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IMLA

THE MUNICIPAL LAWYER MAGAZINE

In this issue

Sign Regulations And The First Amendment: Navigating Developments In The Law

Leveraging The Reefer Tax: How Municipalities Can Benefit From Marijuana Regulation And Taxation

A Day in the Life
Private Practice, Public Service

Second Look
Careless Business Records Certifications: No "Convenience" Defense

Supreme Court
Probable Cause: More Than a Hunch

Practice Tips
Construction Contracts-A Checklist for Getting the Basics Right

Code Enforcement
Chickens and Pigs and Goats, Oh My!

LISTSERV
Casting Off Fetters

Ordinances
Vapers' Hopes Go Up In Smoke?

Amicus Corner
Fourth Amendment...and Much More

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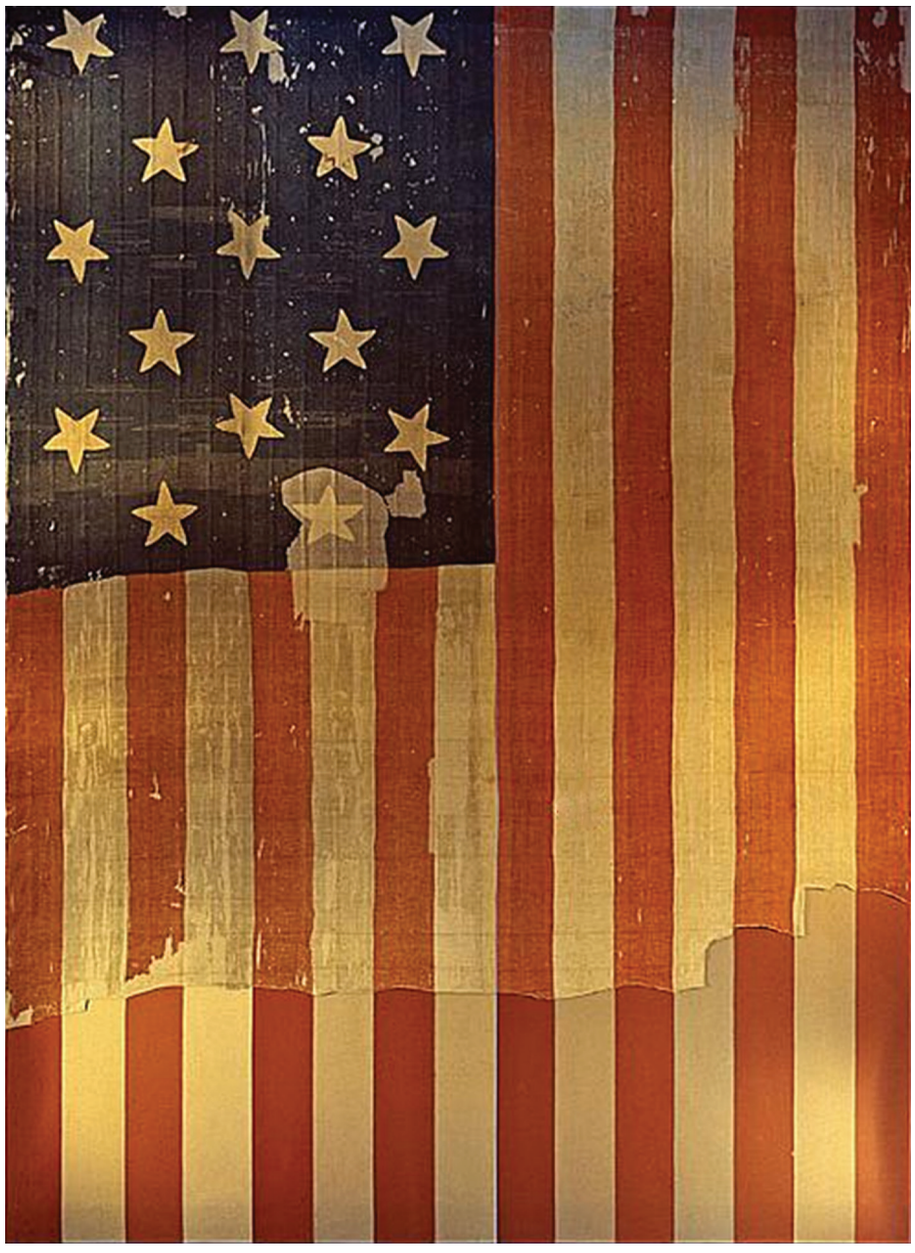



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Leveraging The Reefer Tax: How Municipalities Can Benefit From Marijuana Regulation And Taxation

By Douglas A. Praw, Lewis G. Feldman and Geoffrey M. Geddes

As illustrated in Colorado, taxes from legalized marijuana can provide a significant new source of revenue for municipalities. The authors suggest that, as properly choreographed, those tax flows might even secure local revenue bond obligations.

Page 6

Sign Regulations And The First Amendment: Navigating Developments in the Law

By Deborah Fox, David Warner and Meg Rosequist

Freedom of expression is for many the transcendent Constitutional right. But localities can regulate signs depending on the forum—non-public, designated public or limited public. The authors provide a thorough primer.

Page 10

Practice Tips: Construction Contracts—A Checklist for Getting the Basics Right

By Miles Risley

It sounds simple but eliminates a lot of later missteps: before jumping to the deal points on a construction contract, make sure that the agreement is internally consistent, is properly executed and includes all required ancillary documents.

Page 21

DEPARTMENTS

4 FROM THE EDITOR
Between Two Anthems
By Erich Eiselt

16 A DAY IN THE LIFE
Private Practice, Public Service
An Interview With Harriet Steiner

19 CODE ENFORCEMENT
Chickens and Pigs and Goats, Oh My!
By David Wesner

20 SECOND LOOK
Careless Business Records Certifications: No "Convenience" Defense
By Pete Haskel

22 SUPREME COURT
Probable Cause: More Than a Hunch
By Erich Eiselt

23 LISTSERV
Casting Off Fetters
By Kelly Addy

26 ORDINANCES
Vapers' Hopes Go Up In Smoke?
By Erich Eiselt

27 AMICUS CORNER
Fourth Amendment…and Much More
By Amanda Kellar

28 CASES
Recent Decisions of Interest
By IMLA Editorial Board

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FROM THE EDITOR

Between Two Anthems

By Erich Eiselt, IMLA Assistant General Counsel and Editor



In its two conference sites this year--Anchorage and Baltimore--IMLA celebrates much of what is remarkable about our nation.

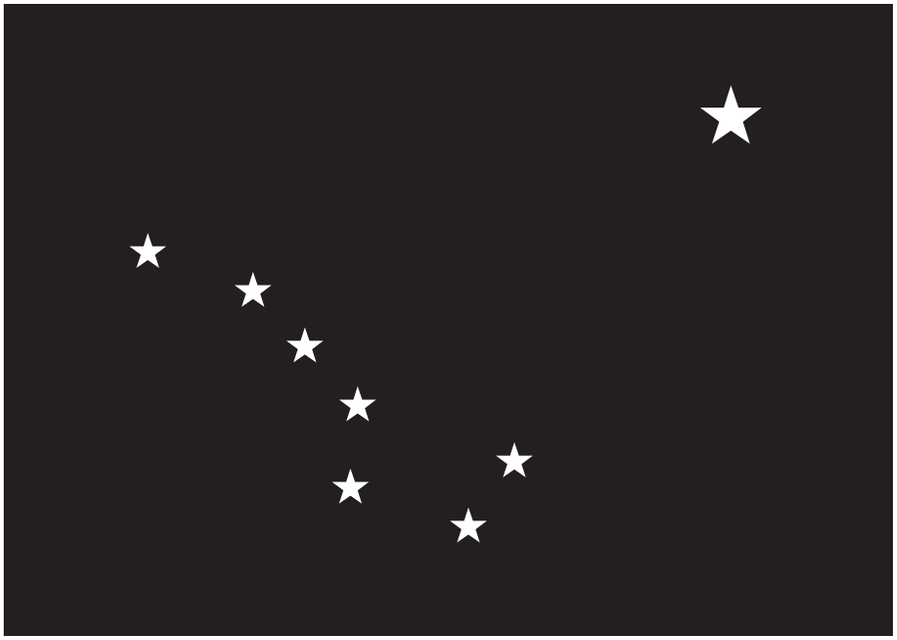
One venue epitomizes our origins as a polity. Baltimore harbor is the birthplace of the nation's anthem penned by Francis Scott Key, a 33-year old lawyer, two centuries ago. The sight of our flag as morning broke over embattled Fort McHenry spawned words now synonymous with America itself, honoring the sacrifice required of the new republic to wrest and keep autonomy from a distant monarch. That city is today the largest metropolis in Maryland, a state whose iconic octagonal capitol building in Annapolis serves as the nation's longest continuously–operating legislative state house, dating to the beginnings of colonial independence. We will gather in Baltimore in September to participate in an epical tribute to The Star Spangled Banner.

The other locale, where IMLA convened in mid-May, symbolizes the enduring values of pioneering and persistence, attributes that built the lower Forty Eight and continue to animate the Last Frontier today. To Americans who explore Alaska from an armchair it seems nearly mythical, with parklands larger than many states, peaks twice as high as anything else in the nation, and wildlife on a scale not seen elsewhere on earth. To those who actually make the trip to Anchorage and beyond, the scale and magnificence of the place is virtually beyond description—as evidenced by some of the photo's in this issue. It is not a matter of serendipity that Alaska's state song would be a paean to the land itself, equal parts gratitude and awe. Like the Star Spangled Banner, Alaska's anthem "The Great North Star" honors a flag and all that it symbolizes:

> Eight stars of gold on a field of blue,
> Alaska's flag, may it mean to you,
> The blue of the sea, the evening sky,
> The mountain lakes and the flowers nearby,
> The gold of the early sourdough's dreams,
> The precious gold of the hills and streams,
> The brilliant stars in the northern sky,
> The "Bear," the "Dipper," and shining high,
> The great North Star with its steady light,
> O'er land and sea a beacon bright,
> Alaska's flag to Alaskans dear,
> The simple flag of a last frontier.

The summer of 2014 has thus aligned to provide our members and their families an opportunity to celebrate both ends of this national history—the foundational and the recent. Each is rock-solid, in its own way, and each contributes to the character of America itself. As IMLA members, we are lucky to experience them both, from the perspective of citizens who discern the basic ingredients that make city centers such as Anchorage and Baltimore--or hamlets, like Kotzebue, Alaska on the Arctic Circle or Crisfield, Maryland on the Chesapeake Bay--function. Those components include transparency, compromise, community involvement, public service—and above all, respect for the rule of law. This is the path on which we spend our days and where we choose to make careers, sometimes forgetting just how rewarding the journey is. But that choreography to which we aspire, if not always achieving—local governance, free of corruption, bias, and injustice—is the thing which commonly eludes other polities as they attempt to take wing around the world. Clearly it is less challenging to cast off the old order than to inculcate the basic values which legitimize and preserve the new.

So as we appreciate the superlatives in our IMLA venues this summer, whether primordial glaciers calving into endless seas or tall ships and pyrotechnics to rival the biggest America has ever seen, we can take quiet pride in being an integral part of the weft and weave which holds it all together—from the Star Spangled Banner to the Great North Star. ML



EDITORIAL NOTES:

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THE MUNICIPAL LAWYER MAGAZINE

Dear Reader-

In this issue, Municipal Lawyer's lead article presents, courtesy of Deborah Fox, David Warner and Meg Rosequist of Meyers Nave, an exegesis on municipal regulation of the Constitutionally-ensured right of free expression, here manifested in the form of signs. We also touch on a less seminal freedom—the farming, possession and use of marijuana in some states —and its fiscal implications for local government, authored by Douglas Praw, Lewis Feldman and Geoffrey Geddes of Goodwin Proctor.

We next explore the use of contracted municipal lawyering versus dedicated in-house legal staff with Harriet Steiner of Best Best and Krieger.

Elsewhere, Pete Haskel (Executive Assistant City Attorney, Dallas) admonishes readers to beware the consequences of haphazard business records certifications, Miles Risley (City Attorney, Wichita Falls, TX) points out some oft-overlooked fine points in construction contracts, David Wesner (Commission Counsel, Danville, IL) muses about urban animal husbandry and Kelly Addy (Civil Deputy City Attorney, Billings, MT) reiterates the merits of our ListServ.

Our own ML writers cover the municipal clamp-down on e-cigarettes, a recent Fourth Amendment decision at the high court (including Justice Scalia's spirited dissent) and our usual array of case summaries and amicus activities.

And we begin to anticipate IMLA's major event of the summer, our upcoming Star-Spangled conference in Baltimore.

IMLA Editorial Board

Are you receiving IMLA's Member Newsletter with case summaries and legal updates? These newsletters are sent out to our members every other Thursday, with a separate monthly Newsletter for our Canadian members. If you are not receiving these, please contact the Editor, Erich Eiselt, at eeiselt@imla.org.

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To Submit An Article, please contact the **Editor, Erich Eiselt, at eeiselt@imla.org** with a brief description of your topic.

Municipal Lawyer is published 6 times per year, and feature articles should be between 2,500 and 4,000 words in length.

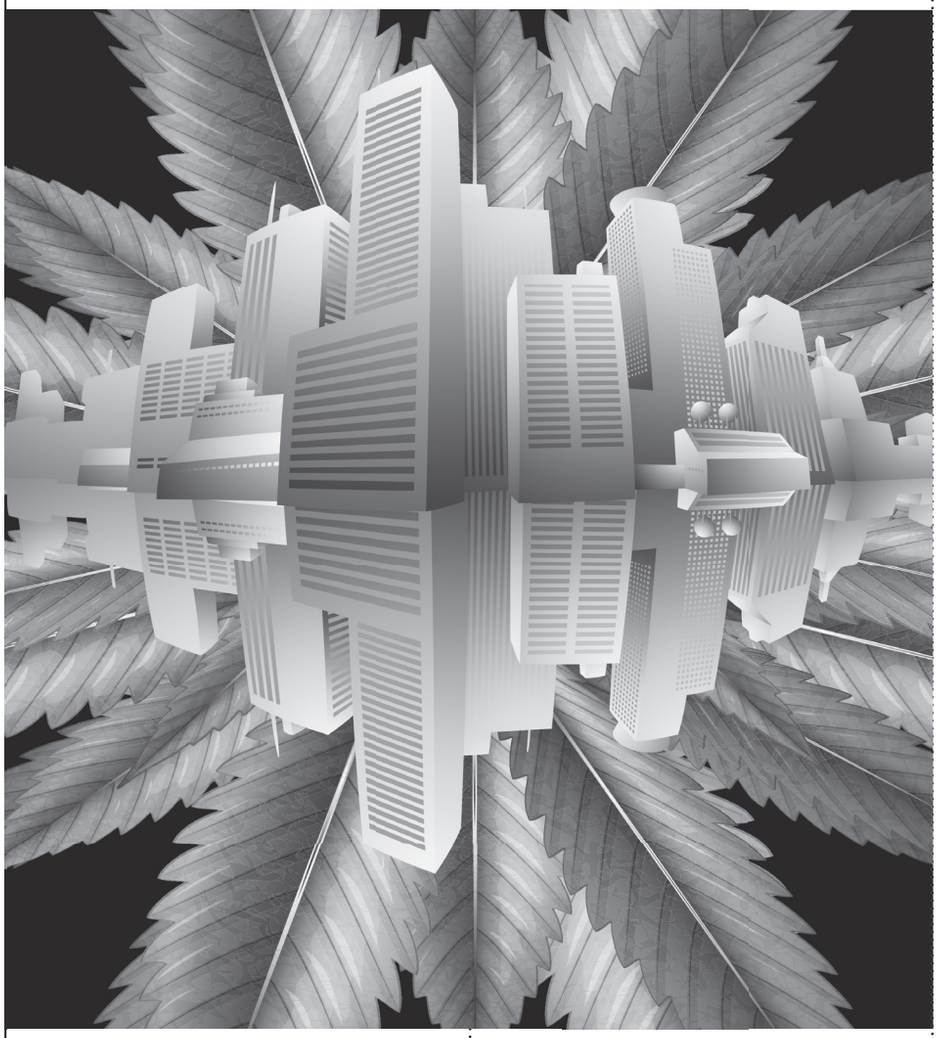
Submitted articles are subject to review by IMLA staff, and IMLA reserves the right to edit articles (for style, clarity, length, etc.).

We look forward to hearing from you!

Questions? Please contact IMLA at info@imla.org.

Leveraging The Reefer Tax: How Municipalities Can Benefit From Marijuana Regulation And Taxation

By Douglas A. Praw, Lewis G. Feldman, and Geoffrey M. Geddes



In November 2013, Colorado voters approved Amendment 64, which amended the state's constitution to permit the personal use and regulation of marijuana. On January 1, 2014, Colorado cannabis outlets opened their doors to long lines of eager customers happy to legally pay for their weed, despite a price that included a 15% excise tax and a 10% sales tax.

Notwithstanding the moral and social debates concerning this new law, which will likely dominate the media for the foreseeable future, in this article we present a modest proposal: that municipalities consider how best to maximize the financial benefit of this new revenue stream. Local agencies that receive a portion of the taxes from the sale of marijuana can leverage that revenue by pledging it to repay tax-exempt securities that can be sold to investors; the proceeds from the sale of those securities can then be used for much needed public infrastructure. The approach is not novel, with ample precedent and experience to support the construct.

Maximizing Limited Revenues

The Great Recession has cut a devastating swath through local governments: since 2007, nearly 40 cities, towns, countries, utilities, and special districts have filed for bankruptcy. While the financial outlook for some states, including California and New York, is improving, other states, including Michigan and Alabama, continue to support struggling municipalities.

Necessity breeds creativity, especially in the public sector. Perpetually budget-strapped municipalities have become quite adept at leveraging or supplementing relatively meager revenue allocations to pay for expensive but vital infrastructure, including roads, utilities, schools, and parks. Effective financing structures, including tax increment financing, special district financing, and tax sharing arrangements, have provided local governments much needed funds to continue building vital infrastructure and balance their budgets. The new marijuana tax may provide another financing opportunity for local governments to meet their public capital and operating obligations.

Leveraging Dedicated Revenue Streams: The California Gas Tax Model

The sale of securities remains the most popular method employed by municipalities to finance capital improvements and operations. The payment of principal and interest to owners of those securities is generally secured by a stream of revenue, typically either taxes (such as sales taxes, special taxes, or transient occupancy taxes) or user fees (such as utility payments). The promise of a new tax, such as the new Colorado marijuana tax, is not just in the annual budgetary bump for a municipality, but also in the prospect of leveraging that revenue stream to finance pressing infrastructure and operating needs.

