IMLA
THE MUNICIPAL LAWYER MAGAZINE

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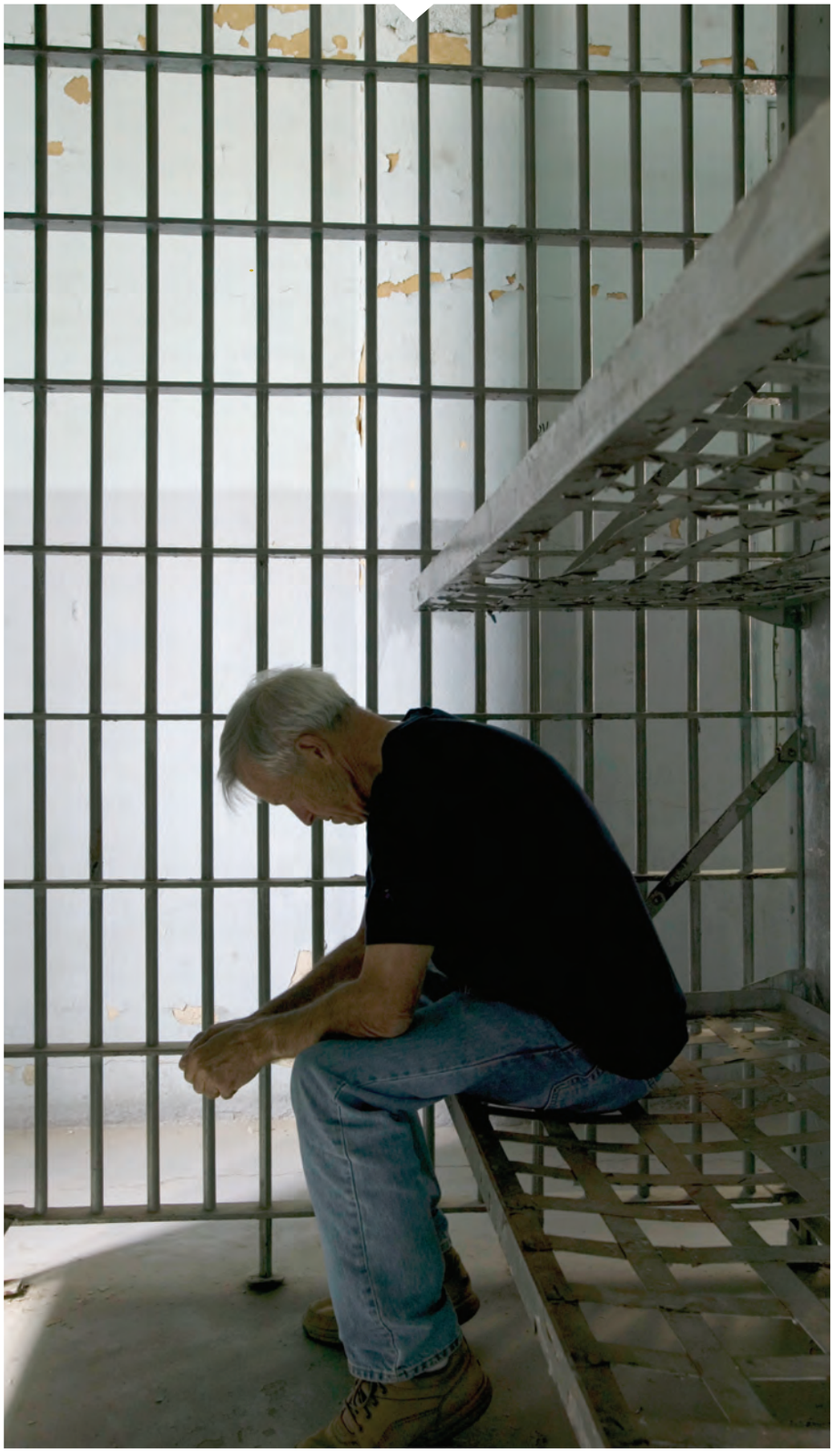
Municipal Jail: The De Facto Mental Health Facility



