increase in the number as well as length of revocations/suspensions; changes in public attitudes regarding alcohol-related driving offenses; and stricter regulations and policies of the Office of the Secretary of State. As a result, favorable consideration of petitions for relief from orders of revocation/suspension is by no means certain.

Provisions of the Illinois Vehicle Code (625 ILCS 5/1-101, et seq.), particularly as they relate to the revocation/suspension of drivers' licenses and driving privileges as well as the interpretation thereof by the courts has become increasingly complex. At the same time, the rules and regulations as well as the hearing procedures in the Secretary of State's office have likewise become complex and often bewildering (92 Ill. Administrative Code, ch. II, sec. 1001 et. seq.) These factors, together with the restrictive consideration accorded to requests for relief have resulted in a relatively high rate of denial of such applications.

The attorney representing a petitioner cannot alter the general policies or attitudes of the Secretary of State as they relate to its approach to the DUI problem and its restrictive consideration of requests for relief from orders of revocation/suspension. These are matters to be addressed, if necessary, legislatively; on administrative review; or subsequent appeal. The attorney can, however, be prepared with a detailed knowledge and understanding of the applicable statutes, rules, regulations and policies of the Secretary of State's Office.

Through adequate and competent preparation, one can effectively and successfully represent his or her client. It is upon this principle and premise that this chapter seeks to assist the general practitioner in representation of the revoked or suspended driver.

1. (1.2) Statutory Grant of Authority

The Secretary of State's Office exercises quasi-legislative (rulemaking) powers as well as quasi-judicial (adjudicatory) powers in the administration and enforcement of the provisions of the Illinois Vehicle Code. 625 ILCS 5/2-104(a), (b) and 2-118(a).

The administrative rules of the Secretary of State's Office which implement the Secretary of State's rulemaking and adjudicatory powers under the Illinois Vehicle

Code, are at 92 Illinois Administrative Code, ch. II, secs. 1001.10 et. seq. These rules and regulations have the force and effect of law and carry with them a rebuttable presumption of regularity and validity. Northern Illinois Automobile Wreckers and Rebuilders Association v. Dixon, 75 Ill. 2d 53, 387 N.E. 2d 320 (1979); Anderson v. Edgar, 100 Ill. Dec. 935, 497 N.E. 2d 1297 (Ill. App. 4th Dist. 1986).

2. (1.3) Discretion Vested in Secretary of State

Broad decision-making latitude is accorded administrative agencies, including the Secretary of State's Office, and extends to the authority of an agency to construe statutory provisions and judicial decisions within its sphere of expertise. Scott v. Edgar, 152 Ill. App. 3d 221, 105 Ill. Dec. 878 (Ill. App. 4th Dist. 1987). For example, the decision to grant or deny a restricted driving permit is permissive and not mandatory and before a restricted driving permit is issued, the Secretary of State must weigh the public interest against the hardship suffered by the applicant. Considerable discretion is given the Secretary in this regard. Foege v. Edgar, 110 Ill. App. 3d 190, 441 N.E. 2d 1267 (1st Dist. 1982), Murdy v. Edgar, 73 Ill. Dec. 722, 454 N.E. 2d 819 (4th Dist. 1983); affm'd at 103 Ill. 2d 384, 469 N.E. 2d 1085. (1984).

3. (1.4) Standard of Administrative Review

Contributing further to the "wide-berth" accorded administrative agencies in the exercise of their discretionary functions is the rule that courts of review will not disturb the decision of an administrative agency unless the decision is contrary to the manifest weight of the evidence. The reviewing court will not reweigh the evidence introduced at a hearing or make an independent investigation or determination of facts. Menning v. Department of Registration and Education, 14 Ill. 2d 553, 153 N.E. 2d 52 (1958). Murdy v. Edgar, supra. The findings and conclusions of an administrative agency on questions of fact are considered to be prima facie true and correct. 625 ILCS 5/3-110.

B. (1.5) Initial Interview of Client

Initially, the attorney representing a client before the Office of the Secretary of State should determine if a hearing is necessary or whether some administrative solution short of a hearing may resolve a client's problem.

The attorney should closely question his/her client as to the basis for the revocation or suspension of a driver's license and privileges and in order to verify the information provided, should obtain a court purposes abstract of the client's driving record from the Secretary of State. In the event time considerations do not permit awaiting a written response, a telephone inquiry to the Driver's Services Division of the Secretary of State's Office in Springfield, providing the client's driver's license number, can produce a more immediate answer.

If the client has alcohol-related offenses the attorney should have the client provide a complete history of such offenses, including offenses that have occurred in foreign states. In order to verify the client's arrest history, again counsel should obtain a court purposes abstract of the client's driving record. Additionally, counsel should contact the Secretary of State's office and obtain a Problem Driver Pointer System ("PDPS) check of the client's record to determine if there are out of state offenses. PDPS is a national data basis designed to check any driver's foreign state 'history'.

1. (1.6) When a Hearing is Required

A hearing is always required where:

(a) the order that has been entered against the client is the result of a mandatory revocation of the client's license which is indicated on the client's driving abstract by a type action code "01", e.g., a revocation for DUI as provided under 625 ILCS 5/6-205.

(b) the client's license has been revoked by discretion, indicated by a type action code "02", e.g. revoked for multiple moving violations as provided under 625 ILCS 5/6-206(a)(3).

(c) the driver has a discretionary suspension as indicated by a type action code "03", e.g., as the result of the accumulation of at least three (3) moving violation convictions within a twelve (12) month period. 625 ILCS 5/6-206(a)(2).

2. (1.7) Exception to Requirement of Hearing

The only exception to the requirement of a hearing above (1.6) is in the case of a discretionary suspension where the suspension is based upon violations of a sufficiently low point total so as to qualify that person automatically, upon application, for a probationary license with full driving privileges. If a person so qualifies, it will be indicated by the prefix "p" appearing by the driver's license number on the Order of Suspension received by the client.

C. (1.8) Types of Hearing.

There are two (2) types of hearings for available to those seeking driving relief. The attorney representing the revoked or suspended driver must first determine whether a *formal* hearing is necessary or whether the client is eligible for an *informal* conference which may result in a more expeditious resolution of the client's problem, without diminishing or delaying the chances for a favorable determination.

1. (1.9) Formal and Informal Hearings

Currently, as measured from the time of application for hearing until the ultimate rendering and entry of a final order, a formal hearing may take an average of 3-4

months. On the other hand, an informal hearing may take an average of only 4-6 weeks. A formal hearing is always required where:

(1) The client has multiple DUI convictions or implied consent violations (not including zero-tolerance suspensions (625 ILCS 5/11-501.8)) arising out of different occurrences (including those which have occurred out of state and do not necessarily appear on the client's Illinois driving record). Note that DUI supervision dispositions and convictions or supervisions for reckless driving (reduced from DUI) do not constitute a disqualification for those seeking an informal hearing under this rule;

(2) The client's license and/or privileges are revoked, suspended or cancelled as the result of an offense involving a death;

(3) The client is seeking the modification or rescission of a discretionary order of suspension or revocation.