In 2007, the City of Oxnard, California, pioneered a mechanism to leverage the state's gasoline tax that earned the transaction The Bond Buyer's "Far West Deal of the Year" and that has since been duplicated many times in that state. California cities and counties receive a portion of the state's 18-cents-per-gallon tax on the sale of gasoline and diesel fuel. The California Constitution requires that those tax revenues be used for the construction, improvement, maintenance, and operation of public streets and highways. The cost

to construct and maintain local streets and highways, however, often substantially exceeds the gas tax revenues received by a city or county in any given year. In addition, because only 25% percent of the gas tax revenues received by a city or county may pledged to pay bonded indebtedness incurred to finance street and highway construction, and because such indebtedness must be voter-approved, bond financing is severely constrained.

To advance the delivery of infrastructure, the City of Oxnard, together with its legal and financial consultants, devised a financing structure that allowed them to leverage their future gas tax revenues to finance current transportation infrastructure needs, while avoiding the 25% limitation, the voter-approval requirement, and Constitutional debt limitations. Under this innovative financing structure, the City agreed simultaneously to (i) sell designated unimproved City streets to another City-controlled public agency (in this case, a joint powers authority) pursuant to a sale agreement and (ii) purchased the newly constructed or improved streets from that joint powers authority pursuant to an installment purchase agreement. The City also agreed to construct and improve the designated streets as the agent of the joint powers authority. The purchase price of the improved streets was paid from installment payments made by the City solely from gas tax revenues received over 30 years – and the City pledged all of its gas tax revenues, not merely a percentage thereof, to pay the installment payments.

This financing structure required no additional security beyond the gas tax revenue pledge, such as a backstop general fund pledge, and a triple-A rated bond insurer insured the financing based on a gas-tax-revenue-only pledge.

Weed Bonds: How Would They Work?

Assuming the current marijuana-friendly trend continues across the country, each state will decriminalize and regulate the plant according to its own needs and political values. Consequently, the provisions of each law will likely vary as to the mode of collection and distribution of funds, as well as the restrictions as to their use. Nevertheless, the Colorado law is a good starting point to begin thinking about structures that might effectively channel and leverage the prospective tax revenues to optimal public application.

If the amount of marijuana tax revenues becomes regular and relatively dependable, and the state or localities do not place limitations on the bonding of such revenues, local governments in Colorado, including school districts, may be able simply to issue revenue bonds secured by their share of the prospective tax revenues, much the way municipalities issue water or electricity revenue bonds.

Amendment 64 provides for an excise tax to be levied on marijuana sold or transferred in the state at a rate not to exceed 15% prior to January 2017, with the state's General Assembly determining the rate thereafter. The amendment also authorizes the state to impose a sales tax, which is currently set at 10%. The first $40 million in revenue raised annually from any such excise tax is required to be credited to the Public School Capital Construction Assistance Fund, which provides financial assistance for school construction, as well as various educational programs throughout the state. The remaining revenues will be used for administration and regulation purposes. But some of the funds are expected eventually to find their way to local municipalities. In addition, local municipalities are permitted to enact their own regulations and levy additional sales taxes on the sale of marijuana. For instance, the City of Denver has enacted an additional 3.5% tax on sales within the city.

If the amount of marijuana tax revenues becomes regular and relatively dependable, and the state or localities do not place limitations on the bonding of such revenues, local governments in Colorado, including school districts, may be able simply to issue revenue bonds secured by their share of the prospective tax revenues, much the way municipalities issue water or electricity revenue bonds.

Most states, however, including Colorado, are likely to limit the use of the proceeds from the sale of such bonds. In such cases, the model that the City of Oxnard utilized to leverage its gas tax revenues might serve as a workable financing

Continued on page 29



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Reefer Tax *Cont'd from page 7*

template. Using a joint powers authority, the governmental agency could sell or lease the proposed project area to the JPA pursuant to a an installment sale or lease agreement, and then purchase the newly constructed improvements back from the JPA, which would pledge those sale or lease payments to the investors in the municipal security.

But What About the Fed?

One of the great advantages that issuers of municipal securities enjoy derives from the exemption of interest payments available to investors. When an investor can avoid taxation on its muni bond interest, the low interest bond is able to compete with higher interest corporate bonds for a spot in the investor's portfolio. But when such exemption is unavailable, or only available on a state level and not from the federal government, the interest rate that the issuer would have to pay to make up for the loss of that exemption can quickly become prohibitively high.

The tax analysis for marijuana bonds will be interesting, to be sure. Notwithstanding the various marijuana laws throughout the country (twenty states and D.C. currently have laws legalizing marijuana in some form), the sale and use of marijuana is still illegal under federal law. The federal government has been inconsistent in its approach to the legalization of marijuana at the state level. In 2009, Attorney General Eric Holder announced that the Department of Justice would stop enforcing the federal marijuana laws against persons and business in compliance with local and state law. Nevertheless, in 2011, the Department of Justice began notifying property owners that any property being utilized by medical marijuana tenants was subject to seizure and forfeiture by the federal government. Yet, after the passage of the Washington and Colorado laws permitting the recreational use of marijuana, the Obama administration announced that it would not challenge laws legalizing marijuana, so long as those states maintained strict rules involving the sale and distribution of the drug. Deputy Attorney General James M. Cole followed with a memo that directed federal prosecutors to focus on eight areas of enforcement, rather than spending time targeting individual users. Those areas include preventing distribution of marijuana to minors, stopping the growing of marijuana on public land, keeping pot from falling into the hands of cartels and gangs, and preventing the diversion of marijuana to states where it remains illegal.

Further complicating matters, many potential underwriters for bonds secured by a marijuana tax, including state-chartered banks, are reluctant to provide traditional services to marijuana businesses, fearing that federal regulators and law enforcement authorities might fine them or otherwise impose sanctions for violating prohibitions on money-laundering, among other federal laws and regulations.

Another impediment to marketing a "weed bond" is the potential resistance on the part of the IRS in upholding an exemption of interest on a validly issued municipal security that is secured by revenue from an activity that is illegal under federal law. If the IRS balks, the question becomes: will the exemption from state taxes (if available) be incentive enough for investors to purchase the securities at an interest rate that is affordable to the municipality?

However, a potential work-around is to have the municipalities pledge an amount equal to the marijuana generated sales tax from their general fund. Thus, the municipality would be committed to pay the bond debt service from its coffers irrespective of the source. The increase in general fund dollars from the sale of marijuana would allow for the coverage on the bonds, but the security would not be from the tax itself.

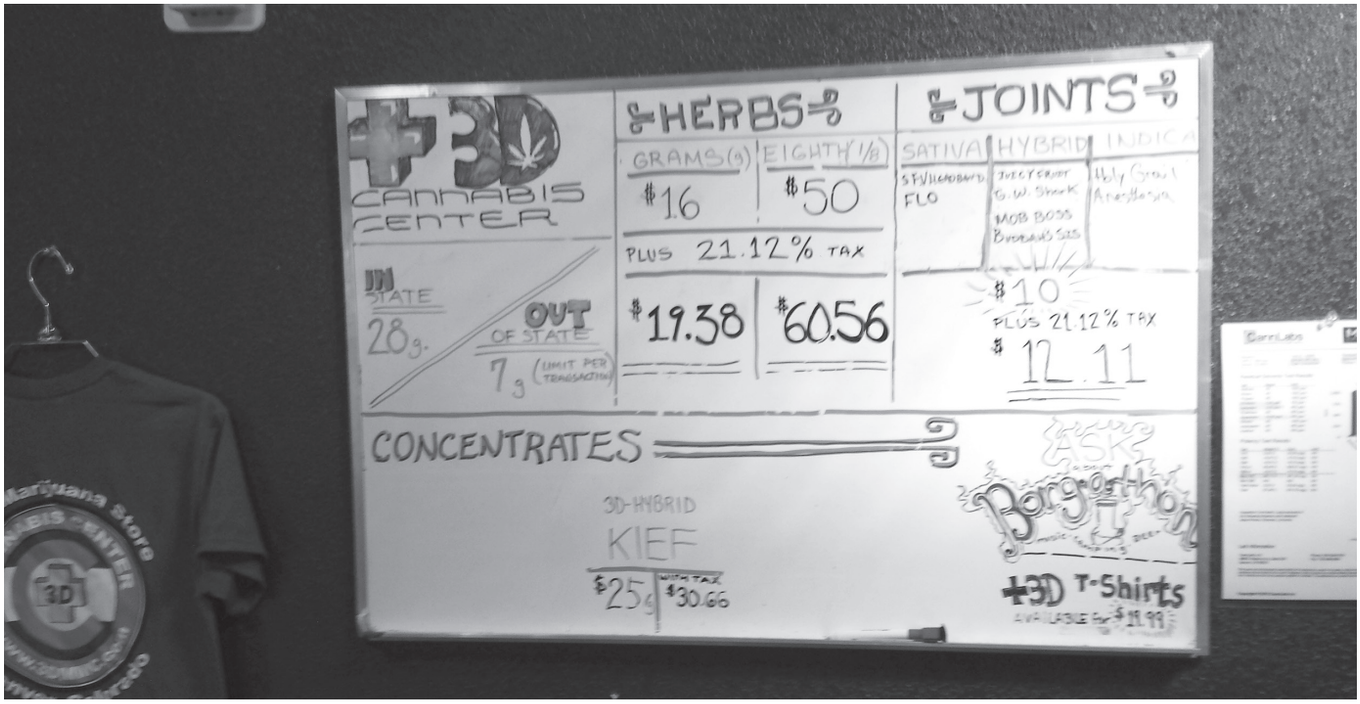
Given the mounting pressures on municipalities to find funding sources for their ever-increasing costs, answers to questions of tax exemption and use of proceeds hopefully will be worked out in short order. As the country's laws and customs ease with respect to the regulation and taxation of marijuana, great benefit could result for local governments if the federal government and bond market embrace the new revenue source with equal acceptance. It may not be long, then, before the walls of your neighborhood school smell slightly of oregano.

EDITOR'S NOTE:

The mind-blowing fiscal dimensions of legalized marijuana were robustly demonstrated at IMLA's recent Top 50 meeting in Denver. Hosted by City Attorney Scott Martinez and Deputy City Attorney Cristal De-Herrera, our two-day event in early June concluded with a field trip to the nation's largest legal weed cultivation facility.

Housed in a nameless and non-descript warehouse on the edge of the Mile High City, the indoor farm covers nearly three acres–120,000 square feet– of carefully coddled cannabis. The plants, all females, live in individual tubs, tens of thousands of them, organized by genotype and provenance. Insulated from insects, herbivores and poachers, they mature rapidly, stretching upward beneath the relentless haze of enough grow lamps to illuminate a triple-A baseball stadium, nursing on precisely-titrated feedings of mountain water and select nutrients.

It takes an army of 430 workers to serve this windowless hive, arrayed across many disciplines. Some raise newborns in a segregated compound, where select clippings from adult plants magically clone, spawning future generations. Battalions comb through the shoulder- high forest of mature specimens, laboriously snipping prime buds and leaves of optimal potency, like pickers in a tea plantation. Their harvest is then sorted at a score of large metal tables, where dozens separate the valuable bits from the chaff. Other employees staff the facility's extraction area, coaxing rich molasses residues from mounds of green silage. A kitchen team carefully incorporates the dark extract into precisely-crafted chocolate wafers, to be sheathed in foil and commercial wrappers looking as all-American as a Hershey bar. Behind it all, a technical



squad monitors a network of sensors, cameras and proprietary applications and ensures that the facility complies with "MITS" - Colorado's Marijuana Inventory Tracking System, which requires that each plant be identified by a separate RFID chip. Still more employees are deployed in other functions—maintaining the physical plant, shipping, security, logistics, sales and marketing, human resources. And there is executive management and finance.

This last component—tracking the dollars and cents of the operation –must be a daunting and enjoyable exercise. While our hosts would not disclose any real metrics of the business, they did reveal one figure: a single pound of their high-quality snippings wholesales for $1,875. Even in the absence of hard numbers, one can assume that the tens of thousands of robust plants thriving in this well-ordered dormitory literally yield tons of prime cannabis. Sales estimates rise rapidly into the millions. With retail and medical stores booming around the state (in Denver, they already far outnumber Starbucks locations), the near-term growth trajectory and profit potential for pot cultivation leaves soybean, corn and wheat farming in the dust.

If large-scale *growing* of cannabis generates an amazing bottom line, the retail *selling* of legalized pot is apparently even more lucrative. Our second stop on the IMLA magical mystery bus tour brought us to Colorado's first recreational use retail store, authorized last November. Its mission is to serve the consumer, 21-years and older, with a wide array of herbal delights. Salespersons spend an average of six minutes per purchase, advising buyers on the characteristics of various offerings like "Hindu Kush" and "Blueberry." The latter is an "Indica-dominant hybrid 80/20, recommended for pain, muscle spasms and insomnia." Its effects? "A long-lasting euphoric high, starts off cerebrally and creeps down through the body." Prices are posted, and are the same for all species of the raw herb: $16 per gram or $50 per 1/8 ounce (3.5 grams)—a rate exceeding $6,000 per pound. Joints are a flat $10 each. (All prices are before tax.)

Here, there was much less secrecy than at the farming operation. The owner volunteered that the shop serves approximately 200 buyers per day, many from out of state. According to her, this one location, in operation for barely six months, generates $11,000 per day, totally in cash. It employs more than 40 workers. The operation supplies its own raw ingredients via an attached indoor farm of 14,000 square feet. She is already looking to expand.

With a single retail outlet generating roughly $2.5 million in annual sales, the tax implications for Colorado are clearly enormous. The state has cast a wide net. It exacts a 15 percent excise tax at the wholesale level. It then levies a 10 percent sales tax on retail transactions, while the city of Denver adds its own 3.5 tax on top of that. According to City Attorney Scott Martinez, marijuana sales will add roughly $7 million to Denver's tax coffers this year alone.

Given these metrics, it doesn't seem implausible that "legal weed" will soon be taking root–or at least be seriously considered–in a town near you. ML

Sign Regulations And The First Amendment: Navigating Developments In The Law

Deborah Fox, David Warner and Meg Rosequist



PART I: INTRODUCTION

The First Amendment of the United States Constitution provides "Congress shall make no law...abridging the freedom of speech, or of the press...." Under the Fourteenth Amendment, municipal ordinances are within the scope of this limitation.[1] The First Amendment forbids the government from regulating speech, such as signage, in ways that favor some viewpoints or ideas at the expense of others. A city, however, is not powerless to regulate signage within its jurisdiction and the courts have recognized the constitutionality of sign regulations in myriad different factual scenarios. Whether sign regulations will pass constitutional muster or will instead be deemed constitutionally infirm requires a detailed understanding of this complex area of law.

Of paramount importance when drafting sign regulations is to first determine the classification of the forum being regulated to earmark the applicable rules for that forum as dictated by First Amendment jurisprudence. Whether the signs being regulated are commercial, such as billboards, or are noncommercial messages such as political signs, is also of critical importance in determining whether regulations will pass constitutional muster. This article examines the jurisprudence of forum classification, the rules for regulating commercial speech (in particular in the context of billboard regulation) and the rules governing the constitutionality of regulations of political signage both on private property and in the public forum.

PART II: FORUM CLASSIFICATION

A. Public Forum Versus Non-Public Forum

The forum doctrine is a system of categorizing places, and then determining the rules according to the category. Forum classification is crucial because the level of scrutiny and the leeway afforded the government differs based on the type of forum being regulated.[2] Historically, there have been two main categories of government property when it comes to First Amendment activity – the traditional public forum and the non-public forum.

A traditional public forum is a place such as a park, public street or sidewalk, where people have traditionally been able to express ideas and opinions. In a traditional public forum First Amendment activities generally may not be prohibited, rather, "speakers can be excluded ... only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[3]

Thus, in a public forum strict scrutiny applies. Content-based regulations (*i.e.* rules that either allow or exclude speech based on the subject matter being expressed) are presumptively unconstitutional for a public forum and only pass muster if they are the least restrictive means to further a compelling government interest.[4] Content-neutral "time, place and manner" regulations of a public forum are valid if they are narrowly tailored to serve a substantial government interest, and they leave open ample alternative means for communicating the same information.[5]

In contrast to the public forum, a non-public forum is government property that has traditionally not been open to the free exchange of ideas, such as a courthouse lobby, a prison or a military base. In a non-public forum, the government has more latitude to regulate and may restrict access to the forum, so long as the restrictions are reasonable and are viewpoint neutral (*i.e.* not an effort to suppress expression merely because the public officials oppose the speaker's view).[6]

B. Designated Public Forum Versus Limited Public Forum

The two main categories of government property (public forum and non-public forum) have been expanded to cover circumstances that do not fall neatly into either primary category – namely, the designated public forum and the limited public forum. Both of these forum classifications apply to non-public fora that the government opens to expressive activity but the terms under which the forums operate and the level of review applied by the courts differ significantly. Specifically, a designated public forum is created when the government intentionally opens (or "designates") non-traditional

areas for First Amendment activity pursuant to policy or practice.[7] Examples of situations where courts have found a designated public forum include: state university meeting facilities where the university had an express policy of opening the facilities to registered student groups; school board meetings where the state statute provided for open meetings; a municipal auditorium and a city-leased theater where the city dedicated the property to expressive activity; and the interior of a city hall where the city opened the building to display art and did not consistently enforce any restrictions.[8] Regulations for a designated public forum are subject to the same strict scrutiny level of review as a public forum.

A limited public forum is created when the government opens a non-public forum to First Amendment activity but limits such access to certain groups or topics.[9] Examples where courts have found a limited public forum include: public library meeting rooms where policy limited it to certain uses; public school property where policy limits use to only certain groups; and the state's specialty license plate program.[10] A property classified as a limited public forum is subject to the same rules as a non-public forum;the government may restrict speech so long as the restrictions are reasonable and viewpoint neutral.[11] The government is not required to keep a designated public forum or a limited public forum open indefinitely, but so long as the forum remains open it must comply with the requisite standards for its forum classification.[12]

Given the different standard of review for regulations of a designated public forum versusa limited public forum, it is critical to classify the forum correctly. In order make the proper classification, courts typically examine the terms on which the forum operates, [13] assessing the actions and policies of cities to determine whether a designated public forum or a limited public forum has been created.[14]

The more consistently-enforced and selective the restrictions are, the more likely the forum will be deemed a limited public forum.[15] By contrast, where restrictions are not enforced or if exceptions are haphazardly permitted, the more likely the forum will be deemed a designated public forum.[16] There is no bright-line test to determine whether the courts will deem a forum a limited public forum or a designated public forum. The cases are varied, fact specific and many times in direct contradiction.