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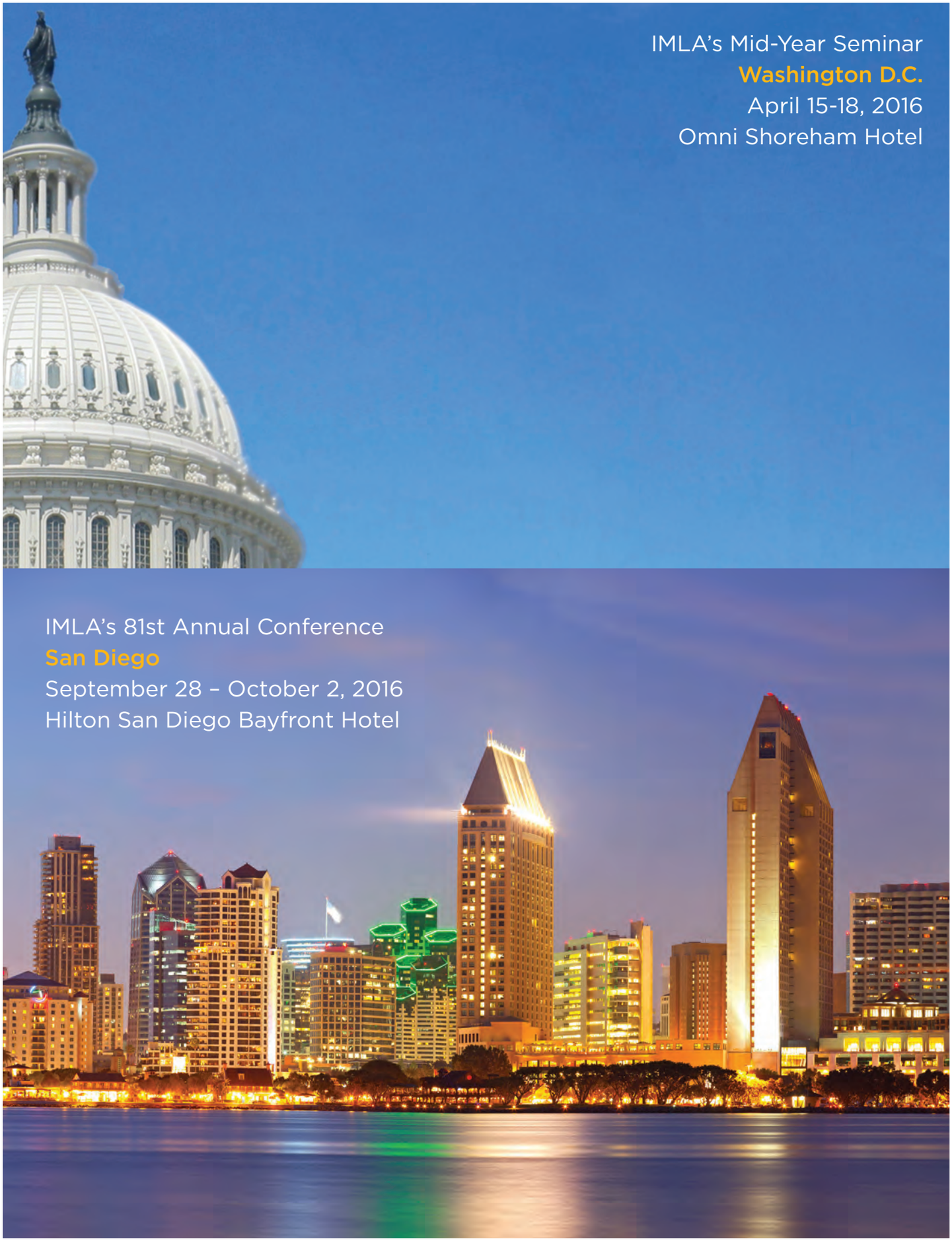
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THE MUNICIPAL LAWYER MAGAZINE



MUNICIPAL JAIL: THE DE FACTO MENTAL HEALTH FACILITY

By: Martha Means and Bryan Meyer

Too often, arrestees with mental health issues cannot be properly assessed or treated. For lack of a better alternative, they may end up in the local jail, putting pressure on penal systems.

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A PRIVILEGED POSSE: PROTECTING THE ATTORNEY-CLIENT PRIVILEGE WHEN DEALING WITH THIRD-PARTY CONTRACTORS

By: Robert Widner

Third party contractors can provide invaluable assistance to counsel. But communications with outsiders are not necessarily privileged. The author highlights how to preserve confidentiality.

