

The Daily Menu

by Warren Kraft

On one of my earliest days as a city attorney, the city manager offered his personal opinion about his day-to-day achievements. He produced a yellow legal pad upon which he had listed 15 or 20 tasks. This was how he organized each workday, he explained. First, he reviewed the prior day's list for any incomplete activities, and then planned out the current day's objectives. Once a task was completed, the item was crossed off the list and he moved on to the next one. His agenda for the day was set.

The manager expressed surprise when I suggested that his process would not work in the City Attorney's office. Reviewing his entries for that particular day, I noted that there were several tasks that required my input, several more for the community development director, and still more for other department heads or supervisors. I explained that, throughout the day, as he reached an item for the legal staff, he would call me to discuss the matter and provide direction. By day's end, I would have several new items on my work agenda. If each department head or supervisor operated in the same fashion (and they did), whatever I would set at 7:00 AM as my day's task list would be obliterated with the first frantic call of the morning—whether it was his call or someone else's. My daily agenda consisted of the daily interruptions that were the norm for the municipal attorney office. Moreover, those interruptions ran the gamut of legal and practice issues facing local governments, some requiring research, and others requiring quicker responses.

The MCC/IMLA Attorney ListServe, on any given day, can be abuzz with activity, ranging from the occasional, "I need an answer for tonight's meeting" in the subject line, to something more detailed. During the first week of a recent month, I counted over 20 different topics under discussion.

For example, a colleague had a controversial Board of Appeals (BOA) appeal and variance hearing in the near future, and fellow attorneys responded with the scripts they had developed for the BOA chair to follow and ensure as fair a hearing as possible. One response included a practical message: encourage or train board members to never explain, empathize, articulate, or say anything from the dais about their vote, except or unless it was factual and grounded in the law.

A bit later that same day, an ATTY-LIST member was looking for help, having been directed to draft legislation specifically related to restraining pit-bull dogs. While the city had a "leash law" and the state had laws on vicious animals, and muzzling or restraining certain animals, the attorney needed guidance for situations before a dog caused injury. Her colleagues did not disappoint her. "Avoid basing the code on a particular breed, but upon dangerous dogs and aggressive behavior in general," one poster suggested, and included that community's code provisions regarding "Public Nuisance," "Running at Large," "Restraint of Animals Generally," and "Restraint and Confinement of Vicious or Dangerous Animals." Additional resources from other municipalities went directly to the member. By day's end, she had a wealth of resourceful and practical information to present to the legislative body for review.

Within the same hour, list members learned that a member community's fire department was being asked to conduct home inspections for residences, both homeowners and renters. The National Fire Protection Association has an approved, detailed inspection list that looks at basic home safety issues, and the local fire department advised that it was willing to provide this new service to its community. Because the law does not operate in a vacuum, the immediate liability concerns evolved into concerns about an increased firefighter time commitment, and needlessly placing inspectors into possibly confrontational situations (e.g., between landlord and tenant).

An immunity discussion ensued based on the statutes and common law of that particular state. The inquirer was directed to look at laws on municipal liability for inspectors, the "public duty" rule, and discretionary acts. One state provides immunity for inspectors unless there is a specific assurance of safety or assistance or other matters. Under the public duty rule, there is no liability. One commenter suggested that if the municipality provided this service, it do so with a strong disclaimer. A lengthier response discussed the concerns related to the positioning of the local government as a consumer affairs advocate, one that would duplicate what private home inspectors are often hired to do. The poster mentioned his legislative body did not permit interior inspections of private homes unless consent was given or a complaint had been made. Owners and occupants, he wrote, got "very vocal" about their privacy rights ("their homes being castles, etc."), adding that an appellate court had ruled that an inspector had no duty to the occupant, since the inspection wasn't for personal benefit but, rather, for the public benefit in having an ordinance enforced.

By week's end, the list had discussed drafting answers in foreclosures, in-junctions for gangs, red-light cameras, limits on rental housing licenses, WI-FI use at fire stations, collective bargaining, political leafleting on

streets and commercial door hangers on residences, abandoned natural gas lines, and drafting language in service contracts that defined ownership of the written materials and drawings created from the contract. An inquiry about suspending an employee with or without pay pending an investigation morphed into questions about last-chance agreements and suspending employees who failed to earn education credits for recertification to continue performing their essential functions.