C. Case Study: Signage On Public Transit Vehicles

Many jurisdictions allow advertising on public owned transit vehicles. Cases analyzing the regulations of signage in this forum provide a useful illustration of how the courts apply forum classification in practice and offer useful guidelines for cities wishing to ensure a forum is classified as a limited public forum so as to retain more control over the type of signage allowed in the forum.

The cases illustrate that a wholesale allowance for "noncommercial" speech on public transit vehicles is problematic where a municipality may wish to restrict potentially inflammatory signage on non-public transit property.

The Supreme Court has ruled that advertising space on public transit vehicles is not a public forum,[17] but whether the space will be considered a designated public forum or a limited public forum is a very fact-specific inquiry.[18]

In *Children of the Rosary v. City of Phoenix*, the Ninth Circuit found that advertising space on municipal buses was a nonpublic/limited forum rather than a designated public forum.[19] At issue in *Children of the Rosary* was Phoenix's refusal to post the plaintiffs' noncommercial anti-abortion message on its buses. The Ninth Circuit explained that Phoenix had not created a designated public forum by opening the exterior panels on buses for advertising to the general public as it had specifically limited the forum to commercial advertising. The Ninth Circuit found the case easily distinguishable from cases where bus panels were found to be designated public fora because Phoenix had consistently promulgated and enforced policies restricting advertising on its buses to commercial messages. Given that the bus panels in *Children of the Rosary* were a limited public forum, Phoenix had only to avoid distinctions based on viewpoint and set advertising standards that were objective and reasonable. The Ninth Circuit found that Phoenix's justifications for the limitations on noncommercial speech (namely to minimize the

Continued on page 12



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chance of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience) all supported the reasonableness of Phoenix's restrictions. The Ninth Circuit also found that the restrictions were viewpoint neutral and concluded that the city could constitutionally refuse to post the plaintiff's anti-abortion advertisements. Likewise, in *Lehman v. Shaker Heights*, the Supreme Court found that a prohibition against political advertising on public transit vehicles was constitutionally sound as it was viewpoint neutral and reasonable to achieve the city's aims of minimizing chances of abuse, the appearance of favoritism and the risk of imposing upon a captive audience.[20]

By way of contrast, in *Christ's Bride Ministries v. SEPTA*, the Third Circuit found that advertising space on bus panels was a designated public forum precisely because the government authority regulating the space had a practice and policy of allowing a broad range of advertisements including noncommercial religious and political messages.[21] The Third Circuit found based on the practice of permitting virtually unlimited access to the bus panels, a designated public forum had been created. The Third Circuit went on to explain that the city's exclusion of the anti-abortion message was a content-based distinction that did not pass constitutional muster under the strict scrutiny test applied to a designated public forum. Thus, the city in the *Christ's Bride Ministries* case could not prohibit the plaintiff from posting its noncommercial anti-abortion messages on bus panels.

The differing outcomes in *Children of the Rosary* and *Lehman* as compared to *Christ's Bride's Ministry* are explained by the different classifications of the forum. The cases illustrate that a wholesale allowance for "noncommercial" speech on public transit vehicles is problematic where a municipality may wish to restrict potentially inflammatory signage on public transit property.

The most prudent approach for municipalities evaluating signage on transit vehicles is to consider limiting the advertising to commercial messages, thereby maintaining their nonpublic forum status. While allowing commercial advertising and prohibiting noncommercial signs may seem at odds with the general rule that the government may not favor commercial speech over noncommercial speech, where the forum is a nonpublic one (like public transit vehicles) a city as a proprietor may favor commercial messages over noncommercial ones so long as the restrictions are reasonable and viewpoint neutral (by contrast, the government may not favor commercial speech over noncommercial speech in a public forum). Cities should articulate reasonable and objective criteria for their limitations and for assessing the type of advertising allowed on public transit vehicles.

The most prudent approach for municipalities evaluating signage on transit vehicles is to consider limiting the advertising to commercial messages, thereby maintaining their non-public forum status.

PART III: THE COMMERCIAL SPEECH DOCTRINE

A. Standard of Review: Central Hudson Test

Stricter standards are applied to governmental regulation of noncommercial speech than to commercial speech.[22] For instance, municipalities are generally prohibited from imposing content-based regulation on noncommercial speech; however these rules do not apply in the context of commercial speech. Thus, regulations that may be unconstitutional with respect to noncommercial speech may be valid when applied to commercial speech.[23] Accordingly, cities must determine whether the relevant speech is commercial or noncommercial when evaluating the appropriateness of their regulations.

While the distinction between commercial speech and noncommercial speech often will be clear, this is not always the case. Indeed, there are times that speech may contain both commercial and noncommercial aspects such as messages about boycotting certain businesses such as Sea World (for concerns over treatment of orcas) or Nike (for concerns over child labor). The courts have articulated three general characteristics to provide guidance in determining whether speech will be deemed commercial in nature: (1) it is an advertisement of some form; (2) it refers ato a specific product; and (3) the speaker has an economic motivation for the speech.[24]

If the relevant speech is deemed commercial in nature, the appropriate standard of review is often referred to as "intermediate scrutiny." This is a relatively modern development in First Amendment jurisprudence; prior to 1975, purely commercial advertisements of services and goods were considered to be outside the protection of the First Amendment.[25]

Today it is understood that commercial speech is deserving of some protection under the Constitution. The seminal case on commercial speech is *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[26] where the Supreme Court adopted a four-part test to determine the validity of government restrictions on commercial speech:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected speech is valid only if it
> (2) seeks to implement a substantial government interest,
> (3) directly advances that interest, and
> (4) reaches no further than is necessary [27]
> to accomplish the given objective.[28]

As municipalities consider regulations for commercial speech, they should not only ensure that such comply with the *Central Hudson* test but also analyze how the rules intersect with noncommercial

speech rules and fit within the cities' overall regulatory framework.

B. Billboard Regulations

Billboards are a popular means of advertising to the masses. They are generally placed along highways or major traffic arterials to garner the greatest amount of attention for a specific product. Originally billboards were static copy but these days one finds advertisements with high impact graphics and bright colors, artfully designed to catch the eye of passers-by. Billboards and other signs are protected by the First Amendment.[29] However, billboards may be regulated and even banned by municipalities pursuant to their police power.[30] Cities are able to implement reasonable zoning ordinances in the interest of public health, safety, aesthetics and maintenance of property values.[31] As articulated by the Supreme Court in *Metromedia, Inc. v. City of San Diego*,[32] municipalities may prohibit all off-site billboards for aesthetic and safety reasons, so long as the city's ordinance complies with the First Amendment. Cities constantly grapple to maintain a fine balance between the legitimate exercise of their police power and the First Amendment.

In *Metromedia*, the Supreme Court applied the *Central Hudson* test and held that San Diego could impose a complete ban on billboards so long as the ban was content neutral. Under the fourth prong of *Central Hudson*, the Supreme Court found that the ordinance was no broader than necessary because "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."[33] The Supreme Court further held that commercial billboards could be banned off-site even if they were permitted on-site.[34]

However, San Diego's regulations also impacted noncommercial speech, which the Supreme Court found invalid. Specifically, San Diego's ordinance permitted on-site commercial advertising but banned on-site noncommercial advertising and offered no explanation why one was permitted while the other was not. San Diego did not offer any indication that noncommercial billboards would be more distracting to drivers or would have an adverse impact on the aesthetics of the city. The Supreme Court further held that the city could not conclude that commercial messages are of a greater value than noncommercial messages.[35] Moreover, with respect to noncommercial speech, San Diego could not choose the appropriate subjects for public discourse.[36] San Diego did not ban all billboards and accordingly the Supreme Court rejected San Diego's argument that the ordinance was a reasonable time, place and manner restriction.[37]

Metromedia supports a city's ability to adopt regulations prohibiting off-site commercial signs. The case also highlights the importance of evaluating commercial speech regulations in the context of the entire regulatory framework to ensure that commercial speech is not being favored over noncommercial speech in the public forum or on private property (although as noted earlier such favoritism is allowed in a non-public/limited forum). Because challenges to billboard ordinances usually lead to expensive federal litigation, it is wise for municipalities to include extensive findings and specific references to case law in support of their regulations. A city's findings should state the governmental interest to be served through the regulation, and provide enough information about the need within the city to show there is a strong correlation between that interest and the regulation. A city should exercise its judgment on how best to solve the billboard issue and explain why the final alternative was selected amongst competing interests. Some cities also choose to include a substitution clause provision in their regulations to avoid problems that may arise from favoring commercial speech over noncommercial speech (although favoring commercial speech can pass constitutional muster, in a non-public or limited public forum as noted above, such is not the case for billboard regulations impacting public forum or private property). A substitution clause provides that a noncommercial message of any type may be substituted for any commercial message which is otherwise allowable.

C. Case Study: Exceptions To Overall Bans On Billboards

As noted above, the courts have found that cities may ban all billboards and that such action is justified by community interests in safety and aesthetics.[38] However, many jurisdictions, while implementing an overall ban on billboards also seek to provide certain exceptions to the overall ban. It is the constitutionality of these exceptions that has generated a significant amount of litigation in recent years.

The courts have validated exceptions to overall bans under certain circumstances, explaining that a city is entitled to take a graduated response to the proliferation of billboards including "exercising its classically legislative function of creating exceptions to sign bans . . . so long as those judgments are reasonable in light of the City's interests."[39] For the exceptions to be deemed reasonable and pass *Central Hudson*, they cannot undermine or counteract the interests (namely safety and aesthetics) that the government used to support its overall ban.[40]

In examining (and upholding) exceptions to Los Angeles' ban on billboards, the Ninth Circuit in *World Wide Rush v. City of Los Angeles* explained that the exceptions passed constitutional muster because the city was able to demonstrate a link between the basis for the exceptions and the asserted goal of aesthetics and safety which were used to support the overall ban.[41] The Ninth Circuit overturned the district court's determination that Los Angeles' exception to its freeway facing sign ban was unconstitutional.[42] The exceptions at issue allowed freeway-facing billboards near the Staples Center and in a newly created special use district ("SUD"). Los Angeles' code specifically noted that the stated purpose of its ban on billboards was to promote public safety and welfare by providing reasonable protection to the visual environment and by ensuring that billboards do not interfere with traffic safety or otherwise endanger public safety. Los Angeles asserted that the nature of the Staples Center's use, coupled with its location in the center of a highly urbanized area, required billboards that could effectively communicate event-related information. Likewise, the SUD that acted as an exception to the sign ban was created as part of a project to renovate Santa Monica Boulevard to improve traffic flow. The targeted corridor had sixteen

Continued on page 14

billboards, the outright elimination of which might have triggered an obligation by Los Angeles to compensate the owners Thus, Los Angeles and the billboard owners agreed that four sign faces could be relocated to a newly created SUD which allowed new billboards facing the freeway but also resulted in an overall decrease in the number of billboards.

While the district court in *World Wide Rush* found the Staples Center and SUD exceptions to the sign ban undermined Los Angeles' stated interest in safety, the Ninth Circuit took a more nuanced approach. The Ninth Circuit explained that the critical question is whether the city denigrates its interest in safety and beauty and defeats its own case by permitting freeway facing billboards. The Ninth Circuit then went on to find that the exceptions were made for the express purpose of advancing those very interests and thus were constitutional. Specifically, the billboards at the Staples Center were an important element of a project to remove blight and dangerous conditions from downtown Los Angeles. Moreover, the Ninth Circuit explained that Los Angeles could reasonably conclude that the benefits of redeveloping an otherwise blighted area outweighed the harm of additional freeway facing billboards. Similarly, the newly created SUD was an outgrowth of Los Angeles' efforts to improve traffic flow and thereby safety and also resulted in a net reduction of billboards. The Ninth Circuit found that Los Angeles' rationale was consistent with its asserted government interest and thus the exceptions to the ban were constitutional. The Ninth Circuit found that Los Angeles' decision to permit some freeway facing billboards at the Staples Center and the SUD "did not break the link" between the Freeway- Facing Sign Ban and the city's objectives in traffic safety and aesthetics."

Likewise, in *RTM v. Houston*, the Fifth Circuit validated exceptions to billboard bans where the exceptions furthered the government's aesthetic interest which was the basis for the overall regulatory provisions.[43] Specifically at issue in the *RTM* case was a ban on new billboards displaying offsite commercial messages. Excluded from this ban were noncommercial signs which the regulations defined as a structure that is used exclusively and at all times for messages that do not constitute commercial advertising. The Fifth Circuit found the regulations were valid, explaining that the evidence showed that the regulations were effective at gradually reducing the number of billboards in the city (as the majority of billboards were commercial in nature) and thus the ban (even with the limited exception) enhanced the city's interest in aesthetics.

Similarly, in *Clear Channel Outdoor v. City of New York*, the Second Circuit upheld New York City's outdoor advertising regulations.[44] The sign companies argued that loopholes and inconsistencies prevented the regulations from advancing a substantial government interest, rendering them invalid under the First Amendment. In finding otherwise, the Second Circuit explained that despite exceptions to the ban on offsite advertising, the regulatory scheme advanced New York City's interests in traffic safety and aesthetics. Likewise, the Second Circuit explained that distinctions in the regulations between permissible and impermissible locations for outdoor commercial advertising were meaningful and did not defeat the purpose of the regulatory scheme.

As the above cases illustrate, courts have signaled that content-neutral exceptions to billboard bans may be constitutionally valid but the exceptions must maintain a link with the overall purpose of the ban in order to pass constitutional muster. Recently, in the face of tight fiscal times, municipalities have been looking to billboards as a potential revenue generating platform (potentially through revenue-sharing agreements with billboard companies). Such ventures pose concerns that the necessary link to a city's interest in safety and aesthetics, which is used to support an overall billboard ban, will be broken. For instance, some cities have considered the constitutionality of forming new freeway overlay zones that would be exempt from a city-wide ban on billboards. Billboards could then be erected in such a zone pursuant to an agreement with billboard companies for revenue sharing. It is unclear, however, how offsite billboards in a freeway overlay zone would improve aesthetics and safety--the government interest used to support the overall ban. Rather, a city's real interest in the exception to the ban would be the revenues generated by the proposed revenue sharing agreements.

There are also legal concerns as to the validity of potential revenue sharing agreements themselves. Some California cities have contemplated using statutory development agreements, although it is unclear that signage alone qualifies for such an agreement. Other jurisdictions have considered incorporating an operating agreement provision as an element of the regulations whereby a company is required to enter into an operating agreement over which the city has broad discretion to impose terms before being granted a billboard permit. This raises First Amendment concerns under the prior restraint doctrine which requires that a permitting regime "avoid placing unbridled discretion in the hands of government officials."[45] As the primary purpose of the operating agreement requirement is to provide the city with an opportunity to negotiate for revenue sharing, it is unlikely that the decision-maker's discretion can sufficiently be cabined to pass constitutional muster while also meeting the goal of providing flexibility to negotiate for revenues. Either of these scenarios (a development agreement or an operating agreement) for revenue sharing pose significant legal risks.

It is unclear how the courts will reconcile the objectives of aesthetics and safety supporting an overall billboard ban with exceptions to bans where the primary government interest supporting the exception is the generation of revenues. There is a high risk that exceptions to billboard bans justified by revenue-generating objectives will result in litigation and a significant danger they will be deemed unconstitutional.

PART IV: POLITICAL SIGNS

A. Time, Place and Manner Restrictions

Signs promoting a political viewpoint, belief, position, or opinion are a fundamental form of expression protected by the First Amendment and are entitled to the highest form of protection.[46] But political signs also pose unique problems

that implicate a city's police powers. Political signs take up space, they may obstruct views, they distract motorists, they take up land which may be used for another purpose, and they may present aesthetic concerns such as "visual clutter." Just as the government may regulate audible expression such as noise,[47] the government may regulate the physical characteristics and locations of political signs under the time, place and manner doctrine.[48]

The time, place and manner doctrine applies to both public forum property (where the government acts as the owner of property) and to cases where the government is acting as the regulator of private property.[49] To pass constitutional muster, time, place and manner restrictions: (1) must be narrowly tailored to serve a significant government interest; (2) must not be based on the content of the message; (3) must leave open ample alternatives for communication; and (4) must not delegate overly broad discretion to a government official.[50]

In drafting regulations governing political speech, cities should first consider the forum and whether the property being regulated is private or public. As the time, place and manner doctrine mandates content-neutrality, cities should make every effort to ensure that regulations impacting political signage are not content-based. This can be difficult as courts are not at all clear or consistent as to what constitutes an impermissible content-based distinction. Cities should evaluate the case law in their jurisdiction and evaluate the interplay of regulations impacting political speech within the context of their overall regulatory framework.

B. Political Signs On Private Property

The posting of political signs on private residential property was squarely examined and discussed by the Supreme Court in *City of Ladue v. Gilleo*.[51] In this case, Margaret P. Gilleo placed an antiwar sign in the front yard of her home with the printed words "'Say No to War in the Persian Gulf, Call Congress Now.'"[52] The sign disappeared and Gilleo put up another one which was knocked to the ground.[53] She called the police and was informed that such yard signs were prohibited under the City of Ladue's sign ordinance which banned all residential signs except those falling within one of ten exemptions, political signs. Gilleo filed an action against the city alleging the sign ordinance violated her First Amendment right to free speech.[54] The district court issued a preliminary injunction against enforcement of the ordinance and Gilleo subsequently placed an 8.5-inch by 11-inch sign in the second story window of her home stating "'For Peace in Gulf.'"[55]

> There is a high risk that exceptions to billboard bans justified by revenue-generating objectives will result in litigation and a significant danger they will be deemed unconstitutional.

The Supreme Court found the City of Ladue's ordinance unconstitutional, reasoning that the city's aesthetic interests, while valid, must be considered against the effects of the ban which summarily foreclosed an entire medium of expression: namely, prohibiting a property owner from freely expressing an opinion in his or her own front yard.[56] The Court emphasized that although Ladue's ban on almost all residential signs violated the First Amendment, cities were not powerless to address the ills associated with residential signs.[57] Unfortunately, the Court gave little guidance about what types of regulations are acceptable, focusing instead on the strong incentives of individual property owners' self-interest in keeping their property values up which diminishes the danger of the limitless proliferation of residential signs creating visual clutter.[58]

The *Ladue* decision permits the placement of political signs on private residential property. However, the Court did not foreclose the government's imposing reasonable content-neutral regulations on the size, shape, location, and other aspects of political signs, so long as the regulations do not unconstitutionally impinge upon a homeowner's First Amendment rights.