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EDITOR'S NOTE:

IMLA
THE MUNICIPAL LAWYER MAGAZINE

Dear Reader:

Fall is here and many of us recently convened in Las Vegas for IMLA's Annual Conference, bypassing the allure of card rooms and gaming tables to further our knowledge of municipal lawyering and renew our professional ties. *Municipal Lawyer* deals you a full house:

Our lead story, "*Municipal Jail: The De Facto Mental Health Facility*" discusses the pervasive problem of mental illness and substance abuse among many who pass through local law enforcement, judicial and penal systems. Martha Means, a seasoned prosecutor in Kansas City, points to positive steps being taken in Missouri and elsewhere around the country.

ML's second feature, "*A Privileged Posse*" examines the challenges to claims of privilege when attorneys interact with non-client third parties. Robert Widner of Centennial, Colorado's Widner, Michow & Cox discusses the "interpreter" and "third party equivalent" safe harbors in privileged communication.

In her *Practice Tips* contribution "*Apps in the Hall*" Catherine Lizotte, Boston Senior Assistant Corporation Counsel, provides valuable perspectives for municipal lawyers considering the regulation of sharing economy businesses.

Pete Haskel, Dallas Deputy Executive City Attorney and dean of our *Second Look* department, raises the novel prospect that cities may have standing--and legal precedent--to sue HUD directly for failing to affirmatively remediate housing discrimination.

In *Supreme Court*, our colleague Lisa Soronen, Executive Director of the State and Local Legal Center, offers a compact review of the Roberts Court's era to date. And keeping with that theme, in *Amicus Corner,* IMLA Associate Counsel and Director of Legal Advocacy Amanda Kellar assesses the early implications of *Reed v. Town of Gilbert*—the expansive dimensions of which are only now beginning to be fully understood.

Monica Ciriello brings us cases from Newfoundland, Ontario, Alberta and British Columbia in her regular *Inside Canada* column and as always, IMLA editors add recent US cases of interest.

In our upcoming issue, we will report on some of the goings-on from our Las Vegas Annual Conference—and will no doubt leave other stories behind. Discretion is the better part of valor.

Best regards-

IMLA Editorial Board

DO YOU HAVE AN ARTICLE FOR THE MUNICIPAL LAWYER?



IMLA members are involved in some of the most challenging and interesting legal issues of our time—First Amendment questions, environmental debates, law enforcement policies, taxation and finance, and many others.

Share your experience, insights and practice tips. Our readers include a wide range of government attorneys at the state, city, county and local level, many lawyers in private practice who specialize in municipal law, and law libraries across the country.

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.

LETTER FROM THE EDITOR

Four Score Years Ago ...

By: Erich Eiselt, IMLA Assistant General Counsel and Editor



FLORIAN.ARND AT THE GERMAN LANGUAGE WIKIPEDIA

On the morning of September 30, 1935, a motorcade of stately black automobiles made its way over the desolate roadways near Boulder City, Nevada. Within one of the vehicles sat the President of the United States. He and his entourage had travelled to this rural outpost to confer national recognition on a nearby engineering milestone, one which would change the face of the American West forever.

On that day, speaking to a crowd of 15,000 onlookers and enduring 102 degree heat, Franklin Delano Roosevelt commissioned the Hoover Dam.

Built on the backs of 21,000 laborers over a five-year period, the Dam spanned the Colorado River at Black Canyon, between Arizona and Nevada. There, the rock walls dropped sharply to the waters far below, forming an optimal site for construction, but making for treacherous lobor. Nearly 100 workers died during the project. On completion the Dam would tower some 726 feet above the riverbed, making it the tallest such structure in the world at the time. Power from the Dam would soon begin to energize towns and cities in a vast arc across the Southwest, and the Colorado's waters would be harnessed and routed across thousands of miles of viaducts and canals, sustaining agriculture on millions of parched acres. Behind the Hoover Dam's massive curvature, Lake Mead would become the nation's largest reservoir, a status it maintains to this day.

The municipality which housed the Dam's workers was an anomaly. Boulder City, located six miles from the Dam, had been hastily established by the Federal government to provide better housing and services for the thousands of Depression-era workers and their families drawn to the desolate environment to earn a living working on the Colorado River project. Modest dwellings were rapidly erected, replacing the squatters' tents which dotted the landscape. The town had no elected officials. Situated on Federal property, it was administered by the Bureau of Reclamation. Alcohol and gambling were prohibited, and miscreants faced eviction from the jurisdiction.

Boulder City would not be incorporated until 1960.

