Written remarks provided to ILTA by Attorney James Gilliam regarding the decision filed by the Supreme Court of Iowa on August 21, 2009 (No. 08-0133):

By way of background, the case involved judicial review of the Iowa Title Guaranty (ITG) decision to grant Charles Hendricks a waiver of the statutory requirement that he own or lease a 40-year title plant to become a participating abstractor in the ITG program. ITG ruled that the burden of owning or leasing a state-wide title plant constituted a "hardship" under the statute, and that the "public interest" was served by granting the waiver. Our appeal had the primary focus of asking the court to interpret the terms "hardship" and "public interest" more restrictively than ITG. The secondary issue of the appeal asked the court to find that Hendricks failed to prove either "hardship" or "public interest", even under the less restrictive interpretation adopted by ITG, and thus he should be required to start over with his application process. We lost on both these issues before the district court and took our appeal to the Supreme Court.

When Iowa administrative agencies such as Iowa Title Guaranty have their activities appealed, Iowa Code Chapter 17A governs. Under Section 17A.19.6 of the statute, the agency is required to file a certified record of the proceedings:

"6. Within thirty days after filing of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of any contested case which may be the subject of the petition."

One of the issues we asked ITG to consider was to "stay" the grant of the waiver to Hendricks until after the litigation was completed. ITG refused to do so. We decided not to incur any further delay by asking the district court to issue a stay and instead worked out an expedited schedule with ITG's attorney general representative (Grant Dugdale) to get the case in front of the district court judge as soon as possible.

Because we filed the appeal immediately and filed our briefs soon thereafter, ITG and Dugdale were required to file the certified record before ITG had approved the minutes from the various meetings in which it discussed the Hendricks application. When Dugdale filed the certified record within the thirty days required by the statute, he indicated that the record was missing the final, approved minutes (because they had not yet been approved) and that he would supplement the record once those minutes were approved. He never did so, thus the district court (and subsequently the Supreme Court) never did get "a certified copy of the entire record" as required by the statute. Dugdale did not catch this and neither did I.

In the briefs filed by Dugdale on behalf of ITG, he never indicated any concern that the record was incomplete or that the court's review was hampered in any way. The district court judge did not indicate he was impaired in any way by the absence of the minutes from the record. One of the Supreme Court justices brought it up for the first time at the argument. I argued that the failure to have the "entire record" before the court was ITG's responsibility under the statute quoted above. I also argued that the missing minutes were unimportant due to the other items we had in the record. As you can see from the parts of the decision discussing this issue, the Supreme Court disagreed, and laid the fault for the incomplete record at my feet rather than ITG. Personally, I think the court was looking for an excuse not to discuss the evidence in the record and the missing approved minutes gave them a convenient way to do so. Had the court been troubled by what ITG did in granting Hendricks the waiver, I believe there was sufficient evidence in the record for them to rule accordingly.

The main issues in the case were not affected by this part of the ruling. The primary focus of our appeal, to get the court to define the terms "hardship" and "public interest", were purely legal issues. Therefore, the court did not require a record to make that decision. Unfortunately, the court sided with ITG on that part of the appeal. The secondary focus of our appeal was that even under the definitions adopted by ITG, the evidence did not support the waiver. The portion of the ruling about the incomplete record only affected this part of the appeal. Unfortunately, under the ruling, this part of the appeal was doomed as soon as Dugdale did not supplement the record and I failed to catch it.

Going forward, ILTA's only remedy on the statutory interpretation issue is legislative. That is, I doubt that there are any circumstances under which the Supreme Court would reverse its decision on the meaning of the terms "hardship" or public interest", so you would need the legislature to tighten up that loophole. The second issue regarding the type and quantum of proof necessary to obtain the waiver is still an open issue. However, I doubt that the court would impose too heavy a burden on either ITG or an applicant based on their reaction to the Hendricks waiver. Thus, I believe your best bet is to try and influence ITG in its rulemaking process to ensure that "hardship" and "public interest" are proven.