Although a total ban on political signs in the front yard is unconstitutional,[59] a city may consider regulating the non-communicative aspects of political signs such as size, shape, location, and duration.[60] The challenging and perplexing area of regulation for a city is when the regulation of the non-communicative aspects of signs impinges on communicative aspects. The government's regulatory interests must be balanced against the individual's right to expression.[61] If the regulation is content-based, for example targeting signs regarding upcoming elections, then the regulation must be necessary to serve a compelling government interest and narrowly drawn to achieve that end. If, on the other hand, the regulation is content-neutral, for example regulating the size, location, and duration of all signs placed in the front yard, then it must serve a substantial government interest and be narrowly tailored to further this interest, leaving open ample alternative means for communicating the desired message.

Unfortunately what emerges from the case law for regulations pertaining to the physical attributes of signs is anything but clear; rather, judicial precedence is fact driven andat best offers subtle guidance to a city seeking to implement regulations which will withstand a constitutional challenge.

C. Political Signs On Public Property

As the rules governing a public forum are different from those governing a non-public or limited public forum, cities must determine the relevant forum in which political signage is being regulated. For example, if a political sign will be posted on a billboard in a park, then the relevant forum is the billboard and not the park. Similarly, if a political sign will be posted on a lamp post on a public sidewalk, then the relevant forum is the lamp post and not the public sidewalk.

Thus, in *Members of the City Council v. Taxpayers for Vincent*,[62] the Supreme Court upheld a Los Angeles ordinance prohibiting the posting of signs on public property.[63] The ordinance was challenged by a City Council candidate who posted campaign signs on utility poles

Continued on page 16

which were subsequently removed by City workers.[64] "Taxpayers for Vincent" argued the utility poles were a public forum or should be treated as a public forum because they were located on public sidewalks.[65] The Court concluded that utility poles are a non- public forum, and that the government could prohibit the posting of signs to preserve physical and aesthetic values.[66] The Court rejected the claim that the public property was a public forum because of the absence of "a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks" and simply because property is owned by the government does not mean that all access shall be granted to whoever wishes to express their opinions.[67]

D. Durational Limits

Courts have frequently held that durational limits on political campaign signs are content-based and are unconstitutional because the local government has failed to show a compelling interest to justify the durational limits.[68] Courts have distinguished between pre-election durational limits and post-election durational limits.

For example, an ordinance which prohibits residential property owners from placing political signs on their property more than 30 days before an election amounts to an impermissible content-based restriction.[69] In some residential neighborhoods, a property owner may be able to express support for a community organization or high school sports team year- round, but if an ordinance prohibits displaying a political sign made of the same material, with the same dimensions and colors, in the same location, the ordinance is inherently content-based.[70]

Similarly, an ordinance limiting signs advertising political events or viewpoints for 10 days before the event was found to be content-based.[71] The Court deter- mined that other signs advertising events of a temporary nature—such as yard sales, town festivities, or athletic events—could presumably be posted at any time within 30 days before the actual event.[72] An ordinance prohibiting the posting of political signs more than 60 days before an election was also struck down on the basis that it failed to adequately provide for free speech rights.[73] The court struck down a municipal ordinance which banned the posting of temporary political signs everywhere in the city for all but a 60-day period before an election, viewing the ordinance as a general "ban" on political speech which was temporarily suspended 60 days prior to an election.[74] An ordinance allowing one noncommercial opinion sign to be posted year round and additional campaign signs or noncommercial opinion signs during the election season was upheld by a Minnesota state court.[75]

> Although a total ban on political signs in the front yard is unconstitutional, a city may consider regulating the non-communicative aspects of political signs such as size, shape, location, and duration.

While pre-election restrictions are generally found to be unconstitutional, post-election removal requirements on political signs have been upheld. For example, in *McCormack v. Township of Clinton* the New Jersey court found that a requirement that political signs be displayed not more than 10 days prior to any election and be removed no later than three days after the election was unconstitutional.[76] However, the *McCormack* court indicated that the City's interests in safety and aesthetics could be adequately served by a provision removing all temporary signs, including political signs, within 10 days after termination of the special event.[77] Likewise, in *Collier v. City of Tacoma*, the Washington Supreme Court rejected a 60-day pre-election restriction on the posting of campaign signs.[78] But the Court did not find unconstitutional a provision of the ordinance requiring removal of political signs seven days after the date of the election.[79] The court held that pre-election political speech interests that may outweigh a municipality's regulatory interests are not present following the event and may be outweighed by a municipality's demonstrated interests in aesthetics and traffic safety.[80]

One approach which cities may consider for imposing durational requirements on political campaign signs is to design the durational requirements around a special event, in general, and to focus the durational limits on the post-event period only. For example, the city could draft an ordinance requiring all temporary signs publicizing a special event to be removed no later than ten days after the special event. The ordinance would define a "special event" as any event, activity, or circumstance of an entity which is not part of its normal daily activities and which occurs uninterrupted for a continuous period of time, not to exceed ten days.

E. Permits, Registration, and Fees

Rules which impose special permits, registration requirements, and removal fees on political signs posted by a property owner in a residential area are not generally validated. For example, in *Baldwin v. Redwood City*,[81] the city required filing an application, paying a $1.00 inspection fee, and depositing a $5.00 removal charge, for each sign.[82] The requirement was found unconstitutional on several grounds. First, requiring a permit for each sign would inhibit traditional means of communication in a political campaign; this was unnecessarily burdensome and contained elements of arbitrariness.[83] Second, the application form solicited the same information required for a more permanent sign, including plot plans and attachment specifications which were irrelevant to temporary signs.[84] The - Court went on to suggest that any permit requirement applied to temporary signs is unconstitutional because no substantial interest is served by requiring the city to be notified that signs are going to be erected.[85]

More recently, however, a Federal District Court in New York upheld a permit requirement that applied to all temporary signs, including political signs.[86] Plaintiff,

a candidate for public office, filed suit against a number of towns and cities in Orange County, New York alleging that the ordinances regulating political signs were unconstitutional. The court analyzed several challenged sign ordinances for the respective towns and cities. One ordinance provided that all temporary signs, including those conveying a political message, must receive a permit before posting and must pay a permit fee.[87] The court concluded that the permit requirements were "a reasonable time, manner and place restriction narrowly tailored to support Greenwood Lake's significant government interests in aesthetics and public safety."[88] However, the court found that the city did not provide sufficient safeguards to ensure a permit determination was made expeditiously, thus rendering the entire sign ordinance unconstitutional.[89] The court concluded that the permit fee was a reasonable content-neutral restriction on speech narrowly tailored to further a significant government interest.[90]

Another ordinance analyzed in the same court opinion imposed permit requirements on all temporary political signs, but did not require permit requirements on other temporary signs.[91] The court struck down this ordinance as unconstitutional. Similarly, a third ordinance uniformly required permits and fees for all signs; however, a few categories of signs were exempt from the fees and application requirements.[92] Political signs were not one of the categories which were exempt and the court concluded the ordinance was unconstitutional.[93]

The Third Circuit recently upheld an ordinance exempting all temporary signs posted in a historic district from obtaining a permit and paying a fee prior to posting the sign.[94] The Third Circuit also upheld another provision in the ordinance requiring that all permanent signs, regardless of their nature, obtain a permit.

The Ninth Circuit also upheld exemptions of certain signs from a permit requirement, one of which was an exception for temporary signs in residential zones for signs 90 days prior to an election and an exemption for temporary signs prior to the sale, lease or rental of property.[95] The Ninth Circuit acknowledged that the city clearly anticipated that the signs would relate to the triggering event (*i.e.*, an election or the sale of a house), but did not mandate that the temporary signs comply with content restrictions and revealed the extent to which the city was willing to go to avoid content-based restrictions on expression. The Ninth Circuit termed the exemptions event-based regulations and found them constitutional. Most recently, the Ninth Circuit found that the distinction between different types of noncommercial speech, such as ideological, political and temporary directional signs, was content-neutral because it did not require consideration of the content of the sign.[96] In other words, if all political signs were treated the same way based on objective criteria for the category of signs, with no distinction made based on the specific political message, the regulation is content-neutral. Such an analysis seems more typical of a determination of viewpoint neutrality rather than content neutrality, but appears to be the approach the Ninth Circuit is now taking when evaluating exceptions in sign codes for noncommercial signs.[97] (The Ninth Circuit appears to be departing from its earlier approach where it explained that such distinctions were not allowable. A key element of the Ninth Circuit's most recent ruling that may account for its more permissive approach is that it found that the city's distinction between noncommercial messages was not based on a preference for some type of noncommercial speech over another, but instead it was employing objective criteria to address the special needs of the different types of noncommercial speech).[98]

As the cases illustrate, careful analysis of the specific facts of each situation and a strong knowledge of the current jurisprudence of political signage is critically important to determining whether a regulation is likely to be upheld against a constitutional challenge. Cities should be aware that courts evaluate the totality of sign regulations when doing their First Amendment analysis, and regulations for political signage will need to be considered within the overall regulatory framework.

V. CONCLUSION

A city may regulate signs on public property and private property. The constitutionality of these regulations will be based on many fact-specific inquires such as the classification of the forum as a public, non-public, designated public or limited public forum. Compliance with First Amendment requirements will also depend on whether the signs being regulated are commercial in nature, triggering the *Central Hudson* standard of review. If instead, the signs being regulated are noncommercial in nature, such as political signage, the time, place and manner doctrine is applied for signs on private and public forum property. Sign regulation is a dynamic and ever-developing area of law that requires cities to be vigilant as to the details and particulars of their regulations and jurisdictions.

Notes

1. Lovell v. Griffin, 303 U.S. 444, 450 (1938).
2. International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992); *see also* PMG Int'l Div., L.L.C. v. Rumsfeld, 303 F.3d 1163 (9th Cir. 2002); Sammartano v. First Judicial Dist. Court, 303 F.3d 959 (9th Cir. 2002); Hopper v. City of Pasco, 241 F.3d 1067, 1076 (9th Cir.2001).
3. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985).
4. Foti v. City of Menlo Park, 146 F.3d 629, 637 (9th Cir. 1998); Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).
5. *Cornelius,* 473 U.S. at 799-800.
6. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).
7. *See Cornelius,* 473 U.S. at 800, 803; *Perry*, 460 U.S. at 45-46.
8. Widmar v. Vincent, 454 U.S. 263, 267 (1981); Madison Joint School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174 (1976); Southeastern Promotions, Ltd v. Conrad, 420 U.S. 546, 555 (1975); *Hopper*, 241 F.3d at 1075-6.
9. Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1049 (9th Cir. 2003).
10. Faith Center Church v. Glover, 480 F.3d 891, 908 (9th Cir. 2007); Good News Club v. Milford Center School, 553 U.S. 98, 102, 106 (2001); Arizona Life Coalition v. Paisley, 515 F.3d 956, 969 (9th Cir. 2008).

Continued on page 30

A Day In The Life



Harriet Steiner, Best Best & Krieger

There are, obviously, pros and cons to the cities with contract city attorneys versus in-house attorneys. I think that one of the pros is our ability to provide services as needed–some months the city has more legal issues or projects than other months, and we have the flexibility to provide services as needs arise and on a timely basis.

ML: Harriet, tell us where your career path began.
After college at the State University of New York (SUNY) Binghamton, I obtained a master's degree in library science from SUNY at Albany and began working as a librarian in a town outside of New York City. While I enjoyed library work, I wanted a career that could have more immediate impact. After working on a program in which lawyers came to the library and gave talks, and talking to several attorneys, I decided that being a lawyer sounded like something I would enjoy (and maybe be good at). I picked up, moved to California and entered McGeorge School of Law in Sacramento.

ML: From town librarian in New York to California law student, in three sentences. You make it sound easy. How did your connection with municipal law come about?
The same day I started McGeorge School of Law's evening program, I was hired by the local law firm of McDonough Holland and Allen as its librarian. Shortly after, I became the legal assistant for the public agency lawyers at the firm. I started working on city projects – both litigation and non-litigation matters. I loved both the legal work and my association with city officials and employees. When I graduated law school, I was lucky to be able to continue to work for the firm and with these clients--which included cities and other public agencies. As soon as I passed the bar, I took over as the city attorney of Lincoln, California, a client I had worked with previously. Working with Lincoln and with the other public agencies provided wonderful "on the job" training. I joined Best Best & Krieger in 2010.

ML: So you've stayed *in* the private sector while working *with* the public sector. How would you compare your effectiveness as a municicplal attorney being in a private firm to serving full-time as an in-house municipal lawyer?
One of the advantages to my affiliation with BB&K is the ability to work for more than one agency at a time and see how different agencies address similar situations. The variety of experiences helps me provide sound advice to different cities with different goals. In addition, the variety helps keep me on top of trending issues that may affect my city clients. Working in a private firm also allows me to both provide general counsel advice and have time to specialize in areas that I find challenging and interesting, such as telecommunications, public finance and land use.

As to disadvantages – depending on the city client, I am often not brought in early enough on new projects and plans, which limits my ability to prevent and address issues at the earliest stage possible. I have not worked as an in-house city attorney, but I know many and I think that the in-house attorneys may have a closer relationship to staff and be more attuned to the city's internal processes and, possibly, emerging issues at the city.

ML: And what would you say are the ramifications to the municipalities that use outside counsel rather than employ full-time in house attorneys?
There are, obviously, pros and cons to the cities with contract city attorneys versus in-house attorneys. I think that one of the pros is our ability to provide services as needed – some months the city has more legal issues or projects than other months, and we have the flexibility to provide services as needs arise and on a timely basis. In addition, I am able to draw on the expertise of other attorneys in the firm on a moment's notice by walking down the hall or picking up the phone. For example, a while ago, very late in the afternoon, I got a call regarding medical marijuana storage and use from the city's cold weather shelter operator. I was able to reach one of my partners who is known statewide for medical marijuana regulations in California and he provided a knowledgeable answer in time for the nightly check-in at the cold weather shelter.

Similarly, I can provide my expertise to other city attorneys and general counsels at BB&K in areas such as cell tower siting, city taxes and fees, and land use issues and impact fees.

ML: Are you retained on an annual/monthly/hourly basis—how does the "money part" work?
The majority of my public agency clients pay on an hourly fee basis, with different rates depending on the type of legal work required. One of my city clients has an overall monthly retainer for general city attorney work, with hourly rates for specialized work and work that is reimbursed by third parties.

ML: To whom are you accountable within your municipality?
I am accountable to the city council, which hires two people – the city manager and the city attorney. I work closely with the city manager and management staff, but I am independent of the city management and accountable only to the city council.

ML: Clearly there's a lot of flexibility in-

Continued on page 32



Code Enforcement

Chickens and Pigs and Goats, Oh My!

By David Wesner, Corporation Counsel, Danville, Illinois

In my many years of serving Danville, Illinois, I have not had to deal directly with an issue that other municipal lawyers may have already had the pleasure of handling. I am talking about farm animals kept within the municipality. Several years prior to becoming the Danville City Attorney (which goes back almost 20 years), I heard that the then-City Attorney had the luck of dealing with a pet that had run afoul of the neighbors. That pet was a pot-bellied pig. It was a notorious case that brought chuckles to most who remember it (except for the owners who had to move the animal out of town ... although that was never confirmed). What got me thinking about that case was the passage by a nearby municipality of an ordinance allowing backyard chickens. My Mayor indicated that he has had various requests for such a provision, and I recall the issue being brought up a couple of times over the years. He is now looking to look into whether our council desires to address the matter. So, I have begun thinking about the possible issues and the ordinance changes that would need to be made.

The main provision we have in place is in our animal regulation ordinance. The regulation indicates that it is unlawful to maintain any animal which is not a companion animal and which would generally be found on a farm. One would think that the definition of "companion animal" clearly describes the commonly understood meaning of that term, typically a dog or cat. However, my ordinance indicates that it is any animal commonly considered to be—or to be used as–a pet, and includes dogs, cats and horses. That definition would suggest that as long as I intend on a pot-belly pig being my pet, I should be able to keep it. I decided to check our zoning code to see if it contained any provisions that might relate to the keeping farm animals in a residential area.

I was surprised by what I found. My zoning code indicates that general agriculture is allowed in a single-family low density and single-family medium density zoning district. When I looked at what may be encompassed by "general agriculture," I found that agriculture is related to uses consistent with growing of farm or garden crops and animal or poultry husbandry. The zoning code provides that commercial livestock and poultry facilities can only be located in an industrial zoning district. But, this limitation would not apply to personal use of these types of animals. So, again, the zoning code would suggest that keeping certain animals in a residential area may be allowed. Thankfully, I have not had yet anyone question or push this issue.

In addition to the ordinances described above, I found a couple of others that would control certain aspects of keeping animals on a residential property. Our animal regulation ordinance prohibits the keeping of a "public nuisance" animal. A public nuisance animal is any animal that unreasonably annoys humans, endangers health, or substantially interferes with the rights of other citizens or the enjoyment of life or liberty. It includes animals that make disturbing noises. Admittedly, I have never lived on a farm or kept chickens. But my sense is that neighbors are likely to complain about the activity, noise and smell that comes with keeping any farm animal, including poultry. Our property maintenance code provides that all exterior property areas shall be maintained in a clean, sanitary and safe condition. Our general nuisance ordinance provides that it is a violation to allow property where animals are kept to become nauseating, foul or offensive. Lastly, our general noise ordinance provides certain examples of what would be considered violations. One section describes that it is a violation for anyone to keep any animal, bird, or fowl which by causing frequent or long continued noise disturbs the comfort or repose of any person in the vicinity. Unfortunately, I have prosecuted ordinance violations for a significant number of years and can easily see how these provisions would be used by residents to harass their neighbors merely for possessing chickens, regardless of whether they are truly a problem. If my municipality moves in the direction of allowing backyard chickens, I am going to have to review these ordinances to determine if any amendments would be needed to avoid neighbors merely harassing other neighbors.