Twenty-six miles to the Northwest of Boulder City, another town was taking shape. For eons, an abundance of water from artesian wells had created a verdant oasis at that spot in the Mojave desert, drawing native peoples including the Paiute. They were followed by Mexican settlers who also prized the aquifers and gave the area its name – "The Meadows" in their parlance. During the Civil War came Nevada's statehood, and ranchers and railroaders began to occupy the region.

This town would have a far different character and trajectory than Boulder City's—although the latter would play a major role in its early growth. Nevada had banned gambling for several decades (which merely spurred the growth of illegal gaming) but reversed that prohibition in 1931. Young men from the Dam project flooded into the region, with paychecks in their pockets and no place to spend them. The same year Hoover Dam construction commenced, the Pair-O-Dice Club opened its doors on a portion of the Los Angeles Highway less than one hour's drive from Boulder City. Nearby, the Northern Club obtained Nevada's first gaming license.The casino town soon became an early recipient of the Hoover Dam's gift of unlimited electricity.

Las Vegas would never be the same. In 1935, its population was still less than 5,000--but its future was bright.

The same year Franklin Roosevelt travelled west to commission the Hoover Dam, an accomplished and visionary attorney inaugurated his own legacy. In late 1935, Charles Rhyne met with Fiorella La Guardia of New York City, Richard Daley of Chicago, and other large city mayors, many of whom were themselves lawyers. The concept of national cooperation among municipalities on legal matters was discussed, and shortly after, the National Institute of Municipal Law Officers (NIMLO) took flight. Rhyne and NIMLO went on to file numerous amicus briefs on topics from antitrust to zoning ~ labor relations, federal tax liens, rent control, employment, natural gas rates, criminal law, Indian rights under federal law, energy law, aviation, annexations, and others. And he successfully argued the groundbreaking case in *Baker v. Carr*, which would forever change judicial oversight of electoral districting in the United States, moving the country towards a more equitable "one person, one vote" process. A series of NIMLO publications and meetings would serve to bring like-minded lawyers together, creating a network of professionals dedicated to furthering excellence in municipal law across the country.

Charles Rhyne would become the youngest President of the American Bar Association and the personal lawyer to Richard Nixon, and would be twice nominated for the Nobel Peace Prize. NIMLO would become the International Municipal Lawyers Association (IMLA), which would carry Rhyne's vision forward.

It is somehow fitting that we celebrate IMLA's 80th anniversary with our Annual Conference in Las Vegas. In many ways, it exemplifies the American saga—new, brash, and unconventional, a 24-hour a day phenomenon known the world over, and still evolving. Today, there are over 625,000 residents in Las Vegas. It has literally grown 125 times in 80 years. And more than 2.1 million people now call the Las Vegas metropolitan area home.

There can be no doubt that the glimmering lights of greater Las Vegas, stretching ever-further across the desert, were made possible by that seminal accomplishment of engineering on the Colorado River commissioned by an American president four score years ago. There is also little question that beneath the whirring metropolis, often unseen and unsung, the rubric of municipal law—and the lawyers who help derive, interpret and enforce it—have played a significant role in that remarkable prosperity.

We are proud to have chosen Las Vegas as the site for IMLA's 80th anniversary celebration--and join you in our mutual efforts to promote excellence in our chosen field. ML

Municipal Jail: The De Facto Mental Health Facility

By Martha Means, Associate City Prosecutor, Kansas City, Missouri and Bryan Meyer, Guin Mundorff LLC, Kansas City, Missouri



I. The Reality of Mental Health in Missouri Municipal Courts.

Across the nation, persons with mental illness and co-occurring substance abuse repeatedly circulate thru the criminal justice system causing significant challenges for municipalities. The Kansas City Municipal Court is not an exception to this epidemic and constraints of the municipal system make handling these defendants difficult, often resulting in municipal jails operating as de facto mental health facilities. A municipal jail is not a mental health facility by statute, but frequently becomes one when the lack of inpatient mental health and substance abuse treatment programs combine with society's unwillingness to force medication and provide locked facility treatment. Mentally ill individuals, oftentimes with co-occurring substance abuse and behavioral problems, present the Kansas City Municipal Court with serious challenges; these persons are in need of stabilization, a continuum of mental health care, and substance abuse treatment. They may also have behavior problems or criminal behavior traits that make managing treatment increasingly difficult. Many habitual offenders often require municipal courts to internally question the defendants' competency to stand trial however, according to an Attorney General Opinion, municipal courts in Missouri lack jurisdiction to address competency issues as permitted by statute to state courts.[1] Missouri statute currently provides jurisdiction to state courts to order competency evaluation when issues of competency of the accused are raised.[2] The Attorney General opinion is in response to a request for a ruling on the question "[Whether] municipal courts in Missouri have jurisdiction to commit individuals to facilities of the Department of Mental Health for evaluation or treatment pursuant to Sections 552.020 and 552.040 RSMo."[3]