92 Ill. Administrative Code, ch. II, sec. 1001.300 (b).

2. (1.10) Other Considerations

The practitioner should keep in mind that before electing to proceed with an informal hearing, this type of hearing does not constitute a final administrative decision. Accordingly, if the informal decision is not favorable to the client, it will still be necessary to proceed with a formal hearing in order to obtain a final appealable decision. 92 Ill. Administrative Code, ch. II, sec. 1001.360 (a); 625 ILCS 5/3-101.

For this reason an informal hearing should not necessarily be pursued unless counsel, after a review of the facts, evidence to be presented, applicable statutes and rules of the Secretary of State, is of the opinion that such a hearing is likely to be successful.

D. (1.11) Issues at Hearing

Illinois Courts have had an opportunity to consider the issues to be addressed when determining whether relief from an order of revocation or suspension was proper.

The Courts have identified the main issues to be considered as:

(a) The Secretary of State's statutory duty to protect the public safety and welfare, i.e., the degree of risk posed by returning the petitioner to the highways; and

(b) The degree of hardship suffered by the petitioner as the result of the loss of driving privileges.

As discussed below, the courts have attempted to determine the appropriate weight

to be accorded these competing interests.

1. (1.12) Petitions for Restricted Driving Permits

In Murdy v. Edgar, supra, the Illinois Appellate Court, later affirmed by the Supreme Court, reviewed the standards to be considered by the Secretary of State in determining whether an applicant should be granted, upon his application, a restricted driving permit:

Granting a restricted driving permit is permissive and not mandatory, and before a restricted permit is issued, the Secretary must weigh the public interest against the hardship suffered by the applicant. Murdy, 73 Ill. Dec. 722 at 726.

The public interest has previously been defined by the Court in Foege v. Edgar, supra:

Since the legislature has expressly given the Secretary of State discretion under the statute, the Secretary of State must exercise the discretion based upon the public interest. This means that the Secretary of State should not issue a restricted driving permit unless he has determined that granting the applicant a restricted driving permit will not endanger the public safety or welfare, then the Secretary of State should carry out the purpose of the statute by granting the applicant a restricted driving permit. Foege, 65 Ill. Dec. 753 at 755.

2. (1.13) Petitions for Reinstatement

The Court in Murdy also defined the issues to be considered by the Secretary of State upon a petition for full reinstatement, 625 ILCS 5/6-208(b), and further defined the differences to be considered in the granting of a restricted driving permit versus full reinstatement:

The standard to be applied by the Secretary under section 6-208 is similar to that involved when issuing a restricted driving permit. (See Foege.) In each case the pertinent inquiry is the danger to the public in allowing the applicant to drive. Under sections 6-205 and 6-206, however, hardship is to be taken into consideration apart from public safety and welfare. Section 6-208 mandates no consideration of hardship to the applicant. A further difference is in the scope of rights granted. Under section 6-205 and 6-206, a restricted driving permit may only be issued for driving between a residence and a place of employment or other proper limits. Relief under section 6-208 contains no limitations. Foege, 73 Ill. Dec. 722 at 727.

II. Preparing to Represent the Client Whose License is Suspended or Revoked as the Result of an Alcohol/Drug Related Offense(s).

A. (1.14) Introduction

Generally, the phrase "alcohol/drug related hearings" includes those matters where the underlying basis for the Order of Revocation or Suspension is related to:

(1) Conviction of driving while under the influence of alcohol, other drugs, or combination thereof. 625 ILCS 5/11-501; or

(2) Suspension for violation of the Illinois Implied Consent Law Prior to January 1, 1986 under 625 ILCS 5/11-501.1 or suspension under the Illinois Summary Suspension Law as a second or subsequent offender under 625 ILCS 5/6-208.1(f)(2); or

(3) Conviction for the offense of DUI or the offense of driving while impaired in a foreign state and revocation pursuant to 625 ILCS 5/6-206(a)(6); or

(4) Suspension or revocation for a non-alcohol/drug related reason, but the client previously has a DUI disposition or summary suspension, regardless of whether any suspension or revocation (or court supervision) is still in effect.

B. (1.15) Preparation of Documentary Evidence

Prior to hearing, counsel should take steps to instruct the client to prepare and, where appropriate, assist the client in preparing or obtaining documentary evidence required and/or suggested under the rules of the Office of the Secretary of State.

1. (1.16) Alcohol Evaluations

The client shall have an alcohol or drug evaluation completed by an agency licensed by the Illinois Department of Human Services, Division of Alcoholism and Substance Abuse (“DASA”) and meeting the requirements of the Secretary of State and DASA. This evaluation cannot be more than six (6) months old as of the date of hearing. In the event the applicant has an evaluation that is more than 6 months old, then an updated evaluation must be completed by the same or agency or by the agency that provided the client’s treatment. If the agency that conducted the original evaluation or treatment has transferred the client’s file to another agency (and such transfer has been approved by DASA) due to closure, etc. of the originating agency then the agency now in lawful possession of the client’s file may provide the update evaluation.

In many cases the client has had a previous hearing in the Secretary of State's Office. If this is the case, it is <u>essential</u> that counsel obtain a copy of the previous evaluation, treatment documentation and any other documentation submitted at the hearing as well as the order (if the hearing was a formal hearing) or the letter of denial (if the hearing was an informal hearing). These documents can be obtained by simply having the client execute a document authorizing release of the information to the attorney and submitting it to the Secretary of State’s Office, Department of

Administrative Hearings, Support Services Division. The Secretary of State will then notify counsel of the cost. These documents will assist counsel in verifying the consistency of evidence to be presented at any new hearing. In the event the person has been denied relief at a prior hearing (formal or informal), the evaluator is required to prepare a letter addressing the reasons for the prior denial. 92 Ill. Administrative Code, ch. II, sec. 1001.440;

In the author's opinion, the alcohol evaluation is probably the single most important item of evidence to be submitted on behalf of the client. Therefore, it follows that the selection of an experienced, competent evaluator becomes equally important. Counsel should be certain of the evaluator's qualifications and most importantly, the evaluator's experience in preparing evaluations to be submitted to the Office of the Secretary of State.

The author makes it a practice to provide the alcohol evaluator with a 'background letter' based upon an interview with the client and the relevant documentation referred to above which summarizes the client's driving history; facts concerning client's alcohol / drug related arrests; criminal history; B.A.C. levels, if available; personal information concerning the client and summary of the client's perception of his/her alcohol/drug use history as well as the client's treatment history, if any. Also, the evaluator should, without fail, be provided with a copy of any formal order or informal letter decisions entered by the Secretary of State concerning a client's previous application as well as copies of any previous alcohol evaluations or treatment documentation on record with the Secretary of State.

Counsel should make arrangements to receive the completed evaluation in a sufficient amount of time prior to the hearing in order to review same and satisfy oneself that the evaluation is in proper order, accurate and meets the requirements as set forth by the Office of the Secretary of State. 92 Ill. Administrative Code, ch. II, sec. 1001.440.