If my municipality does move to allow backyard chickens, I will be tasked with putting together appropriate regulations of that activity. In my quick review of how other municipalities have handled the issue, I have seen regulations governing the number of chickens allowed, the area where pens may be placed, how the pens should be constructed, and, the cleanliness of the area where the chickens and pens are kept. I believe these regulations are reasonable and

Continued on page 32



There Is No "Convenience" Defense to Perjury: Risks and Opportunities Arising From Careless Business Records Certifications

by Pete Haskel, Executive Assistant City Attorney, Dallas, Texas

Lazy Lawyers and Lazy Staff

How many times a day does our local government staff execute affidavits or certificates attesting that government documents are "business records" (records of regularly conducted activity)? How many times a day does our legal office do so – for example in preparing evidentiary exhibits for summary judgment or other motions? The certificates serve several functions – outside of litigation they provide official authentication of government records that our citizens can use for their own purposes. In litigation, the government records custodian's properly executed business record certificate establishes that the exhibit is authentic and that it is not hearsay. These two steps make the record admissible for the truth of the matters stated therein in any proceeding at which the rules of evidence apply (assuming relevance and absent other objections).[1]

How carefully do government staff–non-lawyers who may not even have a high school diploma–consider the accuracy of our certifications? How carefully do our legal assistants and lawyers?

Probably not carefully enough. However, we probably are more careful than our litigation adversaries – which we can use to our advantage.

Careless or unthinking certifications can render our clients and our offices subject to potential attacks (and worse) for making false official statements, false swearing, and related (sometimes-criminal) conduct, and jeopardize the admissibility in evidence of documents that we certify. Careless certifications by adverse parties can furnish a fruitful subject for deposition, for impeachment if the certifying custodian ever testifies, and for evidentiary objections.

The enumerated established hearsay exceptions such as the one for business records are supposedly justified on grounds of "convenience and necessity"[2] and defended based on the notion that long experience provides assurances that evidence within hearsay exceptions are usually reliable.[3] How a blatantly false rumor published 22 years ago in a tabloid rag becomes reliable as an "ancient document" after the passage of 20 years,[4] I will leave to others to prove. But there can be no denying that the established hearsay exceptions are convenient (unless you are objecting to the evidence).

However, but convenience does not justify failure to use due diligence to ensure the accuracy of custodial certifications. I have grown tired of arguing this point – which to me is self-evident–with lawyers for non-government parties who want city clerks to certify document to facilitate their use in evidence regardless of any other considerations.

How the Business Records Exception Should Work

The details of the business records exception vary among jurisdictions, but most if not all include the two elements that I consider most likely to be abused: Certification that (i) the content of the certified document came from a person "with knowledge" of the information and (ii) making "the record" was in the ordinary course of the business of the organization whose custodian attests to the record. Subdivisions (A) and (C) of Federal Rule of Evidence 803(6) include both of these elements:

Rule 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Typical Abuses of the Business Records Exception

So, when can a city clerk validly certify, for example, that a license application's recital of a business' gross sales, net worth, or corporate directors' names is furnished by a "person with knowledge"? One could argue that furnishing the application under oath should suffice. But how does the fact that the application is under oath prove to the certifying custodian that the applicant had "knowledge" of the facts in the appli-

Continued on page 33



PRACTICE TIPS

Construction Contracts-A Checklist for Getting the Basics Right

By Miles Risley, City Attorney for the City of Wichita Falls, Texas.

We sometimes overthink what our boss or client wants. As a young attorney, the first time I was handed a construction contract to review for a municipality, I attacked the task with enthusiasm. I spent days looking at every detail and nuance of the document. I dug through every part of the 400 pages that were incorporated into the contract. I analyzed the plans, the drawings, the specifications, the likelihood of success under the liquidated damages clause, potential ambiguities, and sundry other contractual elements.

When I brought the various issues to the attention of my boss at the time, a wizened City Attorney with many years of experience, she informed me that she merely wanted me to ensure they signed it correctly and included their bonds and insurance.

Her experience taught her that, despite the time we attorneys put into drafting and reviewing contracts, they are often not executed properly prior to beginning the work.

At the time, I would have been greatly assisted by a simple construction contract checklist. I eventually found a good list in a legal guide for municipal clerks and have gradually added more details to best suit my department's purposes.

Such a checklist is a powerful tool for reducing the time we spend reviewing each contract and ensuring that all departments contribute to the process. Here is a contract checklist modified for use outside of a single state:

1. The contract is signed by the contractor.

2. The numerical figure representing the amount of the contract agrees with:

- the resolution authorizing the contract,
- the amount described in words, and
- the remainder of the bid documents.

3. All blanks are filled in, except for the signatures of the City Manager or Mayor (as authorized by resolution), City Clerk-Secretary (attestation), and City Attorney (form only).

4. The contract (sometimes called a "Form of Agreement") includes all necessary ancillary contract documents. Construction contract documents will commonly include:

- Form of Agreement;
- General Conditions;
- Special Conditions;
- Technical Specifications;
- Standard Specifications;
- Completed Bid Forms;
- Completed Bid Sheet;
- Resolution Authorizing Corporate Contractor to Execute Contract;
- Federally Required Documents;
- Copy of Notice for Bids;
- Instructions to Bidders;
- Certificate of Insurance;
- Prevailing Wage Rates (if required);
- Performance Bond (if required);
- Payment Bond (if required);
- Drawings (often separate).

5. The full legal name of the contracting entity is shown in the contract. Following the legal name, the entity type and state of organization should be specified.

Examples:

- Billy Bob Thornton d/b/a Thornton Contracting;
- Able Contracting, LLC, a Texas limited liability company d/b/a Able Construction;
- Boll Construction, Inc., a Delaware corporation d/b/a Boll Constructors;
- Brown, LP., a Utah limited partnership;
- Bonanza Dirtworks, a Nevada limited liability partnership

6. The contractor's name on the contract matches the contractor's name on the bidand on the City Council action awarding the bid and authorizing the contract.

7. The corporate name on the contract matches the corporate name on file with the Secretary of State for the state in which company is organized.

8. If the contract was not approved by resolution of the governing body, why was it not necessary to be approved by resolution?

9. The project description on the contract corresponds to the resolution/minutes of the City Council action awarding the bid and authorizing the contract.

10. If the Contractor is not a corporation, the person who signed the bid is the same person who signed the contract.

11. If the Contractor is a corporation, limited partnership, limited liability company, the corporation name is exactly the same in all places it is listed.

12. An authorized officer with the company, such as the President or Vice-President, signed the contract. Some contract document forms will contain a copy of a resolution for the Board of Directors of the contractor's corporate entity to execute.

13. The signature page of the contract and the bonds contains the corporate seal of the company. A seal is not necessary for contract enforceability, but it is evidence of authenticity of the corporation's agreement In some states, a seal extends the time for bringing suit on the contract. If the corporate seal is absent, an explanation should be provided as to why is it absent.

Continued on page 38



Probable Cause: More Than a Hunch

By Erich Eiselt, Assistant General Counsel and Editor

In August 2008, the California Highway Patrol (CHP) in Mendocino received a call from the CHP in neighboring Humboldt County, relaying a tip from a 911 caller who stated that she had been run off Highway 1 by a southbound Silver Ford 150 pickup only five minutes earlier. The caller provided the offending vehicle's license plate and its milepost location.

Approximately 20 minutes later, a CHP officer spied the pickup, followed it briefly and pulled it over. Another squad car soon arrived. Neither officer had witnessed the truck weaving or otherwise being operated in an unusual fashion. As the officers approached the vehicle, they smelled marijuana. A subsequent search of the truck bed uncovered 30 pounds of the contraband. The pickup's driver and passenger were arrested.

Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officers lacked reasonable suspicion of criminal activity. The magistrate who presided over the suppression hearing disagreed, as did the California Superior Court. Petitioners pleaded guilty to transporting marijuana and were sentenced to 90 days in jail plus three years of probation. The California Court of Appeal affirmed and the California Supreme Court denied review.

The Supreme Court granted certiorari, heard the case in January and issued its opinion on April 22, 2014.

The majority opinion, written by Justice Thomas and joined by Justices Roberts, Kennedy, Alito and Breyer, affirmed the lower courts, confirming that the Fourth Amendment permits a traffic stop when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States* v. *Cortez*, 449 U.S. 411,417-418 (1981); see also *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968). Although a mere "hunch" does not create reasonable suspicion, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989).

The Court held that these principles "apply with full force to investigative stops based on information from anonymous tips." Reasonable cause for an investigative stop need not be based solely on an officer's personal observation; while anonymous tips *alone* seldom demonstrate an informant's veracity, under appropriate circumstances, an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." *Alabama v. White*, 426 U.S. 325, at 327.

The scenario in *White* was instructive. There, an anonymous tipster had informed police that a woman would transport cocaine at a particular time from a particular apartment building to a particular motel via a brown Plymouth station wagon with a broken right tail light. Officers observing the scene confirmed the station wagon's details and then stopped it as it neared the motel, finding cocaine in the vehicle. The officers' corroboration of certain details about the car "made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity." By accurately predicting future behavior, the tipster demonstrated "a special familiarity with respondent's affairs," which in turn implied that the tipster had "access to reliable information about that individual's illegal activities." 426 U.S. 325, at 332.

In this case, the anonymous call about the pickup truck "bore adequate indicia of reliability" to justify the officers' action. The caller provided a specific license plate number, a specific vehicle model, make and color–and the tip was phoned in minutes after the incident.

The Court acknowledged that *White* was a "close case," because mere knowledge of a person's future actions does not confer knowledge that the person is carrying contraband. Here, the caller's claim that another vehicle ran her off the road, however, "necessarily implies that the informant knows the other car was driven dangerously."

The majority found additional reason for credibility due to the caller's use of the 911 system, which allows capture of data about the caller and would presumably discourage fraudulent reports.

Under *Terry* standards, even a reliable tip justifies an investigative stop only if it creates reasonable suspicion that "criminal activity may be afoot." 392 U.S. at 30. The majority concluded that the behavior alleged by the 911 informant, "viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion" of drunk driving—a criminal offense.

> The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: run-

Continued on page 36



Casting Off Fetters

by Kelly Addy, Civil Deputy City Attorney, Billings, Montana

I heard an article on NPR a few months ago (Morning Edition, March 21, 2014, with Scott Greene) that intrigued me for some reason. I couldn't put a finger on it. The program reminded me of someone, but I couldn't remember who.

It was about scientific journal articles and how the authors' names are increasingly Asian and African and Latin American. The question asked was what effect this increased diversity of scientific studies was having on the quality of the science.

It turns out that the more highly scientists themselves gauged the quality of an article the more often it was cited in other articles. This made sense to me, as a practicing attorney.

We know this, too, as front line legal practitioners. Consider these case names: *Marbury v. Madison. Brown v. Board of Education. Gideon v. Wainwright.*

These are big examples, but think of the number of times these cases have been cited over the years. It gives us a sense of the importance of the case and the validity, over time, of the result.

The people looking at these scientific papers were using 'big data' techniques to complete their study. They looked at 1.5 million papers written between 1985 and 2008 to see what they might find.

The result shouldn't have been as surprising as it was, I suppose. Like wheels on luggage, once you see it you wonder why you ever did it any other way.

Scientists who wrote papers with members of their own ethnic and cultural group were cited less often than if they wrote with a more diverse group of people and, so to speak, paint with a broader brush.

It wasn't just the fact that the contributors were from China or Africa, either. The touchstone was diversity. Chinese papers and African papers are simply not cited as often as papers that had both Chinese and African authors. It's the mix that adds the spice.

As Richard Freeman, an economist at Harvard University put it, 'You tend to do better if you stretch.' The diversity of the contributors increases quality of the results.

I can't say it better than Freeman did: 'Ethnic diversity is an indication of ideas' diversity. People who are more alike are likely to think more alike and one of the things that gives a kick to science is that you get people with somewhat different views.'

This didn't bother me, but it intrigued me. There was something more in that story than scientific papers and how often they are cited.

It took a few days of pondering for the light to come on. As usual, the pieces of the puzzle came together for me one morning in the shower, when I wasn't thinking of it at all. This same diversity of ideas is a great strength of the IMLA ListServ.

It's not all the attorneys in the Billings City Attorney's office looking at the problem (but they have pulled my bacon out of the fire a few times), or even all the Texas municipal attorneys, although with a larger group, I would expect a better result (and I don't think I would be disappointed either).

What we have here is a success to communicate. It's because you have never been to Billings that you can see the things I am blind to. It's because you haven't been reading our local paper that you hear things that I am tone deaf to.

I am not limited in my thinking by the same things that limit you. You are not limited by the things that limit me. And the worst thing about our self-limitations is that we don't see them.

It is together that we throw off those chains. Because of the freedom with which you have shared your ideas with me you have given me the freedom to share.

It might be right. It might be wrong. But until I can see the problem from many points of view, I can only deal with part of the problem.

It's not about me, or you, or anybody else. It's about the law, and that, my friends, is about all of us. **M.**

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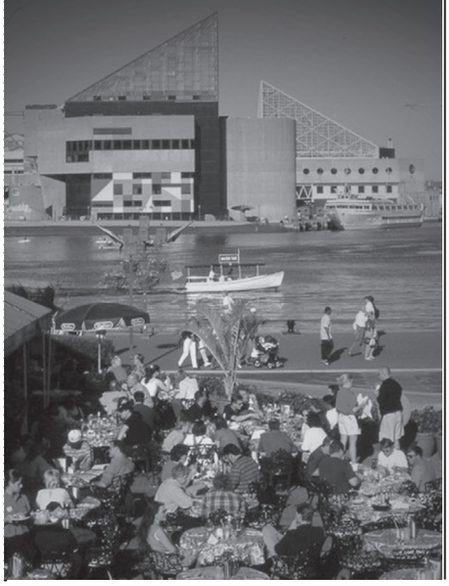






IMLA GOES











TO ALASKA











ORDINANCES

Vapers' Hopes Go Up in Smoke?

by Erich R. Eiselt, Assistant General Counsel and Editor

As the summer of 2014 begins, proponents of medical marijuana, same-sex marriage, legislative prayer and concealed gun carry can justifiably point to momentum for their causes across the country. In contrast, cigarette smokers see only smoldering prospects.

They continue to lose ground, in jurisdictions large and small. In March, Hackensack, New Jersey joined a nationwide plurality, passing an ordinance prohibiting smoking (1) inside any municipal building; (2) anywhere within 35 feet of a municipal building entrance; or (3) in any public park or recreational facility owned or operated by the city. Violators of the smoke-free ordinance face stiff penalties: a $250 fine for the first offense, $500 for the second, and a punitive $1,000 for each additional infraction. According to the Global Advisory for Smokefree Policy (GASP), Hackensack joins 23 other municipalities in Bergen County with similar bans, reflecting the efforts (and funding) from the New Jersey Department of Health Office of Cancer Control and Prevention.

Hackensack is a relative newcomer to the anti-smoking party. More than 25 states and hundreds of municipalities have already passed laws prohibiting cigarette and cigar smoking in public places. But the recent Hackensack ordinance included a notable enhancement, now beginning to appear among the panoply of anti-smoking laws nationwide: it added a ban on electronic cigarettes.

Roughly the size of a traditional cigarette, the e-cig is a battery-powered cylinder that heats a mixture of liquid nicotine, propylene glycol, glycerine and flavorings. In lieu of smoke, e-cigarettes release only water vapor--hence the innocuous and sociable verb "vaping" has emerged to describe their use. As opposed to a price of $8.00 or more per pack of traditional smokes, an e-cigarette nicotine cartridge which can last roughly as long as twenty cigarettes costs only about $2.00. Allegedly, they do not produce tar or other cancer-causing toxins, delivering instead mere nicotine and flavors. They are thus purported to be a virtually harmless alternative to true tobacco, both for vapers and those in their vicinity. And for the millions of tobacco-addicted among us, they are presented as an effective means to kick the smoking habit, once and for all.

Thus far, those distinctions have allowed e-cigarettes to skirt the reach of many anti-smoking laws. As a non-tobacco product, the e-cig routinely gains entry to venues where traditional tobacco would be ostracized. And e-cigs can be marketed indiscriminately across a vast matrix of outdoor, print, cable, internet and social media-powered advertising. Sometimes they employ subtle messaging and symbology far more youth-oriented than the discredited Joe Camel ever was.

But now the prospect of a sleepy and lenient public response to e-cig makers and their vaping acolytes seems narrower than a Virginia Slim. Indeed, on April 22, 2014, the United States Food and Drug Administration announced that it intends to pass an array of regulations covering e-cigarettes. In the future, electronic cigarette manufacturers will have to produce exhaustive "New Tobacco Product Applications." And the sale of e-gig's to anyone under eighteen years of age will be prohibited.

These are moves certain to incite massive lobbying efforts from the faux tobacco industry and their anti-government allies. That assault is already underway. One free market publication recently warned, "If these regulations go into force — and that may take years — the likely outcome is a severe reduction in consumer choice, and thus fewer smokers quitting and more dying needlessly."[1] The article then revealed the effects which industry pressure has already had on the proposed FDA reg's and the constitutional ballistics which regulators will no doubt confront:

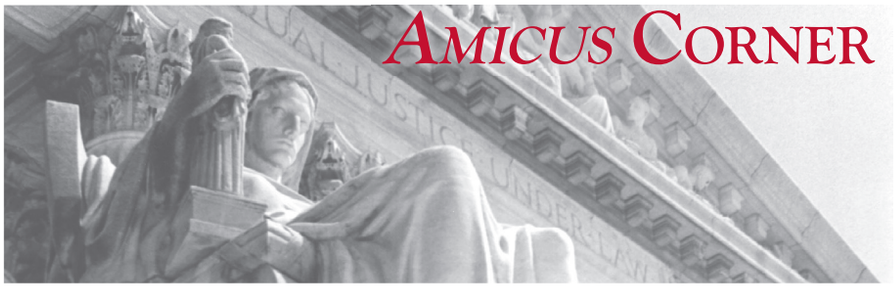
> On a more positive note, the FDA did manage to ignore the hysterics from some politicians about nicotine poisoning and child-friendly flavors ostensibly seducing young people into a lifetime of nicotine addiction and smoking. Nor did the FDA address advertising or Internet sales: both hot-button issues would have clearly approached or transgressed constitutional dicta and spurred litigation, delaying implementation for years.[2]

Obviously the federal e-cig initiative will be delayed and declawed. But localities are not waiting for Washington's K street carnival to conclude. Like Hackensack and its recent stepped-up ordinance, major cities including New York, Los Angeles and Chicago are moving rapidly. Concerned about the unsubstantiated health attributes of e-cig's, the unknown effects of second-hand faux-smoke, and the unstoppable adolescent attraction to flavored fumes and colorful high tech gadgetry, local lawmakers are increasingly construing "vaping" as just another species of smoking.