Kansas City Municipal Court, the largest court by volume in Missouri, processes approximately 250,000 municipal ordinance violations each year. Of these, approximately 25,000 are general ordinance charges, e.g. assault, stealing, domestic violence, resisting arrest, prostitution, drug paraphernalia, trespassing, and disorderly conduct. As a large metropolitan area court, Kansas City Municipal Court handles cases involving defendants dealing with a number of complex issues. In Kansas City, cases that may be filed as state misdemeanor or felony charges in other jurisdictions, are referred to municipal court and prosecuted as ordinance violations including assault, drug paraphernalia, domestic violence assault, driving while intoxicated and driving while suspended.[4] Nationally, 76% of local jail inmates who have a mental health problem meet criteria for substance dependence or abuse, and 64% of defendants sentenced to municipal jails have a mental health problem.[5] In the Kansas City municipal jail, approximately 44% of persons indicated that they have a mental health problem and 52% report having an alcohol or drug problem.[6]

Mentally ill persons enter the criminal justice system in numerous ways but most commonly it begins with a request for police service. In Kansas City if the call for service or a 911 dispatch call for assistance requires the respondent to encounter a person with a mental illness or "emotionally disturbed person (EDP)"[7], the police officer is provided authority to assess the person's competency and to take that person into custody for a period not to exceed 96 hours if necessary.[8] The reality a police officer faces when confronted with an "emotionally disturbed person" does not always make this statutory alternative to incarceration a valid option. A police officer must determine whether a person is suffering from a mental disorder and determine if the "likelihood of serious harm by such person to himself or others is imminent."[9] Often an officer does not have a whole picture of the situation but regardless must take action in order to stabilize a potentially dangerous situation. A person's behavior may be erratic as a result of mental illness or substance abuse, or both, complicating the officer's determination. Further impeding an officer's ability to properly assess an "emotionally disturbed person" situation is the absence of a formal database that might assist an officer to determine if a person is suffering from a mental illness. This inability to categorize prior mental health issues is a result of health information privacy laws and civil rights concerns regarding criminal justice

information about a person's mental health status.[10] Often a mentally ill person is arrested on a municipal ordinance violation because it is the most efficient way to resolve an issue and avoid a larger potential problem. These circumstances often result in detention of an individual with mental illness and entrance into a municipal criminal justice system not entirely equipped to provide the treatment necessary to preserve justice and protect the community.

To combat this cyclical process, problem solving and treatment courts have evolved to address gaps in services to persons with mental illness and co-occurring substance abuse. Mental health courts, drug treatment courts, and veterans' courts were implemented in Kansas City to address unique problems presented by these individuals. Problem solving, therapeutic, treatment courts provide specialized dockets that combine substance abuse community mental health services with judicial monitoring in order to effectively address these persons revolving through the criminal justice system. Law enforcement officials have also revised protocols regarding persons with mental illness and often have crisis intervention trained (CIT) officers respond to a call for service involving persons with possible mental health issues. Even with the evolution of treatment courts and police procedures, gaps persist throughout the legal system. Persons seriously mentally ill, who are not actively or willingly participating in mental health services, and who continue to get arrested on new charges, may cycle in and out of the civil, probate and criminal justice systems. These defendants pose a safety risk to themselves and the community.

The interaction of mentally ill individuals and the criminal justice system requires an understanding of the distinct and separate functions of federal, state, and municipal court systems, state laws and constitutional guarantees. Persons with mental illness that become involved in the criminal justice system may be moving throughout many different and distinct court processes. The state provides civil commitment and guardianship proceedings through the probate court. The probate division of the circuit court may determine the incapacity of persons through the processes of the Probate Code. State law permits for formal transfer of state misdemeanor and felony criminal court cases to probate court for Chapter 552 RSMo 2013 proceedings. Federal and municipal courts function independently from the state civil commitment and guardianship proceedings and from state court criminal proceedings.