2. (1.17) Risk Education

For those individuals other than those classified as High Risk the client shall have completed and passed a risk education course offered by an agency licensed by DASA and provide written certification of completion of such a course. This course must have been completed since the client's last alcohol related violation. 625 ILCS 5/6-205(c); 92 Ill. Administrative Code, ch. II, sec. 1001.440(a)(5);

3. (1.18) Evaluation Classifications and Requirements for Each Classification

Effective November 1, 1992, DASA adopted new rules that created a new classification system for DUI offenders and minimum requirements to be fulfilled for each classification level. These classifications and treatment requirements, as subsequently amended, have been adopted by the Secretary of State. 92 Ill.

Administrative Code, ch. II, sec. 1001.440. The classifications and the recommendations applicable to each classification as currently in effect under the Secretary of State regulations are as follows:

Level I - Minimal Risk

Defendants classified at this level must have

1. no prior conviction or court-ordered supervision for DUI and no prior statutory summary suspension and no prior reckless driving conviction reduced from DUI;

2. a blood-alcohol concentration (BAC) of less than .15 as a result of the arrest for DUI; and

3. no other symptoms of substance abuse or dependence.

Level II - Moderate or Significant Risk

1. Moderate Risk

Defendant classified at this level must have

a. no prior conviction or court-ordered supervision for DUI and no prior statutory summary suspension and no prior reckless driving conviction reduced from DUI;

b. a BAC of .15 to .19 or a refusal of chemical testing as a result of the arrest for DUI; and

c. no other symptoms of substance abuse or dependence.

2. Significant Risk

Defendants classified at this level must have

a. one prior conviction or court-ordered supervision for DUI or one prior statutory summary suspension or one prior reckless driving conviction reduced from DUI; and/or

b. a BAC of .20 or higher as a result of the most current arrest for DUI and/or

c. other symptoms of substance abuse.

Level III - High Risk

Defendants classified at this level must have

1. symptoms of substance dependence; and/or

2. two prior convictions or court-ordered supervisions for DUI or two prior statutory summary suspensions or two prior reckless driving convictions reduced from DUI within a ten-year period from the date of the most current (third) arrest.

4. (1.19) Classification Recommendations and Documentation

Level I - Minimal Risk

Completion of a minimum of ten hours of alcohol and drug risk education.

Level II - Moderate Risk

Completion of a minimum of ten hours of alcohol and drug risk education and a twelve hour early intervention program.

Level II – Significant Risk

Completion of a minimum of ten hours of alcohol and drug risk education and a outpatient treatment program (minimum twenty hours) followed by an aftercare plan.

Level III - High Risk

For defendants with identified symptoms of dependence:

1. completion of an intensive outpatient or outpatient substance abuse treatment program (minimum of 75 hours) followed by an aftercare plan, or

2. completion of a residential or inpatient substance abuse treatment program followed by an aftercare plan.

For defendants without identified symptoms of dependence:

3. completion of an outpatient treatment program (minimum of 75 hours) followed by an aftercare plan.

For High-Risk-None Dependent individuals the program must provide a separate letter containing a detailed explanation of why dependency has been ruled out. See 92 Ill. Administrative Code, ch.II, sec. 1001.440 (b)(4).

5. (1.20) Character Reference Letters and Letters Verifying Drinking Habits

Character reference letters and letters verifying the client's current drinking habits should be prepared. A minimum of three (3) letters are required if the client has been classified as High-Risk-Non-Dependent but are suggested even if classified at a lower level. Such letters should indicate the relationship of the writer to the applicant, how often he/she sees the client, the client's current drinking habits as well as past habits if they have changed and if so, when. Also the writer should indicate why he believes the applicant's habits have changed and give general opinion as to the applicant's maturity, responsibility and risk to receive future alcohol related violations. All letters should be fully consistent with the information contained in the assessment.

6. (1.21) Abstinence/Drinking Habit Verification Documents

In the event the client has been classified as High Risk (Dependent), a minimum of three (3) letters verifying the client's abstinence meeting Secretary of State requirements. If the client has been classified as High Risk (Non-Dependent) three (3) letters verifying the client's abstinence or non-problematic drinking pattern must be provided. Preparation of letters are suggested even if the client is presenting at a lower classification. Counsel should be aware that the Secretary of State rules provide that in cases of applicants with a clinical impression of alcoholism/chemical dependence, a minimum period of twelve (12) months of abstinence is required with certain limited exceptions. 92 Ill. Administrative Code, ch. II, sec. 1001.440(e)(f).

7. (1.22) Documentation of Self-Help Group Involvement

If the client has been classified as High Risk-Dependent and the client is a member of Alcoholics Anonymous (AA) or other self-help group, in addition to the three (3) abstinence letters required above, the client should provide at least three (3) letters from program co-support group members meeting the requirements of 92 Ill. Administrative Code, ch. II, sec. 1001.440(g) - (i). A restricted driving permit may be issued to allow an applicant to drive to and from such self-help group meetings or counseling and accordingly counsel should not neglect to request such relief if appropriate. 92 Ill. Administrative Code, ch. II, sec. 1001.440(j).

(Note: the Secretary of State provides forms that may be completed in lieu of letters.)

In O'Neil v. Ryan, 301 Ill. App. 3d 392, 703 N.E.2d 511, 234 Ill. Dec. 650 (1st Dist. 1998), the plaintiff had been classified as Level III (dependent). The Secretary of

State found that the plaintiff had not established a sufficient ongoing support system. The plaintiff claimed that his support system consisted of (a) participation in athletic activities with his brother and (b) talking to family members when he has problems or feels the urge to drink.

The court found that such "unstructured and sporadic contact does not fit the definition of support/recovery program found in regulations." 703 N.E. 2d at 515.

> [P]roviding support for an alcoholic involves much more than just providing a willing ear when he has the urge to talk or filling his time with new activities. A proper support/recovery program provides a framework which helps the alcoholic identify the signs of relapse and gives the alcoholic the tools to prevent it. Neither plaintiff nor the members of his support group have described such a framework. *Id.*

This case strongly suggests that in the absence of a strong, principled program specifically designed to help the recovering alcoholic avoid relapse, it will be rejected by the Secretary of State as not meeting the regulation's requirement of an ongoing support/recovery program for those classified as High Risk (Dependent).

If the client is not involved in such a structured, organized and recognized program such as AA or NA, the client will be required to identify what program the client has established and how it accomplishes the goal of keeping the client abstinent. This again must be documented by three (3) independent sources who can testify at a hearing or provide written documentation in the form of letters which meet the requirements found at 92 Ill. Administrative Code, ch. II, sec. 1001.440(i)(1).

8. (1.23) Treatment Records

Copies of any treatment records including a treatment verification form, discharge summary, treatment plan, continuing care plan and continuing care status report are necessary where the client has completed a program of counseling or other intervention dealing with a previous alcohol/drug related problem. Treatment documents are required for all levels other than Minimal Risk individuals. 92 Ill. Administrative Code, ch. II, sec. 1001.440(m).

9. (1.24) Documentation of Employment, Medical or Educational Relief

Completion of a letter from the client's employer must be provided when the client's petition includes a request for employment relief. This letter should comply with the requirements as set forth in 92 Ill. Administrative Code, ch. II, sec. 1001.420(b)(1). If the person seeks medical or educational relief the documentation of any of these requests should comply with 92 Ill. Adm. Code, ch. II sec. 1001.420 (b)(2-4).