For example, last December, amidst what some would revile as a final surge in Mayor Michael Bloomberg's "Nanny State" agenda, the New York City council voted 43-8 to ban e-cig's in public. New York City's "Tobacco Product Regulation Act" (Act)[3] became effective on March 19, 2014. The Act specifically includes electronic cigarettes:

§ 17-719. Definitions:

Continued on page 34



Amicus Corner

By Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

IMLA's amicus activity continues at a rapid pace. Below are some of the cases where IMLA is involved:

Comptroller of Maryland v. Wynne, Case No. 14-485 (petition-stage *amicus* brief filed on November 18, 2013, certiorari granted on May 27, 2014). A Maryland resident is challenging the state's tax scheme which allows a full credit against Maryland state income taxes for taxes paid out of state but does not allow such a credit against Maryland county taxes. The Maryland Court of Appeals found for the taxpayer, in essence construing the dormant Commerce Clause to require that each state give a full income tax credit to local residents for income taxes paid out of state. IMLA, in an amicus brief joined by the United States Conference of Mayors, the National Association of Counties and others, promotes the fundamental right of a state to tax its residents on all income, wherever received, and argues that the dormant Commerce Clause does not require dismantling every taxing scheme—whether state or local—which does not grant a full credit for all income taxes paid elsewhere. The United States Solicitor General requested that the Court review the Wynne case.

The IMLA amicus brief was written by IMLA Assistant General Counsel Erich Eiselt as Counsel of Record; Chuck Thompson, Amanda Kellar and Tagg Hutchinson of IMLA all contributed significantly to the brief.

The date for oral argument has not been set.

City and County of San Francisco v. Sheehan, Case No. 13-1412 (petition-stage *amicus* brief filed on June 26, 2014). This case presents two substantial questions of federal law that bear on police officers' authority and discretion in responding to dangerous individuals who are mentally ill: specifically, the extent to which the mental illness of a dangerous person constrains police officers' (1) discretion regarding the tactics or methods they may use to bring the person into custody, by making those tactics or methods subject to "reasonable accommodations" analysis under the Americans with Disabilities Act (ADA); and (2) authority to make a Fourth Amendment search. For purposes of qualified immunity, the collateral question is whether those limitations were "clearly established" at the time of the arrest.

Two San Francisco police officers were called to take the Respondent into custody for an involuntary mental evaluation after she had menaced a social worker with a knife. When the officers opened the door to the Respondent's residence she threatened to kill them, brandishing a knife. They closed her door and called for backup. However, they then re-entered her residence before reinforcements arrived to effectuate the arrest and prevent her from harming herself or others. Respondent rushed them with the knife. The officers tried to use pepper spray to stop her; when that didn't work, they shot her several times. She survived and sued under 42 U.S.C. § 1983 and the ADA.

The Ninth Circuit held that the first entry was lawful (under the warrantless search exemption to render emergency assistance or respond to exigent circumstances), as was the officers' ultimate use of deadly force under the circumstances. However, the Circuit Court reversed the district court and held that the officers' second entry into the Respondent's residence was unlawful under both the Fourth Amendment and ADA. The court held that under the Fourth Amendment, it was unreasonable to make an otherwise lawful second entry when the officers could have desisted from their efforts to arrest Sheehan in light of her resistance and mental illness, and could have used different tactics that might have resulted in a different outcome.

Regarding her claim under the ADA, the Ninth Circuit held that the "reasonable accommodation" requirement of Title II of the ADA applies to officers' conduct in the course of an arrest – including the arrest of a violent individual like the Respondent. The court further held that the issue of the reasonableness of the accommodations proposed after this incident by the Respondent's litigation expert (i.e., that the officers should have allowed her to remain in her "comfort zone" until they were able to calm her down), was one for the jury.

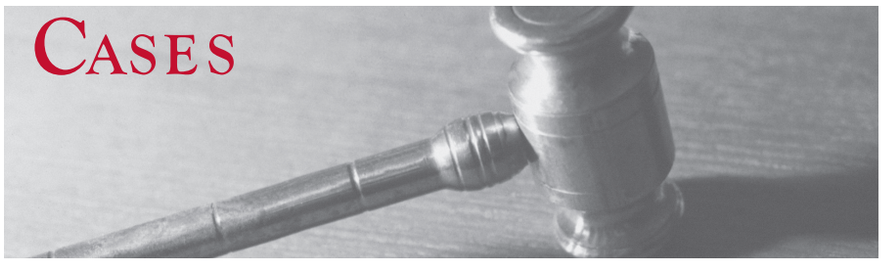
These issues have significant implications for local governments. Not only would the Ninth Circuit's holding create added liability for municipalities, but it would also invalidate many state laws that specifically do not require police officers to retreat in their efforts to arrest an individual by reason of resistance or threatened resistance of the arrestee. Additionally, the decision undercuts police officers' ability to make split-second decisions under dangerous circumstances.

Sarah Shalf and the Emory Law School Supreme Court Advocacy Program wrote the petition-stage brief supporting the position of the City and County of San Francisco. IMLA's brief was joined by the National Sheriff's Association and the Major County Sheriff's Association.

Koopman v. Myers, Case No. 13-1143 (petition-stage *amicus* brief filed on April 21, 2014). This case implicates important questions for law enforcement and municipalities regarding whether a claim for malicious prosecution may be brought as a Fourth Amendment violation under 42 U.S.C. § 1983.

Continued on page 34

Cases



by IMLA Editorial Staff

Boston Police Department's Hair-Based Drug Testing Is Challenged on Racial Lines

Where a hair-based test for cocaine use produced anomalous results along racial lines, such that black police officers tested positive at rates far in excess of normal standard deviations, the First Circuit has reversed a lower court decision, finding that the officers had made a prima facie case of disparate impact under Title VII.

In 1999 the Boston Police Department began subjecting officers and candidates with conditional offers of employment to drug tests, using hair samples. Two exculpatory safeguards were in place for individuals testing positive: 1) an independent, licensed physician would check to see if the individual had been given "cocaine hydrochloride" in a recent medical procedure; and 2) the individual could elect to have a second test done of a different hair sample. If neither exculpatory path exonerated the individual, he or she was terminated unless agreeing to undergo rehabilitation and treatment, as well as an unpaid 45-day suspension. Moreover, before termination every individual was provided written notice of the reason, followed by an evidentiary hearing (if he or she elected to have one), and then an optional post-termination appeal to the Massachusetts Civil Service Commission.

More black officers than whites tested positive, despite the fact that that white officers outnumbered black officers on the Boston police. Ten black officers challenged the hair-testing program, alleging that it caused a disparate impact on the basis of race in violation of Title VII. All plaintiffs denied that they used cocaine and that instead the results were false positives, evidenced by statistical analysis. The District Court granted summary judgment to the Police Department on the Title VII claim.

HELD: The First Circuit reversed the District Court, finding that no genuine issue of material fact precluded the plaintiffs from making a prima facie case for disparate impact.

DISCUSSION: Title VII prohibits employers from utilizing "employment practices that cause[] a disparate impact on the basis of race" unless those practices are justified by business necessity. Plaintiffs in such cases must first identify the employment practice and then show that it causes a disparate impact on the basis of race, with either direct or indirect evidence. The Supreme Court has recently described this prima facie showing as "essentially a threshold showing of a significant statistical disparity."

Plaintiffs relied on the raw numbers of black officers terminated in comparison to the number of terminated white officers. The Department did not challenge the numbers or that its testing program was an "employment practice" within the meaning of Title VII. In short, plaintiffs demonstrated that the employment practice in question had a statistically significant correlation with race.

Additionally, plaintiffs showed the standard deviation – the amount by which the observed disparity in drug-test outcomes for black and white officers differed from the expected result if the individuals had been given an equal opportunity – evidenced disparate impact as well. The Supreme Court has stated that "[a]s a general rule . . . , if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis [that the outcome in question] was random would be suspect to a social scientist." Here, aggregating the total numbers for all years since 1999, the standard deviation was 7.14. The Court held this evidence allowed it to be "almost certain" that the drug-test outcomes in at least three years and in the aggregate "cannot be attributed to chance alone."

The Department argued that, even if there was a statistically significant skew in the drug-test outcomes, it does not constitute disparate impact unless the racial differential is also "practically significant." The Court acknowledged that "practical significance" does matter, pointing out that the EEOC guidelines on Title VII include a rule defining when disparate impact is taking place – the four-fifths rule, which states that where an employment practice results in a "selection rate" for any racial group less than four-fifths of the "selection rate" for another group, these statistics "will generally be regarded by [f]ederal enforcement agencies as evidence of" disparate impact.

However, even the EEOC has stated that its four-fifths rule should not be decisive. The rule allows anomalous results because, for example, if a police department (like Boston's) with 500 black officers and 1200 white officers fired 90 black officers, under the rule this would not constitute disparate impact because 82% of black officers survived the firing (more than four-fifths of 100%) but "this hypothetical illustration undoubtedly has a very significant and disproportionate effect on black officers." The Court found "any theoretical benefits of inquiring as to practical significance outweighed by the difficulty of doing so in practice in any principled and predictable manner." It concluded that "a plaintiff's failure to demonstrate practical significance cannot preclude that plaintiff from relying on competent evidence of statistical significance to establish a prima facie case of disparate impact."

Jones v. City of Boston, No. 12-2280 (1st Cir. May 7, 2014).

Chicago Requirement That Candidates Collect 12,500 Signatures From City Voters Within 90-Day Window Is Constitutional

Chicago's requirement that candidates for mayor, city treasurer and city clerk must collect a threshold number of signatures within a specific window of time in order to appear on the ballot has been upheld at the Seventh Circuit.

In order to be placed on the ballot, candidates for mayor, city treasurer and city clerk of Chicago must collect 12,500 signatures from "legal voters in the city." Candidates have ninety days to perform the task, and voters may not sign more than one nominating petition for the same office in a single election cycle. Of the twenty-one individuals who submitted nominating petitions in 2011 (not all of which collected 12,500 signatures), four filed suit against the city arguing the signature requirement, the ninety-day window, and the limit against signing more than one nominating petition were unconstitutional. The District Court rejected the argument, holding both Supreme Court and Seventh Circuit precedent proscribed such a claim. The candidates appealed.

HELD: The Seventh Circuit affirmed the District Court. It held that, although burdening candidates to some degree, the scheme furthers the state's interests in avoiding ballot overcrowding and preventing voter confusion while still allowing reasonably diligent candidates to get on the ballot.

DISCUSION: The Supreme Court recognizes that candidate eligibility requirements impact both the constitutional right to associate politically with likeminded voters and for those voters to cast a meaningful vote, but that simultaneously states can enact "reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." There is no hard-and-fast rule to separate valid and invalid regulations; rather courts perform a practical assessment of the justifications and effects of the scheme at issue by considering the "character and magnitude" of a party's asserted First and Fourteenth Amendment injuries by "identify[ing] and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed by its rule[s] . . . [and] consider[ing] the extent to which [the] interests make it necessary to burden the plaintiff's rights."

Plaintiffs argued the 12,500-signature requirement burdened "average 'Joe' and 'Jane'" candidates that cannot afford to assemble a political infrastructure and hire signature collectors, a burden which is "amplified" by the two complementary requirements. Second, they pointed out Chicago's requirement was much more burdensome than the election rules in other big cities. The Court began its assessment by looking at the number of candidates that have achieved the 12,500-signature goal, and, seeing that nine did in 2011, said that "reasonably diligent candidates" were able to meet the requirement. The Court also pointed out that one of the plaintiff's in the case had in fact met the threshold himself. Another element the Court found relevant was that Chicago's mayoral elections are nonpartisan, meaning every candidate has to meet the requirement in the same time frame from the same voter pool, further evidencing the reasonableness of the regulation and its furtherance of the city's legitimate goals of reducing voter confusion and ballot overcrowding. As for the number 12,500, the Court looked to Supreme Court precedent and noted that it had approved a signature requirement mandating candidates collect signatures of 5% of registered voters (Chicago's requirement amounted to 1%).

The Court also found the other requirements of the ballot rules—timeframe and single nominating petition) were acceptable under Supreme Court case law. The ninety day window was a full forty days longer than the shortest period the Supreme Court had approved – in that case candidates had to collect 22,000 signatures–almost twice as many signatures in nearly half the time. And the rule that voters only sign one nominating petition did not concern the Court given that there were no other restrictions on voters. (The one time the Seventh Circuit had found such a restriction unreasonable was when only independent candidates were subject to the rule, each had to collect signatures from 10% of the voting population ninety days before the primary, and the signatories could not vote in the primary election).

Overall, the scheme was deemed reasonable and non-discriminatory, and a legitimate means to serve the important government interests of preventing voter confusion and reducing ballot overcrowding.

Stone v. Board of Election Commissioners for the City of Chicago, No. 10-cv-7727 (7th Cir. Apr. 25, 2014).

No "Reasonable Suspicion" for Vehicle Stop Based Solely On Automated License Plate Identification

A police officer who did not confirm the accuracy of an automated license plate identification before pulling an allegedly stolen vehicle over and publicly arresting the driver was not entitled to summary judgment on the plaintiff's section 1983 claim, according to the Ninth Circuit.

Denise Green's 1992 Lexus was stopped by the San Francisco Police Department (SFPD) when its Automatic License Plate Reader (ALPR) mistakenly identified her car as having been stolen. Based on the incorrect description, and without personally confirming Green's license plate, Sergeant Ja Han Kim of the SFPD made a "high-risk" stop at 11:15 pm during which Green, a 47-year old African American, was surrounded at gunpoint, handcuffed, forced to her knees, and detained for twenty minutes. She was released only after officers ran her actual plate number and verified that the Lexus was not stolen.

Sergeant Kim knew from police radio transmissions that the plate number had been matched to a gray GMC truck, while the ALPR photo captured a dark Lexus. Kim did he not visually confirm her license plate number, even though nothing obscured his view as he trailed the Lexus. Nor did he verify the plate number with his dispatcher. He admitted that if he had read the plate, he would not have had reasonable suspicion to make the stop.

Green sued Kim, the City and County of San Francisco and SFPD, alleging Fourth Amendment violations for unreasonable search, seizure and use of force, violation of California laws, intentional infliction of emotional distress, assault and negligence. Defendants moved for summary judgment, arguing that Kim merely subjected Green to an investigatory detention and not an arrest, that he had reasonable suspicion to stop her vehicle, and that the force used was reasonable in the context of a lawful investigatory stop.

The District Court for the Northern District of California granted Defendants' motion for summary judgment. It held that Sergeant Kim reasonably assumed a fellow officer communicating the ALPR data had visually confirmed Green's plate, because the officer did not expressly state otherwise. The court concluded that Kim's belief that the plates had been matched to the ALPR

Continued on page 37

Sign Regulations *Cont'd from page 17*

11. *Id.*, *Perry*, 460 U.S. at 46; United States v. Kokinda, 497 U.S. 720, 725-27 (1990); DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 (9th Cir. 1999); Riel v. City of Bradford, 485 F.3d 736, 753-54 (3d Cir. 2007).
12. *Perry*, 460 U.S. at 46.
13. *Hopper*, 241 F.3d at 1074, 1075; United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998).
14. *Hopper,* 241 F.3d at 1076.
15. *Id.* at 1076-78; *Cornelius*, 473 U.S. at 804-05; *See also Perry*, 460 U.S. at 47; Lehman v. Shaker Heights, 418 U.S. 298, 302-04 (1974); Children of the Rosary v. City of Phoenix, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).
16. *Id.*, *Hills*, 329 F.3d at 1049.
17. *Lehman*, 418 U.S. at 303, 305.
18. *Children of the Rosary*, 154 F.3d at 976; Seattle Mideast Awareness Campaign v. King County, 771 F.Supp.2d 1266 (W.D. Wash. 2011); Christ's Bride Ministries v. SEPTA, 148 F.3d 242 *(3d Cir. 1998*).
19. *Children of the Rosary*, 154 F.3d at 976-80.
20. *Lehman*, 418 U.S. at 304.
21. *Christ's Bride Ministries*, 148 F.3d at 250-55.
22. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981).
23. National Advertising Co. v. Orange, 861 F.2d 246, 248 (9th Cir. 1988). (1980).
24. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).
25. *Metromedia, Inc.*, 453 U.S. at 505.
26. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 562-63.
27. Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).
28. *Central Hudson*, 447 U.S. at 563-66.
29. *See* Prime Media, Inc. v. City of Brentwood, 398 F.3d 814 (6th Cir. 2005).
30. *Metromedia,* 453 U.S. at 507-510.
31. Outdoor Graphics v. City of Burlington, 103 F.3d 690 (8th Cir. 1996).
32. *Metromedia,* 453 U.S. at 512.
33. *Id.* at 508.
34. *Id.*
35. *Id.* at 513.
36. *Id.* at 515.
37. *Id.* at 515-16.
38. *Id.* at 507-08, 510; Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984); Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27 (2008).
39. Vanguard Outdoor, LLC v. City of Los Angeles, 648 F.3d 737, 744 (9th Cir. 2011); *see* RTM Media v. City of Houston, 584 F.3d 220 (5th Cir. 2009).
40. Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 911-12 (9th Cir. 2009).
41. World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676 (9th Cir. 2010); *Vanguard Outdoor*, 648 F.3d at 744.
42. *World Wide Rush*, 606 F.3d at 681-82.
43. *RTM*, 584 F.3d at 227-28.
44. Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 106-107, 110 (2d Cir. 2010).
45. Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 904-905 (9th Cir. 2007).
46. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995).
47. *See* Kovacs v. Cooper, 336 U.S. 77 (1949); *see also* Ward v. Rock Against Racism,491 U.S. 781 (1989).
48. *See generally* Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981); Members of City Council of Los Angeles, 466 U.S. at 806; City of Ladue v. Gilleo, 512 U.S. 43 (1994).
49. *Members of City Council of Los Angeles*, 466 U.S. at 806.
50. Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992).
51. *City of Ladue,* 512 U.S. 43 (1994).
52. *Id.* at 45.
53. *Id.*
54. *Id.* at 45-46.
55. *Id.* at 46.
56. *Id.* at 54-57.
57. *Id.* at 58.
58. *Id.*
59. *See Id.* at 56-58.
60. *See Metromedia,* 453 U.S. at 502.
61. *See Id.*
62. *Members of the City Council of Los Angeles,* 466 U.S. 789 (1984).
63. *Id.* at 817.
64. *Id.* at 792-93.
65. *Id.* at 813.
66. *Id.* at 805.
67. *Id.* at 814. *See* United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981).
68. *See e.g.,* Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995); Knoeffler v. Town of Mamakating, 87 F. Supp.2d 322 (S.D.N.Y. 2000); Curry v. Prince George's County, 33 F. Supp.2d 447 (D.Md. 1999); Dimas v. City of Warren, 939 F. Supp. 554 (E.D. Mich. 1996); Antioch v. Candidates' Outdoor Graphic Service, 557 F.Supp. 52 (N.D.Cal. 1982); Orazio v. North Hempstead, 426 F. Supp. 1144 (E.D.N.Y. 1977); City of Painesville Bldg. Dep't v. Dworken & Bernstein Co., L.P.A., 733 N.E.2d 1152 (2000); Collier v. City of Tacoma, 121 Wn.2d 737 (1993); Lakewood v. Colfax Unlimited Asso., Inc., 634 P.2d 52 (Colo. 1981); Maguire v. American Canyon, 2007 WL 1875974 (N.D.Cal. 2007); Christensen v. Wheaton, 2000 WL 204225 (N.D.Ill. 2000). A handful of courts have upheld durational limits on political signs. *See e.g.*, Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972); Huntington v. Estate of Schwartz, 313 N.Y. S.2d 918 (N.Y. Dist. Ct. 1970).
69. *See Whitton*, 54 F.3d at 1404-09.
70. *Id.*
71. McCormack v. Township of Clinton, 872 F. Supp. 1320, 1323-24 (D.N.J. 1994).
72. *Id.*
73. *Collier*, 854 P.2d at 1057.
74. *Antioch*, 557 F. Supp. at 61.
75. Brayton v. City of New Brighton, 519 N.W.2d 243, 248 (Minn. Ct. App. 1994).
76. *McCormack*, 872 F. Supp. at 1323, 1324.
77. *Id.* at 1326-27.
78. *Collier*, 854 P.2d at 1057-58.
79. *Id.*
80. *Id.* at 1058-59.
81. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976).
82. *Id.* at 1370-71.
83. *Id.* at 1372.
84. *Id.*
85. *Id.*, *Baldwin*, 540 F.2d at 1372 f. 32.
86. *See* Sugarman v. Vill. of Chester, 192 F.Supp.2d 282 (S.D.N.Y. 2002).
87. *Id.* at 293.
88. *Id.*
89. *Id.* at 296.
90. *Id.* at 294.
91. *Id.* at 297-98.
92. *Id.* at 299.
93. *Id.*
94. *Riel*, 485 F.3d at 753-54.
95. G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1077-78 (9th Cir. 2006).
96. Reed v. Town of Gilbert (Reed II), 707 F.3d 1057 (9th Cir. 2013.)
97. *Id.* at 1069-1071.
98. *Id.* at 1070-1074. ML