The list proves that it must a creed in the municipal attorney kingdom that the interruptions become the agenda for the day. The immediacy of the resources, including the listserve, assist getting closer to "quitting time."

For those of you who would like to join the listserv, go to http://www.municode.com and select the *Listservs* link to get the page on *Mailing Lists*. Click on *Municipal Attorneys* to bring up the subscription page. Fill it out and hit Subscribe. To sign up for the Water Cooler, send an e-mail to MunicAttyWaterCooler@yahoogroups.com that identifies you and the local government you represent. You will get a response from YahooGroups asking if you want to join. Respond to the message as directed.

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Ordinances

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Notes

1. DDT is the commonly used name for the chemical dichlorodiphenyltrichloroethane.
2. Available at http://www.compoundsecurity.co.uk/. If you are curious as to how sensitive your ears are, go to the Mosquito's USA distributors site, http://www.movingsoundtech.com and listen to the different frequencies.
3. Valerie Strauss, *Amid Metro Brawl, Family's Night Out Turns Into Pandemonium*, Washington Post, Aug. 9, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/201%8/08/AR2010080802755.html.
4. "Public disturbance" standard is also referred to as a "nuisance" or "reasonableness" standard.
5. D.C. Municipal Regulations § 20-2701.01.
6. *Id.*
7. D.C. Municipal Regulations § 20-2714.01.
8. IMLA Model Ordinance Service, Art. 11-4.
9. *Id.*
10. B & W Management, Inc. v. Tasea Inv. Co., 451 A.2d 879 (D.C. 1982) (citation omitted).
11. 47 U.S.C. § 12101, *et seq.* (2006).
12. *Id.* at § 12181.
13. For more information about these ear-related medical conditions, see http://www.aafp.org/afp/ 2004 /0101/p127.html; see also http://www.ncbi.nlm.nih.gov/pmc/articles/PMC539655/.
14. Eric Fidler, *Teens and Young Adults aren't Mosquitoes* (Sept. 2, 2010), available at http://greatergreaterwashington.org/post.cgi?id=7008. ML

Inside Canada

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is what must be pursued. The court did hold, however, that if those responsible for enforcing the legislation do not meet their duties under the Act, the applicants could bring a judicial review application for mandamus or an application for mandatory injunctive relief.

Lucy still resides at the Valley Zoo.

(Scott McAnsh is the Municipal Prosecutor for the City of Edmonton. Steve Phipps is a Solicitor with the City of Edmonton.) ML

Supreme Court

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blood evidence and the infringement of Thompson's right to testify in his own defense at the murder trial violated his constitutional rights. Addressing *Monell* liability, the district court found the claims survived summary judgment: it appeared the assistant attorneys were authorized to create the office's policy on the nature of *Brady* duties and the DAO "knew to a moral certainty" that the assistants would acquire *Brady* material. Without training, it was not always obvious what *Brady* required, and withholding *Brady* material would always lead to a substantial violation of constitutional rights. Accordingly, "a reasonable jury could find that the need for training in this situation [was] so obvious that the failure to offer it could properly be characterized as 'deliberate indifference.'" After a jury trial, the trial court found liability predicated on the district attorney's failure to train, monitor, or supervise, and awarded Thompson $14 million in damages. On a motion for rehearing, the Fifth Circuit en banc panel split evenly, resulting in an affirmation of the district court decision.

The DAO sought Supreme Court review on the basis that imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravened the culpability and causation standards established by *City of Canton* and *Bd. of County Comm'rs of Bryan County*, and undermined the prosecutors' absolute immunity recognized by the Court more recently in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). However, certiorari was granted on the *Canton* and *Bryan County* issue only.

As can be expected, a large number of *amicus* briefs have been filed in this case. IMLA has signed onto a brief in support of the petitioners prepared by the State and Local Legal Center. An *amicus* brief filed on behalf of the Alliance Defense Fund and the CATO Institute in support of the respondent, Thompson, states that amici "believe the *Monell* rule unfairly circumscribes the protections of 42 U.S.C. § 1983 by imposing a restriction on municipal liability that is unwarranted by either the text or history of the statute." It urges the Court to overturn the *Monell* rule "so that municipalities hereafter may be subject to liability for the constitutional violations of their agents and employees according to the ancient common law rule of *respondeat superior*," adding "[e]very basis" for applying *respondeat superior* "to a corporate employer applies with equal logical and practical force to a municipal employer." ML