If the client is required to demonstrate an undue hardship in order to obtain a RDP

(i.e., the client is not eligible for reinstatement) then the employer should document the nature of the undue hardship as part of its letter. See 1.27 and 1.59 below.

C. (1.25) Preparation of Testimony

The practice of attempting to prepare a client's testimony immediately prior to a hearing should be avoided. Instead counsel should take appropriate steps to review and prepare the testimony of the client as well as that of any witnesses well before the hearing.

The client should be acquainted by counsel with all procedural aspects of the hearing and otherwise be acquainted in general with the atmosphere he can expect to encounter. The overall aim should be to reduce the apprehension of the client as much as possible and thereby improve the client's performance at the time of hearing.

1. (1.26) Review of Alcohol Assessment

It is of the utmost importance is that the client reviews the alcohol assessment and treatment documentation with counsel to verify its accuracy and completeness. Any errors or omissions should be noted and same should be corrected by the program who prepared the document.

The client obviously should be prepared to testify consistently with all information contained in the evaluation including:

(1) Facts surrounding all alcohol-related arrests (including those where supervision was granted or the offense was reduced to reckless driving);

(2) the client's past history regarding his use of alcohol/drugs;

(3) the client's current use of alcohol/drugs;

(4) the history of any alcohol/drug treatment received by client;

(5) the history of involvement in any self-help support program such as Alcoholics Anonymous.

2. (1.27) Testimony as to Undue Hardship

The client should be thoroughly prepared to testify as to the hardship suffered as the result of the loss of his license and privileges (if applying for hardship relief and not otherwise statutorily eligible for reinstatement in which case hardship need not be shown). In this regard see the definition of 'undue hardship' at 92 Ill. Administrative Code, ch. II, secs. 1001.410 and 1001.420(d). Also see 92 Ill. Administrative Code, ch. II, sec. 1001.420(i) and 1001.430(i) and 1.59 below.

3. (1.28) Corroborative Testimony

In some cases, counsel may wish to call a witness to corroborate the testimony of the client, particularly as it relates to the client's history of alcohol/drug use. The witness should be an individual who has known the client for a significant period of time and who can testify as the client's drinking habits, particularly since the last alcohol-related arrest of the client occurred. Additionally, this witness should also be interviewed by counsel in advance of the hearing to determine the consistency of the witness' potential testimony with that of the client and the information contained in the alcohol evaluation. Counsel should remember that any witness to be called will be excluded from the hearing until called to testify.

However, counsel should be mindful of the fact that since character / abstinence / drinking habit verification letters containing this same information are often required and admissible for this same purpose, it may not be 'tactically' advantageous to call a witness who then would be open to cross-examination.

III. Representation of the Driver Revoked or Suspended as the Result of a Non-Alcohol Related Offense

A. (1.29) Introduction

Generally, the phrase "non-alcohol related hearings" includes those matters where the underlying basis for the Order of Revocation or Suspension is related to:

(1) Suspension or revocation as the result of conviction of three (3) or more moving violations within a twelve (12) month period. 625 ILCS 5/6-206(a)(2); or

(2) Suspension or revocation as the result of conviction of multiple moving violations. 625 ILCS 5/6-206(a)(3).

Other, less frequently seen causes for non-alcohol related suspensions and revocations appear at 625 ILCS 5/6-206(a)(1)-(42).

Initially, if the suspension or revocation is based upon a conviction of a moving violation, counsel should satisfy himself or herself that no basis to vacate the conviction exists in the court of venue, e.g., where there has been an ex-parte default finding against the client. If such a basis does exist, then it may be possible to obtain a full rescission of the order of suspension or revocation without the need for an administrative hearing.

B. (1.30) Preparation of Documentary Evidence

In the author's experience, non-alcohol related suspensions or revocations of a

client's driver's license is usually the result of either inherently poor driving habits, a conscious disregard for the laws governing the operation of motor vehicles or a combination of both. Therefore, the preparation of documentary evidence to meet and carry the petitioner's burden of proof i.e., that to issue driving privileges will not endanger the public safety and welfare, should be with this goal in mind..

The type of evidence that counsel should consider introducing is as follows:

1. (1.31) Remedial Education

Completion of a driver remedial course or defensive driving course by the client. Some websites, e.g., www.nsc.org allow the completion of such a course on-line. See 92 Ill. Administrative Code, ch. II, sec. 1001.420(h), regarding evidence of efforts at rehabilitation or reform of past driving habits and Secretary of State's authority to require such attendance. 625 ILCS 5/6-206(c)(3);

2. (1.32) Character Reference Letters

Character reference letters stressing such things as the client's degree of maturity, responsibility, present general attitudes and what changes have occurred in these areas since the revocation or suspension of his/her privileges;

3. (1.33) Documentation of Request for Employment, Medical or Educational Relief

Completion of a letter from the client's employer, doctor or school must be provided when the client's petition includes a request for employment, medical or educational relief. Careful attention should be paid to the need to establish hardship, if applicable. See 1.24 and 1.27 above and 1.36 and 1.59 below. This document should comply with the requirements as set forth in 92 Ill. Administrative Code, ch. II, sec. 1001.420(b)(1). See 1.24 above.

C. (1.34) Preparation of Testimony

As discussed above (1.23) the preparation of the client's testimony and any witnesses to be called should be completed well before the hearing.

1. (1.35) Prior Record and Change in Attitudes

The client should be familiar with his driving record including the nature and facts or circumstances surrounding each violation.

Since, to a very great extent, the success or failure of the petition for relief will depend upon the client's demeanor and his ability to communicate such matters as his change in maturity, responsibility and current attitudes, the client should be thoroughly prepared to testify in detail as to these matters in a credible fashion. See 92 Ill.

Administrative Code, ch. II, sec. 1001.420(e).

2. (1.36) Testimony as to Undue Hardship

Where the client is applying for hardship relief, he should be prepared to testify to facts necessary to sustain a finding by the Secretary of State that there exists an undue hardship as the result of such suspension or revocation of his license. Note again, that an undue hardship need not be shown if the person is otherwise eligible for reinstatement and a restricted permit is being sought as a probationary device. 92 Ill. Administrative Code, ch. II, sec. 1001.420(i) and 1001.430(i). See 1.27 above and 1.59 below.

3. (1.37) Corroborative Testimony

The preparation of a witness to testify on the client's behalf is generally not necessary if a letter from such a witness is available in meeting the client's burden of proof. The witness's testimony or letter will be important in verifying the client's maturity and sense of responsibility and general opinion as to the client's ability to operate a motor vehicle in conformity with the law. See (1.26) above.

IV. Formal Hearings

A. General Considerations

1. (1.38) Request for Hearing

All formal hearings are conducted in Springfield at the Howlett Building, in Chicago, Mount Vernon and Joliet. A request for formal hearing is initiated by a request in writing and payment of a fee of $50.00. The Secretary of State is required to set the hearing date within ninety (90) days of the request for hearing. Copies of the Notice of Hearing will be sent to both counsel and the client. 625 ILCS 5/2-118(a); 92 Ill. Administrative Code, ch. II, sec. 1001.70.