The interaction of mentally ill individuals and the criminal justice system requires an understanding of the distinct and separate functions of federal, state, and municipal court systems, state laws and constitutional guarantees.

A municipal judge, prosecutor and defense attorney have ethical responsibilities that prohibit direct referral of mentally ill defendants to probate court. Defendants charged in municipal court may be referred by a family member or caseworker to probate courts for civil commitment and guardianship proceedings. The referral system to the probate court and appointment of a guardian is difficult when the defendant is abusing drugs and alcohol, has behavioral problems and is reluctant to participate in treatment. Even if the individual has been referred and a guardian is appointed for the individual, the guardian faced additional problems. When no services are available for the guardian to consent to, and the individual is not willing to participate in community treatment, abusing drugs and alcohol and exhibiting behavioral problems, the individual will likely become involved in the criminal justice system.

The legal system is challenged by these individuals with mental illness, co-occurring substance abuse, and unwillingness to participate with treatment in the community. When a mentally ill person violates local, state and/or federal laws, there may be an interaction with court systems that may have different outcomes for the individual. Each court system is distinct and must work within the legal and statutory constraints of their systems. Legal standards and definitions of mental incapacity, disability, dangerousness and mental defect differ between the criminal, civil and probate courts. Further, the reluctance of courts and society to compel persons to locked psychiatric facilities, forced medication and the lack of funding for long term state mental health and substance abuse inpatient services has created a problem for communities throughout the United States. The ability to provide inpatient care for these individuals with serious problems barely exists in Missouri. It is those persons that ultimately make their way in the city jail.

II. Municipal Court and Competency to Stand Trial

Currently, Missouri statutes vest the power to require competency evaluations solely with state courts.[11] For many, the only realistic possibility of receiving

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Martha (Marti) Means has prosecuted over 10,000 municipal court cases involving city ordinance violations, mental health and domestic violence issues. She has also provided legal instruction for the Police Academy, UMKC School of Law Continuing Education, and Avila University. Marti has served as an Associate City Prosecutor for the City of Kansas City, Missouri since 1991, working in in the Municipal Specialty Courts assisting with the Veterans Treatment Court. She currently works in the Corporate Legal Services Department for the City of Kansas City, Missouri.



Bryan Meyer, of Guin Mundorf LLC in Kansas City, Missouri, practices in the areas of education law, labor and employment law, insurance defense and litigation, and serves as general counsel to a number of public school district clients. He earned his Juris Doctorate and Master of Public Administration at the University of Missouri – Kansas City . He is a former United States Marine and is the Founder-Executive Director of a nonprofit organization that provides free legal services to military veterans.

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treatment will depend upon the individual committing a crime sufficient to be processed in a state court. In municipal courts, once there has been an indication of mental illness and a question of competency to stand trial raised, few other alternatives exist other than to dismiss the case because the municipality is not equipped to proceed with prosecution against an incompetent person.

In Kansas City, defendants are charged with municipal ordinance violations that could also be filed as state misdemeanor and/or felony charge(s); but the state prosecutor and/or police may refer the case to the city for filing, thus the defendant appears in municipal court rather than state court. This charging decision to file a case as a city ordinance violation is a product of longstanding community and law enforcement practice in Kansas City. The result of these charging decisions are that criminal cases which would likely be filed as misdemeanors and or felonies in other jurisdictions are filed as municipal ordinance violations in Kansas City.

When a person is arrested on a municipal ordinance violation, he or she may post bond. If the defendant is unable to post bond, they are held in detention until the next day for an arraignment. At arraignment, the municipal judge explains the charge and considers bond. The defendant may be released on the promise to return on a court date or detained and given a trial date within ten days. In order to make bond determination, the municipal court can consider two factors: court attendance and danger to an individual or to the community.[12]

If a municipal judge believes that a person may be incompetent to proceed, the court lacks jurisdiction to order an unwilling individual to the Department of Mental Health for evaluation and treatment pursuant to §552.020 RSMo 2013.[13] Missouri municipal courts are limited from committing a person to a state mental health facility for either pre-trial competency evaluation or post-trial commitment.[14] Faced with questions of competency to stand trial and an individual's unwillingness to consent to metal health evaluations, municipal judges are provided little other alternative than to dismiss the case and return the individual to the community.