BALTIMORE
IMLA's 79th ANNUAL CONFERENCE SEPTEMBER 10 -14, 2014

Day in the Life *Cont'd from page 18*

volved. How do you allocate your time?
Allocation of time is a difficult and fluid issue. I often think I would drown in projects without the wonderful attorneys at my firm that function as my assistant city attorneys and do most of the drafting and research necessary to respond to the city on a timely basis. Most days, my to-do list starts with the phone calls I get on my drive to the office. No two days are the same and there is never a dull moment.

Most of my time is spent in meetings or on phone calls with city management staff, talking through issues that don't have easy answers or projects that need to be scoped or reviewed. I spend the majority of my time these days working on utility issues – water and sewer issues, including rate setting, and finance issues. In addition I spend a lot of my time on land use and planning issues. Most recently, as the clients approach the election season, I have been working on structuring taxes that will be placed on the ballot and reviewing other ballot and election issues. In addition, I am very involved in litigation regarding the legality of the way water and sewer fees are structured.

ML: That's a broad spectrum, plenty wide to have generated some notable moments. What are some of the successes you're most proud of?
Thanks to Davis, California's desire to conserve the farm land adjacent to the city, I drafted what I think was the first, or one of the first, agricultural preservation ordinances in the country. This ordinance required new development to obtain preservation easements on two acres of land for every one acre that was to be developed. The city holds conservation easements on most of this property, and the fee interest in others. This ordinance, together with an open space tax ordinance that the voters approved by more than a two-thirds vote, has resulted in the preservation of 5,000 acres of farm and open space lands in the area around Davis. I also helped develop and draft an affordable housing inclusionary zoning ordinance that has provided land for much-needed affordable housing projects and developer-built affordable units in the city over the last 25 years.

I have also worked on numerous cable franchise renewals and cell facility matters that have provided added value to my public clients. For example, I have negotiated several fiber optic institutional networks for cities and other agencies that are currently in place and are providing broadband services to the agencies. Some of the public agency clients that I have assisted in siting cell towers or other facilities have been receiving rental income that has helped them to whether the recession.

Lately I have been working on greenhouse gas reduction and energy issues that are extremely interesting. For example, I have been working on energy conservation requirements for new development and net zero energy development standards. In addition, the City of Davis has begun a review of electricity service and costs to determine, after due diligence, whether it wishes to become a publicly owned utility and acquire the existing electrical facilities from the incumbent investor owned utility.

ML: So you continue to be involved in leading-edge issues. May we assume you'd recommend the municipal law route to other attorneys?
I would encourage attorneys who are interested in public service to consider working for cities and counties. The work is extremely challenging, offering both the ability to assist local agencies in reaching their policy goals and helping create facilities and services to improve the lives of citizens within the jurisdiction. In addition, even after practicing in this area for 30 years, there continue to be questions posed that have not arisen before and have no easy answers, creating a continual challenge to provide practical and constructive advice to city clients.

ML: Parting thoughts?
When I drive or bike around the City of Davis, where I have been city attorney for more than 25 years, I marvel at the many projects and facilities that I have assisted the city in creating and implementing. I think the day-to-day work that has helped the city over the years is truly rewarding as I look back to see if I have helped to make a difference.

-Thank you, Harriet. ML

Code Enforcement *Cont'd from page 19*

beneficial. Further, I believe that responsible owners will understand the need for some reasonable regulation of the activity and likely comply without hesitation. The problem will arise with those owners who get the chickens just for fun and really have no concept of how to keep and maintain them properly.

Another issue that has come to mind with backyard chickens is the issue of slaughter. I understand that chickens may only lay eggs for a finite time frame. Once that time period ends and the chickens no longer provide eggs to the owner, what if the owner wants to slaughter the birds for meat? The distinct possibility of an owner desiring an allowance for that activity brings another set of circumstances and problems to address. Hopefully we will gain enough input and information from those interested in the activity to address all of the issues that might arise.

As I get geared up to work on backyard chickens, my mind turns to the future and whether I will also be looking at potbellied pigs and goats. Hmmm... food for thought (so to speak).

Second Look *Cont'd from page 20*

cation? Two important reservations about unquestionably accepting a sworn application for later certification as a business record: First, even a truthful applicant could be relying in good faith on information from others. Second, virtually every document submitted to a government raises a risk of criminal penalties for the submitter if the document contains material falsehoods – the oath (or certificate under penalty of perjury) really adds no additional assurance of veracity.

What if the sworn application includes a statement that the applicant has personal knowledge of the facts in the application? As a practical matter, I think this is as close as we can expect to get to providing an assurance of "personal knowledge," unless the custodian has reason to doubt the accuracy of either the statement of personal knowledge or the truth of substantive matters stated in the application.[5] The form of the record cannot substitute for the custodian

actually reading the document to be certified. I sincerely doubt that many custodians peruse applications sufficiently to catch even obvious defects in the element of "personal knowledge."

The other common, and more pernicious, abuse of the business records hearsay exception involves the filing of self-serving documents of dubious accuracy as attachments to routine government forms in order to boot-strap the admissibility of the attachments' content in later formal proceedings. For example, a property owner might try to use a letter that the owner wrote or solicited reciting the value of real property that the owner submitted as an attachment to a special use permit application in a later eminent domain or tax assessment proceeding, even if the letter was irrelevant or only tangentially relevant to the SUP application.

The "Certified Copy" and Residual Hearsay Exception Alternatives

There are some alternative approaches that avoid technical examination of documents for compliance with Rule 803(6). If the contents of the document are not offered for their truth, then document is not hearsay. It must still be authenticated but the elements of Rule 803(6) will be irrelevant. Authentication can usually be accomplished by a simple notary stamp of "certified copy." Alternatively, if the truth of the document's contents will be relevant, consider invoking the "official records" exception under Fed. R. Evid. 803(8) or the residual hearsay excetion such as is recognized by Fed. R. Evid. 807 if your jurisdiction has a similar rule.[6]

Depositions, Voir Dire, and Objections Regarding defective Certificates

If thine own house be in good order and thou hast no qualms about risking equivalent treatment ...you can have substantial fun deposing the custodian about the truth of the certificate. If the questioning does not deter the offer of the certified record into evidence, object and offer the deposition in support of the objection, perhaps with additional live testimony of the custodian if they are present in court either coincidentally or because you have subpoenaed them for the purpose of contesting their certificate.

Notes

1. *See* Fed. R. Evid. 803, 902.
2. *Mattox v. United States*, 156 U.S. 237, 240 (1895).
3. *See Lee v. Illinois*, 476 U.S. 530, 552 (1986) (Blackmun, J., dissenting) ("[S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' ... and that fact must weigh heavily in our assessment of their reliability for constitutional purposes") (citation omitted), *quoted with approval*, *Idaho v. Wright*, 497 U.S. 805, 817 (1990).
4. *See* Fed. R. Evid. 803(16). "The rationale of the rule is that 'age affords assurance that the writing antedates the present controversy.' Fed. R. Evid. 803(16) advisory committee's note." *Columbia First Bank, FSB v. United States*, 58 Fed. Cl. 333, 336 (2003).
5. I do not defend this approach as a matter of logic. The oath of personal knowledge is subject to the same reservations as the more general oath. I just do not relish spending the rest of my career litigating Rule 803(6) issues and the "personal knowledge" affidavit component provides at least some marginal comfort.
6. Rules 803(8) and 807 are subject to their own abuses. Stay tuned. ML



Amicus Corner *Cont'd from page 27*

The Respondent asserts that Detective Koopman obtained an arrest warrant by falsifying an affidavit to create the illusion of probable cause. Pursuant to that warrant, law enforcement searched the Respondent's property and discovered a jar containing a white substance, which was initially incorrectly identified as methamphetamine. The Respondent was then arrested and he spent three days in custody. Additional tests on the substance revealed that it was not a controlled substance and all charges were subsequently dropped against the Respondent.

The Respondent brought suit under § 1983, alleging violations of the Fourteenth and Fourth Amendments. The Tenth Circuit held that a claim for malicious prosecution exists under § 1983 and that the statute of limitations began from the date the charges were dropped against the Respondent, not the date that he was arrested. Other circuits have held that the statute is tolled as the date of the arrest.

IMLA's petition-stage brief, authored by John Wilkerson of the Arkansas Municipal League, highlights the existing circuit split on this unanswered question.

Lane v. Franks, Case No. 13-483 (merits-stage *amicus* brief filed on April 9, 2014). This is the first public employment First Amendment case the Supreme Court has taken since *Garcetti v. Ceballos.* The Court will determine whether a public employee may bring a First Amendment claim for alleged retaliation against truthful sworn testimony that the employee was compelled to provide pursuant to subpoena. IMLA's brief argues that an employee who is acting as an employee and in the scope and context of employment is protected by all of the rights and benefits accorded to any employee under state and federal law, but the Constitution should not convert an employment action or dispute into a federal claim simply because the employer is a government.

IMLA's brief was authored by Matthew Delude of Primmer Piper Eggleston & Cramer, PC and was joined by the International Public Management Association for Human Resources. Oral argument was held on April 28, 2014.

City of Anaheim v. Gonzalez, Case No. ___ (petition-stage *amicus* brief to be filed on June 27). IMLA is supporting the City of Anaheim's petition in this Fourth Amendment deadly force case.

Two Anaheim police officers made a traffic stop at 2 am after observing a van driving erratically. During the course of the confrontation with the driver, a series of escalating events occurred, ultimately leading one of the officers to enter the van through the passenger door in an attempt to get the driver to comply with the commands while the other officer continued to attempt to restrain him from the driver side window. The driver then began driving away with one of the officers trapped inside the van. It was undisputed that the driver "stomped" on the accelerator to drive away. The officer trapped in the van ordered the driver to stop the vehicle and attempted to put the vehicle in neutral and to turn off the ignition, all with the driver continuing to fight him off. The officer then drew his firearm and shot the driver in the head. The officer was trapped in the van as it drove away for between 5-10 seconds.

The Ninth Circuit held because the parties disputed how fast the van was traveling at the time the officer shot and killed the driver, summary judgment was inappropriate as a reasonable jury could conclude that the use of deadly force violated the Fourth Amendment.

In a scathing dissent, Judge Trott explained that the majority's focus on the speed of the van is entirely misplaced for the purposes of the Fourth Amendment and that under well-established Supreme Court precedent, the officers' actions were objectively reasonable under the circumstances. Specifically, Judge Trott notes that the "factual dispute" relied upon by the majority - i.e., the speed of the van at the time the officer shot Gonzalez – is not a "material" fact and therefore should not have been considered in the Fourth Amendment reasonableness analysis. The dissent explains: "The law does not require an officer who immediately faces physical harm to wait before defending himself until the indication of impending harm ripens into the onslaught of actual physical injury."

T-Mobile South, LLC v. City of Roswell, Case No. 13-975 (merits-stage amicus brief to be filed August 25). IMLA is supporting the City of Roswell in this case involving the interpretation of the Telecommunications Act of 1996 (TCA). In this case, T-Mobile applied to construct a cell tower in the City of Roswell, Georgia in an area zoned as single-family residential. T-Mobile proposed constructing an "alternative tower structure" in the shape of a man-made tree that would be approximately 25-feet taller than the pine trees surrounding it. The City Council ultimately voted unanimously to deny the application. The City sent T-Mobile a brief letter saying that it denied T-Mobile's application and that T-Mobile could obtain the hearing transcript and meeting minutes, which set forth its reasons for the denial. T-Mobile claims that by failing to include the reasons for the denial in the letter, the City violated the TCA.

The TCA requires that a municipality's denial for a cell tower be "in writing." The district court and other circuit courts have held that the TCA requires a written decision and a written record that explain why the city council's majority rejected the application. The Eleventh Circuit disagreed, reasoning that the statute does not say that "the decision [must] be 'in a separate writing' or in a 'writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held' or 'in a single writing that itself contains all of the grounds and explanations for the decision.'"

While this case hinges on a technicality, the local government is faced with the possibility that if a violation of the "in writing" requirement is found, the telecommunications company would automatically be allowed to build its cell tower without further recourse by the local government. IMLA joined a State and Local Legal Center amicus brief authored by Tim Lay of Spiegel & McDiarmid. **ML**

Ordinances *Cont'd from page 26*

"Tobacco Product" shall include, but shall not be limited to, any cigar, little cigar, chewing tobacco, pipe tobacco, roll-your-own tobacco, snus, bidi, snuff, tobacco-containing shisha, or dissolvable tobacco product. Tobacco product shall also include electronic cigarettes, which are battery-operated device that contain cartridges filled with a combination of nicotine and liquid that are turned into vapor and inhaled by the user.[4]

This was only part of the council's revitalized attack on smoking generally. The Act raises the minimum age for purchase of cigarettes, electronic or tobacco, to twenty-one:

§ 17-706. Sale of cigarettes, tobacco products, or electronic cigarettes to minors and young adults prohibited.[5]

a. Any person operating a place of business wherein cigarettes, tobacco products, or electronic cigarettes are sold or offered for sale is prohibited from selling such cigarettes, tobacco products, or electronic cigarettes to individuals under **twenty-one years of age**. Sale of cigarettes, tobacco products, or electronic cigarettes in such places shall be made only to an individual who demonstrates, through a driver's license or other photographic identification card issued by a government entity or educational institution, that the individual is at least twenty-one years of age. Such identification need not be required of any individual who reasonably appears to be at least thirty years of age, provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of cigarettes, tobacco products, or electronic cigarettes to an individual under twenty-one years of age.

The Act also imposes a minimum price floor of $10.50 per pack for cigarettes sold in the City, reflecting a combined New York State and City tobacco tax of $5.85 per pack (versus the nation's lowest cigarette tax of a mere $0.17 per pack in Missouri). Driving the effective price for a single cigarette in New York City to more than fifty cents is intended to discourage—or make unaffordable—tobacco use among minors:

§17-176.1 Prohibition on the Sale of Discounted Cigarettes and Tobacco Products.

> The cigarette price floor shall be **$10.50 per packet of cigarettes**, provided that the price floor may be adjusted to account for consumer price index fluctuations in the New York – Northern New Jersey – Long Island area and for changes in taxes.[6]

Smoke- and vapor-producing products were not the only target of the revised City Council ordinances. Restrictions on chewing tobacco were also specifically tightened, and become effective May 18, 2014:

§ 17-708. Use of tobacco products on school premises prohibited. It shall be unlawful for any person to use a tobacco product, including chewing tobacco, on school premises at any time.[7]

While not moving as far as New York City, other jurisdictions have stepped up their attack on vaping. Last fall, Chicago's City Council approved a proposal to ban e-cigarette use in offices, indoor public areas and around building entrances. Los Angeles, San Francisco, Washington DC, Philadelphia and over 100 other municipalities, large and small, have all adopted similar prohibitions.

Against the protectionist surge, opponents object that there is no evidence showing e-cigarette vapor to be remotely as harmful as second-hand tobacco smoke. They also warn that vaping bans will prevent smokers from kicking the tobacco habit, undermining potential improvements in societal health. Richard Carmona, a former U.S. Surgeon General and a current board member at NJOY, one of America's largest electronic cigarette manufacturers, urged the New York City Council to reject the e-cigarette prohibitions:

"I'm extremely concerned that a well-intentioned but scientifically unsupported effort like the current proposal to include electronic cigarettes in New York's current smoking ban, could constitute a giant step backward in the effort to defeat tobacco smoking," Carmona wrote.[8]

If there is an valid argument—yet to be medically established—that taking away e-cigarettes will imperil smokers who want to quit, there is also a counter-argument. Proponents of the bans say that flooding society with e-cig's will actually spur the re-emergence of traditional smoking as an accepted norm, particularly among teens, for whom electronic cigarettes, with their confection-like flavorings and celebrity endorsers, may be a conduit to tobacco products.[9]

The rationale behind the revised Chicago ordinance, Section 4-64-091 of the Municipal Code of Chicago, includes this very argument. The recitals to the Chicago ordinance include:

> "WHEREAS, CDC Director Tom Frieden, M.D., M.P.H., has stated that "the increased use of e-cigarettes by teens is deeply troubling. Nicotine is a highly addictive drug. Many teens who start with e-cigarettes may be condemned to a lifelong addiction to nicotine and conventional cigarettes; and
>
> . . . .
>
> WHEREAS, the City of Chicago finds that e-cigarettes, with their sweet flavored cartridges, represent a calculated attempt by manufacturers to entice children and young adults to purchase and use their devices, and constitute an indirect marketing campaign which targets youth;"[10]

Effective April 2014, the Chicago ordinance prohibited the sale of e-cigarettes to minors under 18 (and the sale of less than 20 cigarettes at one time).