2. (1.39) Substitution of Assigned Hearing Officer

Under 92 Ill. Administrative Code, ch. II, sec. 1001.100(b), a petitioner may seek a substitution of a hearing officer by written petition. Even if the petition is denied, the petitioner may withdraw a request for hearing and thereafter file a new request, as the result of which a new hearing officer will be assigned.

3. (1.40) Authority of Hearing Officer

The hearing officer has the authority to rule on all motions, administer oaths, to subpoena witnesses or documents at the request of any party, to examine witnesses and to rule on the admissibility of testimony and evidence. 92 Ill. Admin. Code, ch. II,

sec. 1001.100(d).

4. (1.41) Rules of Evidence and Burden of Proof

Generally speaking, the technical rules of evidence do not apply at formal hearings. Regardless of the existence of any common law or statutory bar to the admissibility of certain evidence, such evidence is admissible so long as it is of the sort commonly relied upon by prudent people in the conduct of their affairs. However, irrelevant or immaterial evidence will be excluded. See 92 Ill. Administrative Code, chap. II, sec. 1001.100(d).

The burden of proof rests with the petitioner. Generally, the standard is the preponderance of the evidence. 92 Ill. Administrative Code, ch. II, sec. 1001.100(s).

5. (1.42) Record of Proceedings

Present at the hearing besides the hearing officer, is an attorney who acts on behalf of the Secretary of State and, as a practical matter, as an adversary to the petitioner. A permanent record of the proceedings is made by means of a court stenographer or the use of an electronic recording device. 92 Ill. Administrative Code, chap. II, sec. 1001.100(u).

B. (1.43) Conduct of the Hearing

The actual conduct of the hearing as well as the specific procedure utilized varies to a certain extent upon the personal dictates of the hearing officer. For example, some hearing officers will allow the attorney for the Secretary of State to proceed with examination of the petitioner before the attorney for the petitioner is allowed to proceed. The majority of hearing officers, however, follow the practice of allowing the petitioner's counsel to proceed with questioning first and the attorney for the State to thereafter cross-examine. If counsel for the petitioner is uncertain as to any procedural variables, he/she should request a pre-trial conference to clarify these matters. Regardless of the personal preferences of the hearing officer, it can generally be said that the following elements are part of every formal hearing.

1. (1.44) Opening Statement

Counsel will be allowed to make an opening statement. If counsel chooses to make an opening statement, the relevant issues should be outlined, primarily as determined by, e.g., the client's driving history, history of alcohol/drug use, or other relevant facts and what it is expected that the evidence to be presented will demonstrate. 92 Ill. Administrative Code, ch.II, sec. 1001.100(p).

2. (1.45) Secretary of State's Offer of Documentary

Evidence

The attorney for the Secretary of State will offer into evidence the request for hearing, notice of hearing and the client's driving record (including a PDPS record check) together with documentation for supporting the record. The attorney for the Secretary of State will also customarily attempt to introduce, if available, prior alcohol evaluations submitted to the Secretary of State by the client, prior orders from prior hearings and, if available copies of any traffic accident reports on file with the Secretary of State or the Illinois Department of Transportation (particularly in cases involving death or serious personal injury).

Counsel should object to the introduction of a prior order from a formal hearing if it contains findings of fact, conclusions or opinions that are not accurate. Such objection should be based upon the fact that the formal hearing is a de novo proceeding and that therefore matters contained in a prior order are irrelevant and prejudicial. Although the hearing officer will nevertheless overrule such an objection and take notice of all prior formal hearings, counsel should still make an objection in order to preserve the record for review. See 92 Ill. Administrative Code, ch. II, sec. 1001.360(a).

With respect to accident reports, an objection, if appropriate, may be made upon the basis of lack of foundation, hearsay and the confidentiality accorded such reports under Illinois law. 625 ILCS 5/11-412.

3. (1.46) Driver's Prima Facie Case

The presentation of the client's case-in-chief should include, at a minimum, the following:

(a) Direct examination of the client as to: marital status; age; number and ages of dependents; educational background; recitation of facts and circumstances appearing on the driving record; efforts at rehabilitation of driving habits and/or attitude including attendance at a driver education or remedial education program; involvement in any alcohol/drug abuse treatment or remedial education programs (if alcohol/drug use is in issue); involvement in any ongoing counseling or self-help group such as Alcoholics Anonymous (if alcohol/drug use is in issue); drinking / drug use pattern prior to the last DUI arrest; change in drinking / drug use habits and why any change occurred (again, if alcohol / drug use us in issue); nature of employment, including the days, hours and radius driving is required; whether driving is required only to and from work or also on the job; nature of the hardship (if hardship is an issue) availability of public transportation; how driving needs have been met since the loss of driving privileges; details regarding any arrest(s) for driving while revoked / suspended;

(b) Introduction of written verification of client's completion of any driver improvement or remedial education program and introduction of the written alcohol evaluation / treatment documentation (if applicable);

(c) Introduction of character reference letters; drinking habit verification letters; abstinence letters (if applicable); letters verifying AA attendance (if applicable) and employment verification letters;

(d) Examination of any witnesses appearing on the client's behalf.

4. (1.47) Cross-Examination of Driver

After the attorney for the Secretary of State has had an opportunity to cross-examine the client and each witness appearing on his behalf, counsel will be given an opportunity for redirect examination of his witness. Again, counsel should remember at all times that the burden of proof rests with the client and that the standard of proof is the preponderance of evidence. 92 Ill. Administrative Code, ch. II, sec. 1001.100(r),(s).

5. (1.48) Closing Statements and Close of the Hearing

Counsel for petitioner and the Secretary of State will be granted an opportunity to make a closing statement. If counsel chooses to make a closing statement, its objective should be to summarize the evidence presented as it relates to the ultimate issues with primary emphasis on the question of whether the petitioner has met his/her burden of demonstrating that he/she is not a risk to the public safety and welfare.

Upon the close of the hearing, the hearing officer will announce that the decision will be taken under advisement and that a recommendation will be made to the Secretary of State's review representative. At the time a decision is rendered, both counsel and the client will receive copies of the final written order. The Order will contain the recommendation of the hearing officer, decision of the Secretary of State, findings of fact, conclusions of law, and recitation of applicable statutes and rules. The Secretary of State is required to render a decision within ninety days of the conclusion of the hearing. 625 ILCS 5/2-118(d); 92 Ill. Administrative Code, ch. II, sec. 1001.110.

V. Reinstatement and Issuance of Restricted Driving Permits

A. (1.49) Statutory References

The Illinois Vehicle Code ('I.V.C.'), 625 ILCS 5/1-101, et. seq. grants the Secretary of State authority to fully reinstate driving privileges or to grant restricted driving permits.