In municipal court, questions regarding lack of capacity or competency to proceed as defined by § 552.020, RSMo. 2013, are often raised immediately prior to or during trial.[15] There is no statutory procedure in place to determine competency issues in municipal court cases. The determination that a defendant lacks capacity is a subjective decision made by the municipal court judge, city prosecutor or defense attorney. If the city prosecutor or municipal judge believe the defendant lacks capacity to understand the proceedings or assist in his or her defense, the case or cases are dismissed and the person is released from jail back into the community. Municipal courts also lack jurisdiction to order forced treatment and medication of an incompetent defendant. The U.S. Supreme Court has held that the 5th Amendment Due Process Clause prohibits involuntary administration of anti-psychotic drugs to a mentally ill defendant unless the defendant is facing serious criminal charges and only for the purpose to render the defendant competent to stand trial.[16] Oftentimes the most critically mentally ill and unstable individuals are released back into the community because they have been deemed incompetent to proceed with prosecution of the municipal ordinance violation(s). These repeat municipal offenders are commonly the most critically mentally ill and unstable individuals, whom also pose a greater safety risk to self and to the community.

There is no statutory procedure in place to determine competency issues in municipal court cases. The determination that a defendant lacks capacity is a subjective decision made by the municipal court judge, city prosecutor or defense attorney.

An additional scenario where competency may be an issue is under §552.030 RSMo 2013 where there is a lack of responsibility due to mental disease or defect and is a defense to a charge.[17] This section provides that a person is not responsible for criminal conduct if at the time of such conduct "as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law".[18] Once the defense is raised, one of two things may happen. If the prosecutor accepts the defense, the court must proceed to order a commitment under §552.040 RSMo 2013. If the defense is not accepted the court must order a psychiatric evaluation. Unlike §552.020 RSMo 2013, the culpability of the person for the crime due to mental defect is for the trier of fact. It becomes a factual proof issue for both parties. If a person is found not guilty by reason of mental defect, the court must order commitment under §552.040 RSMo 2013. Again, as with §552.040, RSMo 2013, municipal courts may not order the psychiatric evaluation and cannot order the mandatory commitment under the state statute.

Any person, including treatment providers providing services to a person participating in a municipal treatment court, can petition the probate division of the circuit court in the county where the person is found for commitment to a mental health facility. The person may be committed if a determination of mental disability is found, or an alcohol or drug abuser, and because of that, presents a danger to himself or others.[19] If committed, the person is evaluated by mental health professionals to resolve if he suffers from a mental illness, or alcohol or drug abuse, and treatment is recommended. If the criteria for further involuntary treatment are met, that treatment may be provided; and hopefully, the person, upon release from the mental health facility, would be able to meaningfully participate in the municipal mental health treatment court.

However, gaps exist in services for persons committed pursuant to the state civil commitment statutes. For example, Missouri currently lacks any inpatient facilities designated by the Missouri Department of Mental Health to receive persons committed for thirty day alcohol and drug treatment under Chapter 632, RSMo 2013. Additionally, too few hospital beds are available to accept persons committed for mental health treatment under Chapter 632[20] if they are found to be dangerous to themselves or others because of mental

illness. This often leads to the early release of such patients back into the community, a community that lacks the jurisdiction and resources to involuntarily treat those patients. Further, a person may be mentally ill with behavioral and substance abuse problems, unwilling or unable to participate in the municipal treatment courts, but may not meet the dangerousness requirements for civil commitment.

III. The Inability of a Municipal Court to Determine if a Defendant is Competent to Stand Trial as a Violation of Due Process

Municipal courts in Missouri do not have jurisdiction to commit individuals to the Department of Mental Health for evaluation and treatment.[21] Municipal courts have limited jurisdiction and may not proceed with any matter unless the legislature has given them express authority to do so.[22] "Municipal courts in Missouri are courts whose jurisdiction is limited to enforcement of ordinances of that particular city." [23]

Missouri criminal, civil and probate proceedings are governed by state statute, and those statutes indicate the power to conduct those proceedings are held by the state, not municipalities. Costs provisions for these statutes require payment by the county in a misdemeanor, and by the state in felony cases.[24] No provision is made for the payment of costs from a city treasury to a state institution in cases involving violations of city ordinances.[25]