Whether the benefits—or dangers—of e-cigarettes are overblown will require further verification, likely at the hands of the FDA. In the interim, while municipalities may have effective means to detect and punish the sale of e-cig's to minors, they may have a harder time enforcing bans against actual e-cigarette use in prohibited places. Vapers point to a logistical challenge because there is virtually no evidence that an e-cigarette is being used, detection and enforcement will be no easy matter.

They may have a point. At a recent hearing in Philadelphia on the subject of vaping, a member of the National Vapers Club testified before the committee that he had just sat through two hours of public comment, using his e-cigarette 20 or 25 times, "and no one noticed."[11]

Notes

1. http://american.com/archive/2014/may/new-fda-e-cigarette-regulations-killing-an-industry-killing-smokers (last accessed May 15, 2014).
2. *Id*
3. New York, Ny., Admin. Code art. 17-b16-17-626 (2006).
4. *Id*
5. *Id*
6. *Id*
7. *Id*
8. http://www.reuters.com/article/2013/12/19/us-usa-ecigarettes-newyork-idUSBRE9BI0JM20131219 (last accessed Mar. 22, 2014).
9. http://www.huffingtonpost.com/2014/04/29/e-cigarette-bans_n_5234027.html
10. Chicago, Il., Code § 4-64-091 (1990).
11. http://www.philly.com/philly/news/politics/20140314_City_Council_committee_moves_to_restrict_e-cigarettes.html#6zLxvjy0HTOlzRtf.99 (last accessed Mar. 15, 2014). ML

Supreme Court *Cont'd from page 22*

> ning another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.

Petitioners attempted to discredit the officers' suspicion of drunk driving, with no success. While the Court acknowledged that the reported behavior might also be explained by, for example, a driver responding to "an unruly child or other distraction," it has consistently recognized that reasonable suspicion "need not rule out the possibility of innocent conduct." *United States* v. *Arvizu*, 534 U. S. 266, 277 (2002).

The majority disagreed that the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, should dispel the reasonable suspicion of drunk driving. "It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time."

Under the totality of the circumstances, the majority found the indicia of reliability sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road and was driving while intoxicated. That made it reasonable under the circumstances for the officer to execute a traffic stop.

DISSENT:

Justice Scalia, normally a reliable member of the Court's conservative cohort, wrote the dissent, which was joined by Justices Ginsburg, Sotomayor, and Kagan.

Nowhere did he discern the "sufficient indicia of reliability" that the majority had found. The 911 tip was completely uncorroborated, and the CHP knew nothing about the tipster—not her name, her address or even her phone number. The facts bore little resemblance to *White*, in which the tipster had predicted, with "the finest detail" the future movements of the drug-bearing suspect—here, anyone could have noted a license plate number and vehicle description of a pickup, and could have made the "amazing, mystifying prediction" that petitioners' vehicle "*would be traveling South on Highway 1*."

Scalia also had little patience for the argument that the 911 caller was more likely to be credible because she believed her identity would be discoverable. He challenged the majority to support such an assertion about 911 callers' state of mind.

Finally, he pointed out that the *sine qua non* of the traffic stop—criminal activity in the form of drunk driving—was nowhere to be seen. Petitioners had not even been accused of driving drunk. The tipster made no such accusation; she merely stated that the pickup had forced her off the road. Therefore, at the time the CHP officer saw the pickup and pulled it over, he had no reason to believe that the driver was drunk. The pickup driver's only 'crime' if in fact there had been one, was that he had driven recklessly some 30 minutes earlier. And that infraction, if it had in fact occurred, might have been caused by a distraction.

For the minority, there was simply no basis to make the traffic stop. It was the same group of dissenters who had objected to the use of mouth-swab DNA evidence from arrestees in the 2013 *Maryland v. King* decision, written by the same author. Scalia was no less outraged in this case.

He warned:

> Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures. I would reverse the judgment of the Court of Appeal of California.

Navrette v. California, No. 12-9490 (U.S. Apr. 22, 2014). ML

Practice Tips *Cont'd from page 21*

14. The Contractor provides a copy of its Certificate of Insurance.
15. The insurer named on the Certificate of Insurance exists and is authorized to do business in the state.
16. The Contractor's correct name is shown on the Certificate of Insurance as the insured.
17. The insurance coverage is shown on the Certificate of Insurance and meets the minimum amounts required by the contract:
General Liability
$_____aggregate
$_____per occurrence
Automobile Liability
$_____ aggregate or
$ _____ for bodily injury
$_____ for property damage
Workers Compensation
Statutory Limits
18. If required by the contract, the Certificate of Insurance shows the City (or "Certificate Holder") named as an Additional Insured on:
General Liability
Auto Liability
19. If required by the contract, the Certificate of Insurance shows that subrogation is waived for:
General Liability
Auto Liability
Workers Compensation

20. If required by the contract, the Certificate of Insurance contains a statement that the insurer will mail at least 30 days' advance written notice of cancellation of the insurance policy to the Additional Insured.
21. If the contract requires a Payment Bond and/or Performance Bond, the following items are checked:

- The name of the contractor (the Principal) on each bond is exactly the same name as stated in the contract;
- The bonding company is qualified to do business in the state and is listed on the US Treasury Department list of approved sureties. The US Treasury list can be found at the following website: www.fms.treas.gov/c570/c570.html;
- The amount of each bond is the same as the stated amount of the contract;
- The contract to which each bond refers or the work to which each bond refers

matches the contract or work specified in each bond. If the contract has a title, the title should be described in the bond exactly as it is on the contract;

- The date of each bond is the same date as the contract~ or a later date;
- Each bond is signed by the both the contractor (principal) and the bonding company (surety);
- The names of the principal and surety are sealed. It is possible that the principal will not have a seal, but the reason for the lack of the principal's seal should be documented;
- The surety's seal contains the exact name of the surety. (Agents will occasionally use a seal from the wrong surety company.)
- The bond(s) is/are accompanied by a Power of Attorney, which authorizes the surety's signatory to execute the bond. The Power of Attorney should be checked for the following:
  - The Power of Attorney's authorization matches the bond. Generally, the Power of Attorney will contain a control number that will match the control number for the bond;
  - The person who signed as the surety on the Performance and Payment Bond is listed on the Power of Attorney as an Attorney-in-Fact.
  - Any bonds authorized pursuant to the Power of Attorney do not exceed the amount authorized by the Power of Attorney.
  - The Power of Attorney contains the seal of the surety.
  - The date of the Power of Attorney is the same as or prior to the date of the bond.
  - Usually, the Power of Attorney will be on distinctive paper. If not, there should be indicia of authenticity, such as a raised seal. If in doubt, call the surety to verify the authenticity of the bond(s) and Power of Attorney, and document the call.

This checklist provides the basics. It does not include the various statutory provisions that must normally be incorporated into the contract at the time of drafting. It also does not include the federally required provisions that we are so often expected to include in municipal contracts that use federal funds. However, getting these basics right will ensure that, when we discover a non-performing contractor, our first question need not be "Did they execute the contract?" ML

Cases *Cont'd from page 29*

hit was a "good faith, reasonable mistake" and that "no reasonable jury could find that Kim lacked reasonable suspicion to conduct an investigatory stop." The lower court also decided that that the tactics used by the officers were objectively reasonable in the context of a lawful investigatory stop, rejecting Green's unlawful arrest and excessive force claims. The court further determined that Kim was entitled to qualified immunity because Green had not established a constitutional violation.

HELD: The Ninth Circuit reversed the lower court's grant of summary judgment, finding that a rational jury could find that defendants violated Green's Fourth Amendment rights on the grounds of wrongful seizure, false arrest and excessive force. It further found that Sergeant Kim was not entitled to qualified immunity, at least until later in the proceedings.

DISCUSSION: In assessing whether Sergeant could claim reasonable suspicion, the Circuit Court focused on ALPR procedures. It was well established by the record that an unconfirmed hit on the ALPR did not, alone, form the reasonable suspicion necessary to support an investigatory detention; addition confirmation was required. The parties disputed whose responsibility it was to perform these additional steps: Defendants stated that it was the duty of the officer in the camera car, while Green argued that it was reasonable for the officer actually making the stop to perform these steps. The parties cited no SFPD policy that expressly placed the responsibility with either officer.

In the absence of such a policy, it was disputable whether an officer conducting a stop could reasonably rely on a lack of qualifying information from the camera car operator as a justification for making the stop without independent verification. Reasonable suspicion thus remained a triable issue, not ripe for summary judgment.

Green's detention was found to be de facto arrest without probable cause. It was a greater detention than a *Terry* stop. She was held at gunpoint, handcuffed and directed to her knees. The Ninth Circuit had previously held that "under ordinary circumstances, when the police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment." (citation omitted). Factors justifying such action included 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur. A belief that a vehicle has been stolen does not suffice. Viewing the facts in the light most favorable to Green, a rational jury could find that Green had been arrested using tactics were not reasonable given the totality of the circumstances.

Defendants also failed on the issue of excessive force. Green, a woman of 250 pounds, had been forced to her knees, handcuffed and surrounded by up to six officers with guns drawn. The test for evaluating the legitimacy of these tactics was "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." (citation omitted). By any standard, the Circuit Court found, these factors had not been satisfied, preventing a grant of summary judgment to Defendants.

The district court had found that Kim was protected by qualified immunity. The Ninth Circuit applied the standard test: (1) whether the law governing the conduct was clearly established and (2) whether the facts as alleged could support a reasonable belief that the conduct in question conformed to the established law. (Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993)). Both are questions of law to be determined by the court in the absence of genuine issues of material fact.

The first element was satisfied as a matter of law: it was clearly established that individuals may not be subject to seizure or arrest without reasonable suspicion or probable cause. As to the second question–whether Kim could reasonably believe that his actions were lawful, the Circuit Court saw significant issues of fact: "When viewing the facts in the light most favorable to Green, we cannot make a determination as a matter of law that Sergeant Kim 'could have reasonably believed at the time that the force actually used was lawful under the circumstances.' Instead, this question must go before a jury." (citation omitted).

Green v. City and County of San Francisco, No. 11-17892 (9th Cir. May 12, 2014). ML

IMLA Webinar Calendar

June 18 – Personnel – P54
Remind Me Again – Why Did We Hire that Person?
In contrast to the rigorous effort expended by the NFL on its annual player draft, for most organizations employee selection is more like an art form than a science. Not all hires will mesh well with the needs and culture of the organization. This teleconference examines options to lessen risks when employers need to correct hiring problems.
Speakers: **Dan Crean and Lawrence L. Lee**

July 14 – Land Use – L56
Home Rule and Preemption
A major issue in local government, largely hidden from view because the media doesn't cover the subject, is home rule and preemption, cutting across all manner of federal, state, and local intergovernmental relations, planning, and regulation. The impact can be critical when local governments are deprived of the authority to govern. Regulation of trucking is just one example. Professor Callies, an acknowledged expert in preemption issues, will add his insights to our panel.
Speakers: **Professor David Callies, Dwight Merriam, and Dan Mandelker**

July 16 – Personnel – P55
The Supremes Sing Again: You Keep Me Hangin' On
This teleconference reviews and analyzes the Supreme Court's 2013 Term employment law decisions, along with significant decisions from other federal courts.
Speakers: **Dan Crean, Douglas Haney**

July 24 – Litigation – LI51
Confidentiality versus Public Access in the Courtroom
This webinar will explore tactics for opposing, seeking, and structuring anonymous parties, in camera sessions, ex parte hearings, bench conferences, closed courtrooms, sealing orders, and other non-public procedures in civil litigation. Ethics credit may be available for this session.
Speaker: **Peter Haskel**

August 20- Personnel – P56
Employment Preferences & Discrimination After Schuette
Speakers: **Dan Crean and Sheila Gladstone**

August 26 – Marijuana Legislation – D51
(Specific Topics to be Determined)
Speakers: **Doug Friednash and Lori Bluhm**

September 8 – Land Use – L57
Health Impact Assessments
Speakers: **Dean Patricia Salkin, Dwight Merriam, and Dan Mandelker**

September 17 – Personnel P57
Employee Leave and Time Off and Return to Work
Speakers: **Dan Crean and guest speaker TBD**

September 23 – Municipal Finance – F50
Municipal Bankruptcy
Speakers: **Steve Kemp and Karen Grande**

October 14- Land Use – L58
Implementing the Directive: "Affirmatively Furthering Fair Housing"
Every city and county receiving Community Development Block Grants, HOME funds, and many other federal funds is required to "affirmatively further fair housing" — an obligation that DOJ, HUD, and private parties have been enforcing since 2009. Learn about the key litigation used to enforce this obligation and what communities can realistically do to actually affirmatively further fair housing.
Speakers: **Daniel Lauber, Michael Allen, Dwight Merriam, and Dan Mandelker**

October 15 – Personnel – P58
(Specific Topics to be Determined)
Speaker: **Dan Crean and Guest Speaker TBD**

October 21 – Environmental Law – E50
(Specific Topics to be Determined)
Speaker: **Kevin Madonna**

October TBD – Ethics – E50
When Does "No" Mean "No": A Discussion of the "No Contact" Rule and the Representation of Multiple Internal Government Constituents
A government lawyer faces challenging issues by virtue of representing a governmental organizational.

Summer/Fall 2014

Private lawyers want to communicate with your represented elected and appointed officers and employees under claim of legal right. The government lawyer is often asked to serve multiple constituents within the government, at times with conflicting interests and positions. Sometimes the prudent course is to just say "no". This webinar will include a discussion of the issues and the applicable Model Rules of Professional Responsibility as well as the approach of some state bars.
Speaker: **Marion Radson**

October 30 – Ethics – E51
(Specific Topics to be Determined)
Speaker: **Julie Tappendorf**

November 10- Land Use – L59
Codes
Speakers: **Mark White, Joel Russell, Don Elliott, Merriam, and Dan Mandelker**

November 19 – Personnel – P59
Immigration and Employment
Speakers: **Dan Crean and Rusi Patel**

December 8 – Land Use – L60
RLUIPA
The year would not be complete without a most spirited debate from two people who are widely acknowledged as poles apart on RLUIPA. Professor Hamilton, bar none, is the country's leading government-side advocate and scholar. Dan Dalton has recently published a book for the ABA on how to best represent religious institutions against local governments. He has never lost an RLUIPA case for a religious institution. These two have debated each other before and the discussion will be illuminating.
Speakers: **Marci Hamilton, Dan Dalton, Evan Seeman**

December 17 – Personnel – P60
Specific Topics to be Determined
Speakers: **Dan Crean and guest speaker TBD**

Date TBD – Land Use – L62
Controversial Land Uses - "Guns, Pot, and Sex: Regulating Controversial Land Uses"
Speakers: **Julie Tappendorf and David Silverman**

Date TBD – Antitrust -A50
ISDAfix -- Preparing for Another Possible Rate-Rigging Scandal
The Commodity Futures Trading Commission – which uncovered the massive manipulation by LIBOR banks-- is actively investigating ISDAfix, a leading financial benchmark that 15 banks set in the $630 trillion derivatives market. The investigation has significant implications for IMLA members because ISDAfix is frequently found in swaps and other derivatives that public entities enter into with financial institutions. This webinar will cover the setting of ISDAfix, the CFTC's investigation, and the available options for IMLA members.

Speakers: **Sylvia Sokol and Christopher Burke**

Date TBD – Drafting Effective Ordinances– 050
Speaker: **Kimberley Mickelson**

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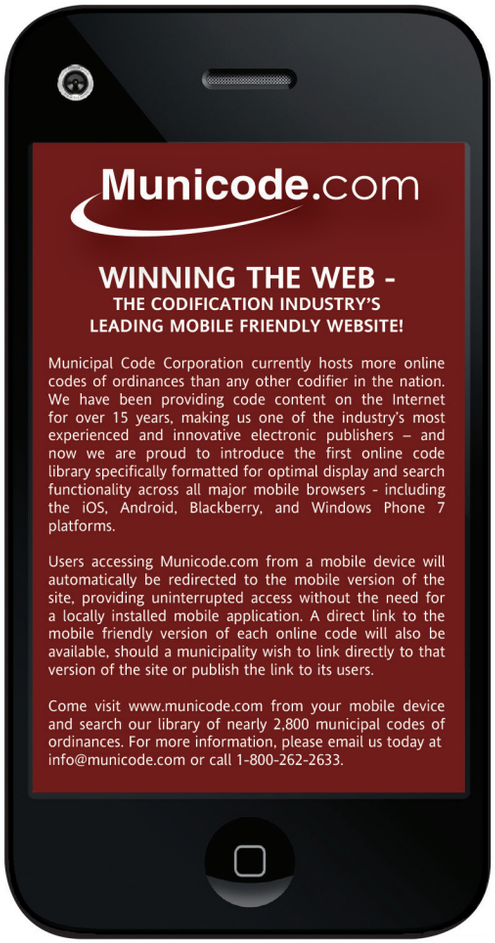

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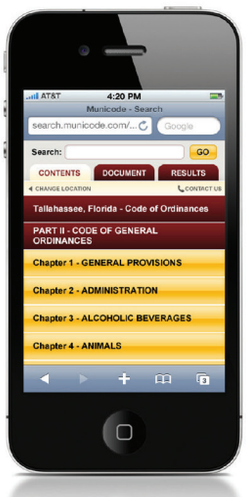

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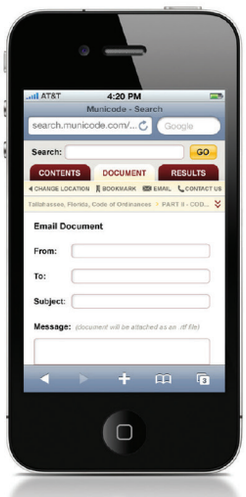

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