1. (1.50) Issuance of Restricted Driving Permit after Revocation

Section 6-205(c) of the I.V.C. provides, in part, that:

Whenever a person is convicted of any of the offenses enumerated in this Section, the court may recommend and the Secretary of State in his discretion, without regard to whether such recommendation is made by the court, may, if application is made therefor, issue to such person a restricted driving permit granting the privilege of driving a motor vehicle between his residence and his place of employment or within the scope of the petitioner's employment related duties, or to allow transportation for the petitioner or a household member of the petitioner's family for the receipt of necessary medical care or, if the professional evaluation indicates, provide transportation for the petitioner for alcohol remedial or rehabilitative activity, or for the petitioner to attend classes, as a student, in an accredited educational institution; if the petitioner is able to demonstrate that no alternative means of transportation is reasonably available and the petitioner will not endanger the public safety or welfare, provided that the Secretary's discretion shall be limited to cases where undue hardship would result from a failure to issue such restricted driving permit. In each case the Secretary of State may issue such restricted driving permit for such period as he deems appropriate, except that such permit shall expire within one year from the date of issuance. A restricted driving permit issued hereunder shall be subject to cancellation, revocation and suspension by the Secretary of State in like manner and for like cause as a drivers license issued hereunder may be cancelled, revoked or suspended; except that a conviction upon one or more offenses against laws or ordinances regulating the movement of traffic shall be deemed sufficient cause for the revocation, suspension or cancellation of a restricted driving permit. The Secretary of State may as a condition to the issuance of a restricted driving permit, require the applicant to participate in a driver remedial or rehabilitative program.

2. (1.51) Issuance of Restricted Driving Permit after Suspension

Section 6-206(c)(3) of the I.V.C. provides, in part, that:

. . . the Secretary may upon application therefor, to relieve undue hardship, issue a restricted driving permit granting the privilege of driving a motor vehicle between the petitioner's residence and petitioner's place of employment or within the scope of his employment related duties, or to allow transportation for the petitioner, or a household member of the petitioner's family, to receive necessary medical care and if the professional evaluation indicates, provide transportation for alcohol remedial or rehabilitative activity or for the petitioner to attend classes, as a student, in an accredited educational institution, if the petitioner is able to demonstrate that no alternative means of transportation is reasonably available and the petitioner will not endanger the public safety or welfare. In each case the Secretary may issue such restricted driving permit for such period as deemed appropriate, except that all such permits shall expire within one year from the date of issuance. A restricted driving permit issued hereunder shall be subject to cancellation, revocation and suspension by the Secretary of State in like manner and for like cause as a driver's license issued hereunder may be cancelled, revoked or suspended; except that a conviction upon one

or more offenses against laws or ordinances regulating the movement of traffic shall be deemed sufficient cause for the revocation, suspension or cancellation of a restricted driving permit. The Secretary of State may as a condition to the issuance of a restricted driving permit, require the applicant to participate in a driver remedial or rehabilitative program.

3. (1.52) Reinstatement After Revocation

Once a license is revoked, reinstatement is not automatic and will not occur until the Secretary of State, upon application, makes a determination that to grant reinstatement will not endanger the public safety or welfare, O'Neil v. Ryan, 301 Ill. App. 3d 392, 703 N.E. 2d 511, 234 Ill. Dec. 650 (1st Dist. 1998).

Sec. 6-208(b) of the Vehicle Code contains the following restrictions on applications for reinstatement:

a. Persons convicted of the offense of leaving the scene of a motor vehicle accident involving death or personal injury (Vehicle Code Sec. 11-401(b) ;may not make application for reinstatement for a period of three years from the date of revocation.

b. Persons convicted of the offense of reckless homicide (720 ILCS 5/9-3) may not make application for reinstatement for a period of two years from the date of revocation or for a period of two years from the date of release from a period of imprisonment, whichever is later.

c. Persons convicted of committing a second violation within a period of twenty years of

1. driving while under the influence (Vehicle Code Sec. 11-501 or a similar provision of a local ordinance);

2. leaving the scene of a fatality or personal injury accident (Vehicle Code Sec. 11-401(b));

3. reckless homicide (720 ILCS 5/9-3); or

4. any combination of the above.

may not make application for reinstatement for a period of five years from the date of revocation.

d. Persons convicted of committing a third violation of the offenses listed in paragraph c above or a combination thereof may not make application for reinstatement for a period of ten years from the date of revocation.

Please note that similar out-of-state offenses are included and that the 20-year period in paragraph c above is calculated using the date the offense was committed. Vehicle Code Sec. 6-208(b)(2)(3).

It should be further noted that despite these extended periods of revocation, such persons may still apply for a restricted driving permit. See Vehicle Code Sec. 6-205(c).

Effective January 1, 1999, persons convicted of committing a fourth or subsequent violation of the offenses listed in paragraph c above are permanently barred from seeking reinstatement in the future. P.A. 90-738. The disqualifying offense must have occurred after the January 1, 1999 effective date.

However, it is not clear whether this prohibition extends to applications by such persons for restricted driving permits. In the author's opinion, it does not since the legislation did not amend Sec. 6-205(c) of the Vehicle Code providing for the issuance of restricted driving relief. The Secretary of State currently takes a contrary position.

4. (1.53) Limitations on Relief During Period of Statutory Summary Suspensions and Revocations

The Secretary of State is prohibited from issuing driving privileges where:

a. The person has a summary suspension in effect and is a second offender as defined in 625 ILCS 5/11-500;

b. During the first year of revocation where the person is revoked as the result of a second or subsequent conviction for DUI.

See Vehicle Code sections 6-205 and 6-206.

B. (1.54) Rules and Regulations of the Office of the Secretary of State

The Office of the Secretary of State has promulgated extensive rules and regulations governing not only the procedural aspects of its hearings but also governing the issuance of restricted driving permits and reinstatements. 92 Ill. Administrative Code, ch. II, sec. 1001 et. seq.

These rules are specific and strictly enforced by the Secretary of State. Failure to comply with any applicable rule may result in denial of a request for relief. Accordingly, the attorney should carefully review these rules and determine the applicability of those rules to the client's particular case.

For example, no consideration for relief will be given to an individual who has a traffic case pending against him/her. 92 Ill. Administrative Code, ch. II, secs. 1001.420(g).

A person otherwise eligible for full reinstatement of his/her driver's license and privileges usually will only be issued a restricted driving permit on a probationary basis prior to further consideration for full reinstatement. (92 Ill. Administrative Code, ch. II, sec. 1001.420(i). Generally, a person is required to drive on a permit for at least 75% of the time for which it was issued before being considered for reinstatement (and provided that such person is otherwise eligible for reinstatement). 92 Ill. Administrative Code, ch. II, sec. 1001.430(i).

The rules also specify those factors to be considered by the Secretary of State in determining whether and what type of relief should be granted. Factors such as the client's age; prior offenses for driving while suspended/revoked; accident history; demeanor and credibility of client; credibility of documentary evidence; driving history in other states; client's overall prior driving record; efforts at rehabilitation; and degree of hardship will be considered among others. 92. Ill. Administrative Code, ch. II, sec. 1001.420(e) and 1001.430(c).

C. Applicable Case Law

1. (1.55) Issuance of the Restricted Driving Permit - Balancing the Interests of the Public Safety and Welfare v. Undue Hardship

In Illinois, once driving privileges are revoked, the restoration of such privileges is not automatic. Murdy v. Edgar, supra; People v. Turner, 64 Ill. 2d 183, 186 (1976).

In Foege v. Edgar, supra, the First Appellate District, in a case of first impression, was called upon to consider under what circumstances the Secretary of State should be required to grant, upon application, a restricted driving permit.

Although the statute gives the Secretary of State discretion to issue a restricted driving permit only in cases where undue hardship would result from a failure to issue a restricted driving permit, we believe that this limitation does not mandate that the Secretary of State issue a restricted driving permit merely because undue hardship would result. Plainly, the language of the statute is permissive only and not mandatory. Foege, 65 Ill. Dec. 753 at 755.

This case has subsequently been cited with approval by the only Illinois Supreme Court case considering the issues raised in these types of hearings. Murdy v. Edgar, supra, later affirmed by the Illinois Supreme Court contains a good discussion regarding the standards governing the issuance of restricted driving permits.

Granting a restricted driving permit is permissive and not mandatory, and before a restricted permit is issued, the Secretary must weigh the public interest against the hardship suffered by the applicant. Murdy, 73 Ill. Dec. 722 at 726.

2. (1.56) Reinstatement

The Court in Murdy v. Edgar, supra, discussed not only the standards governing the issuance of restricted driving relief, but also went on to contrast these standards with those governing the granting of full reinstatement under Section 6-208(b) of the I.V.C.:

> The standard to be applied by the Secretary under section 6-208 of The Illinois Vehicle Code is similar to that involved when issuing a restricted driving permit. In each case the pertinent inquiry is the danger to the public in allowing the applicant to drive. Under sections 6-205 and 6-206, however, hardship is to be taken into consideration apart from public safety and welfare. Section 6-208 mandates no consideration of hardship to the applicant. A further difference is in the scope of rights granted. Under section 6-205 and 6-206, a restricted driving permit may only be issued for driving between a residence and a place of employment or other proper limits. Relief under section 6-208 contains no limitations. Murdy, 73 Ill. Dec. 722 at 727.

3. (1.57) Consideration of the Scope of Right to Be Granted - The Restricted Driving Permit v. Reinstatement.

It apparently was this distinction regarding the scope of driving rights to be accorded to a person, i.e., whether they are granted only a restricted driving permit rather than full reinstatement, that served as the basis for the Court's decision in Breiner v. Edgar, 130 Ill. App. 3d 1010, 474 N.E. 2d 1373 (Ill. App. 4th Dist. 1985). In that case, the Court denied the plaintiff's request for full reinstatement on the grounds that plaintiff had failed to demonstrate that he would not be a risk to the public safety and welfare. The Court went on, however, in granting the plaintiff's request for a restricted driving permit, to state:

> . . . the Secretary argues that even if the likely loss of plaintiff's full-time employment constitutes an undue hardship, the Secretary's decision was proper because, based on his past driving record, plaintiff would pose a serious threat to the public safety and welfare which would out-weigh any hardship suffered by plaintiff.
>
> We might agree with this argument if plaintiff were being

> granted unlimited driving privileges. However, we order that the Secretary issue a restricted driving permit to plaintiff which would allow him to drive to and from work, and to do any reasonable necessary driving required by his work. Such restrictions will allow plaintiff to retain his full-time employment, but will prevent the type of recreational nocturnal excursions which previously resulted in plaintiff's tragic collision.

Accordingly, the Court held that the Secretary's denial of the restricted driving permit was contrary to the manifest weight of the evidence. Breiner, 76 Ill. Dec. 176 at 180.

4. (1.58) Completion of Risk Education

As discussed at (1.16) above, the Secretary of State requires that persons whose licenses/privileges have been suspended or revoked as the result of an alcohol related offense, attend a duly licensed driver risk education course (except for those classified as High Risk (Dependent) or (Non-Dependent) under DASA standards). In Sheldon v. Edgar, 131 Ill. App. 3d 489, 475 N.E. 2d 956 (Ill. App. 1st Dist. 1985), the Court held that the failure or refusal of an applicant to attend or participate in an alcohol-related driver risk education may constitute a lawful basis upon which to deny a request for the reinstatement of driving privileges.

5. (1.59) Demonstration of Undue Hardship

The failure of a petitioner to demonstrate an undue hardship may constitute the sole basis to deny a request for issuance of a restricted driving permit, regardless of whether the petitioner has successfully demonstrated that he/she is not a risk to the public safety and welfare. In Clingenpeel v. Edgar, 133 Ill. App. 3d 507, 478 N.E. 2d 1172 (Ill. App. 4th Dist. 1985), the Court stated that where the plaintiff lived only one mile from his place of employment, that he was able to get to work since his wife drove him every morning and he was generally able to obtain a ride home in the evening and further, that he was not required to drive on the job during the day, the plaintiff had failed to demonstrate an undue hardship. Therefore, the Court held, the trial court's granting of a restricted driving permit to him was erroneous and reversed.

In Breiner v. Edgar, supra, the Court held that an employer's affidavit and applicant's testimony that he would lose his current employment without the ability to drive constituted an undue hardship and ordered the Secretary of State to grant him a restricted driving permit.

In Agans v. Edgar, 97 Ill. Dec. 270, 492 N.E. 2d 929 (Ill. App. 4th Dist. 1986), the Court affirmed the Secretary of State's denial of a restricted driving permit to an individual who was capable of walking to work. The Court also rejected the plaintiff's

claim that he would be in a position to obtain a better paying position if he had a hardship license in the absence of evidence of potential jobs other than his own claims made at the hearing.

Plaintiff offered no evidence of job applications for other positions, nor invitations to interview from potential employers, nor why they would require him to drive. (See Breiner v. Edgar, 130 Ill. App. 3d 1010, 86 Ill. Dec. 176, 474 N.E. 2d 1373 (1985)) (where plaintiff brought to the hearing affidavits from his present employer requiring plaintiff to have a driver's license or face termination).) Plaintiff demonstrates no undue hardship with regard to his employment. Agans, 97 Ill. Dec. 270 at 276.

6. (1.60) Required Period of Abstinence

As noted previously, 92 Ill. Administrative Code, chap. II, sec. 1001.440(e) provides, in part, that:

Petitioners classified as Level III Dependent or any other Petitioner with a recommendation of abstinence by a DASA licensed evaluator or treatment provider, should have a minimum of twelve (12) consecutive months of documented abstinence. Waivers are discretionary when considering an RDP but should be no less than six (6) months continuous abstinence. Documentation of abstinence must be received from at least three (3) independent sources. The Hearing Officer shall determine the weight to be accorded the documentation, taking into account the credibility of the source and the totality of the evidence adduced at the hearing.

In Agans v. Edgar, supra, the plaintiff was an alcoholic who had several prior unsuccessful attempts at abstinence and who had thereafter; entered and successfully completed an alcohol rehabilitation program and was involved in aftercare group sessions. As of the time of the hearing before the Secretary of State, the plaintiff had been abstinent from alcohol for a period of two and one-half months. In affirming the State's decision to deny the plaintiff driving relief, the Court said:

> We note plaintiff's heavy commitment to alcohol abuse support groups. We also acknowledge the optimistic opinion on the most recent alcohol assessment that plaintiff has a "strong handle on his recovery." We applaud and encourage plaintiff in his endeavors to master his addiction to alcohol. We agree with plaintiff that he has taken every reasonable step to combat his addiction. We cannot say, however, that the passage of two and one-half months since plaintiff's commitment to these activities is a sufficient period of time to conclude that plaintiff has no current alcohol problem. Agran, 97 Ill. Dec. 270 at 275.

VI. Administrative Review

A. (1.61) Introduction

Decisions from informal hearings do not constitute final administrative decisions and therefore may not be the subject of an administrative review action to the Circuit Court. Only decisions from formal hearings constitute final administrative decisions from which administrative review may be taken. 735 ILCS 5/3-101 (Administrative Review Act, hereinafter referred to as the 'ARA'); 92 Ill. Administrative Code, ch. II, sec. 1001.360(a).

All final administrative decisions of the Secretary of State are subject to administrative review in the Circuit Court. Ill. Rev. Stat., chap. 95 1/2, sec. 2-118(e); 735 ILCS 5/3-101 et. seq.

B. Preparation and Filing of Complaint

1. (1.62) Time and Place of Filing and Method of Service

A complaint for administrative review must be filed and summons issued within thirty-five (35) days from the date a copy of the decision is served upon the affected party. Service is defined as the time the decision is deposited in the mail. Section 3-103 of the A.R.A. The complaint must be filed either in the Circuit Court of Cook County or Sangamon County. 625 ILCS 5/2-118.1. In Cook County, such complaints are filed in the Chancery Division.

2. (1.63) Basis of Complaint

The complaint should set forth the grounds upon which the plaintiff seeks to overturn the decision of the Secretary of State and must do so upon motion of the state or the court. Section 3-108 of the A.R.A.

In the author's opinion, while it may be legally sufficient to merely allege that the decision of the Secretary of State is contrary to law or against the manifest weight of the evidence (unless otherwise ordered by the court), a better practice is to specifically set forth, in separate counts, the grounds upon which the complaint is based, e.g.:

(1) The specific reasons that the plaintiff alleges the decision is contrary to law or against the manifest weight of the evidence and the specific reasons therefore;

(2) That the plaintiff alleges the decision is arbitrary, capricious and constitutes an abuse of the discretion vested in the Secretary of State and the specific reasons therefore;

(3) Violation of the provisions of the Administrative Procedures Act (Ill. Rev. Stat.,

c. 127, sec. 1001 et. seq.), e.g.:

(a) Failure to serve a proposal for decision upon the petitioner or give petitioner an opportunity to file an exception to an adverse decision where the person(s) rendering the final decision in the matter did not hear the matter themselves, nor were provided with record of the entire proceedings before rendering such decision. See Section 1013 of the Administrative Procedures Act (supra); or

(b) Failure to accompany findings of fact with a concise and explicit statement of the underlying facts in support thereof. See Section 1014 of the Administrative Procedures Act (supra).

C. (1.64) Filing of the Answer and Discovery

The Secretary of State is represented in administrative review proceedings by the Attorney General who must file its appearance within thirty-five (35) days of the service of the complaint and, unless otherwise ordered or stipulated, file an answer which consists of the entire record of proceedings. Rule 291(c) of the Rules of the Supreme Court; 735 ILCS 5/3-108(b).

The right to discovery, as well as the procedural rules governing discovery, are equally applicable to administrative review proceedings as to other civil proceedings. The right to discovery becomes particularly important if the plaintiff is attempting to establish, e.g., the failure of the Secretary of State to follow or abide by the provisions of the Administrative Procedures Act since in most cases such failures are not evident or plain from a review of the record of proceedings.

D. (1.65) Hearing on the Complaint

At the time of the hearing on the Complaint for Administrative Review, the Court generally reviews the complaint, the record of proceedings and argument of counsel in open court. Counsel may not attempt to introduce and the court may not entertain new or additional evidence or testimony on matters in issue before the administrative agency. 735 ILCS 5/3-110; Franz v. Edgar, 133 Ill. App. 3d 513, 478 N.E. 2d 1165 (Ill. App. 4th Dist. 1985).

E. (1.66) Decision of the Court

Pursuant to the provisions of 735 ILCS 5/3-111, the Circuit Court may dispose of the Complaint for Administrative Review in one of several different ways:

(1) Affirm or reverse the decision in whole or in part;

(2) Reverse and remand the decision in whole or in part, and in such case, to state the questions requiring further hearing or proceedings and to give such other

instructions as may be proper;

(3) Remand

(a) to affirm or reverse the decision in whole or in part;

(b) where a hearing has been held by the agency, to reverse and remand the decision in whole or in part, and, in such case, to state the questions requiring further hearing or proceedings and to give such other instructions as may be proper;

(c) where a hearing has been held by the agency, to remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it shall appear that such action is just. However, no remandment shall be made on the ground of newly discovered evidence unless it appears to the satisfaction of the court that such evidence has in fact been discovered subsequent to the termination of the proceedings before the administrative agency and that it could not by the exercise of reasonable diligence have been obtained at such proceedings; and that such evidence is material to the issues and is not cumulative; 735 ILCS 5/3-111 (5-7).

Technical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any part and resulted in substantial injustice to him or her. 735 ILCS 5/3-111(b).

F. Applicable Case Law

1. (1.67) Review of Findings and Conclusions of Agency

The findings and conclusions of an administrative agency are presumed to be prima facie true and correct. 735 ILCS 3-110.

This provision has been interpreted to mean that a court upon administrative review will not interfere with the discretionary authority of an administrative agency unless the agency is found to have acted in an arbitrary or capricious manner in the exercise of its authority or that the decision of the agency is contrary to the manifest weight of the evidence appearing in the record before the agency. Murdy v. Edgar, supra; Eastman Kodak Co. v. Fair Employment Practices Com, 86 Ill. 2d 60, 426 N.E. 2d 877 (1981).

2. (1.68) Manifest Weight Test

A reviewing court is not to reweigh the evidence or make an independent

determination of the facts. The sole function of the court is to ascertain whether the findings of the agency is contrary to the manifest weight of the evidence. Menning v. Department of Registration and Education, supra; Murdy v. Edgar, supra.

The courts have attempted to define the phrase "manifest weight of the evidence" in various ways:

In order to set aside the agency decision the reviewing court must find that all "reasonable and unbiased persons, acting within the limits prescribed by law and drawing all inferences in support of the finding, would agree that the finding is erroneous.

The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

In O'Boyle v. Personnel Board, 119 Ill. App. 3d 648, 456 N.E. 2d 998 (1983), the court said:

The fact that an opposite conclusion might be reasonable or that the court might have reached a different conclusion is not adequate to set aside the agency's decision . . . . . If there is anything in the record which fairly supports the action of the agency, the decision is not against the manifest weight of the evidence and must be sustained on judicial review. 119 Ill. App. 3d 648 at 653 - 654; 456 N.E. 2d 998 at 1002-3.

3. (1.69) Court Bound by Record of Proceedings

In determining whether there is sufficient evidence to support an administrative decision, courts of review will consider only that evidence appearing in the record of proceedings before the administrative agency. Franz v. Edgar, supra; Green v. Edgar, 104 Ill. Dec. 533, 502 N.E. 2d 1193 (Ill. App. 1st Dist. 1986).