The prevailing Missouri legal opinion regarding a municipals judge's ability to mandate inpatient treatment is an Attorney General Opinion from 1978.[26] The opinion makes clear that treatment under § 552.020 or § 552.040, RSMo can only be triggered when a defendant is charged with state misdemeanor or felony charge(s).[27] The opinion specifies that criminal commitment proceedings are governed by statute and not ordinance, and reference to "any judge" in § 552.020, RSMo is not applicable to municipal court proceedings.[28] The statutory provisions provided under the criminal statute for mentally ill persons charged with a misdemeanor or felony also do not apply. §552.020.10(6) RSMo permits the transfer of the individual to the probate division for hearings under §475 RSMo to determine incapacity and guardianship and under §632.120 and 633.120, RSMo 2013 for commitment to a mental health facility as needed. However, the county prosecutor must present the evidence at any hearing regarding mental capacity to stand trial. Therefore, any order of the municipal court, prior to trial and a finding of guilt, purporting to authorize or require the detention of a citizen would be an illegal deprivation of due process in violation of Mo. Const. art. I, § 10 and the 5th and 14th Amendments to the U.S. Constitution.

Consistent with fundamental fairness and due process, an individual should not be held to stand trial, in any court, if he or she is found to be mentally incompetent. Competency to stand trial is a constitutional requirement.[29] It requires that a defendant be capable of understanding the charges against him or her in order to assist the attorney in preparing the best defense possible.[30] In *Miller v. State*[31] the court determined that a person who lacks mental capacity to understand the proceedings against him to act rationally in his own defense may not be submitted to criminal prosecution. Conviction of legally incompetent accused individuals violates due process.[32] In *Drope v. Missouri*[33] the Supreme Court of Missouri found that due process requires a psychiatric evaluation if the court has "reasonable cause"[34] to believe that the accused has a mental disease or defect excluding fitness to proceed, and a hearing if the psychiatric report is in question.[35] This determination of incompetency to stand trial is done "without traditional adversarial concern for burden of proof, reasonable cause to believe the accused suffers from mental disease or defect which affects fitness to proceed".[36] This due process requirement triggers once a legitimate question of competency raises, either by the parties or the court on its own motion.[37] The U.S. Supreme Court holds that a "defendant's fundamental right to be tried only while competent outweighs state's interest in efficient operation of its criminal justice system."[38] Unfortunately once the initial reasonable cause threshold is passed, municipal courts lack jurisdiction to conduct competency hearings and must dismiss the case to meet the due process requirements.

IV. Procedural Remedies for Municipalities

Certain municipalities may have the ability to adopt ordinances that specifically address the gaps between municipal courts and the civil commitment process. Missouri is one of many states that utilize a "home rule" charter, which is intended to allow localities to decide for themselves the form of local government that they desire and the scope of the local government's powers and to delegate autonomous power to local governments through constitutional grant not dependent on state legislative action.[39] Home rule municipalities may act on almost all issues, but they may also be preempted by the state.[40]

Essentially, a state statute occupying an applicable field does not automatically preempt a city from adopting an ordinance in the same field. The ability of the municipality to adopt an ordinance depends on an analysis concerning the nature of the matter the ordinance sets out to address. In a home rule charter city such as Kansas City, the city ordinance will be found valid if it is a matter of local concern, invalid if the matter is of state concern, or it could go either way in areas of mixed concern.[41]

In *Cape Motor Lodge v. City of Cape Girardeau*,[42] the Supreme Court of Missouri addresses the effect of statutory silence on a municipality's authority to act. In doing so, the Court lays out a test to determine when a city is preempted from enacting an ordinance where the state has created a statute or remains silent on the subject. The crux of the test surrounds whether there is a statute that expressly or implicitly prohibits the city from exercising that particular power which is determined by conflicts between the proposed ordinance and the current statute. The test to determine if a conflict exists is whether the ordinance permits what the state prohibits or prohibits what the statute permits and if an ordinance merely prohibits more than the state statue then the two measures are not in conflict.[43]

The Supreme Court of Missouri ruled that under Mo. Const. art. VI, § 19(a) home rule cities have all the power which

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the Missouri General Assembly has authority to give to any city.[44] Under Mo. Const. art. VI, § 19(a), the emphasis no longer is whether a home rule city has the authority to exercise the power involved, rather the question is whether the exercise of that power conflicts with the Missouri Constitution, state statutes, or the charter itself.[45] If there is a conflict between a constitutional or statutory provision and an ordinance then the state law provision will prevail.[46] In *Frech v. City of Columbia*[47] the court upheld a city ordinance empowering municipal judges to issue search warrants for administrative searches in conjunction with the city's code enforcement and licensing procedures for residential rental properties. The court found no limitation on the city's power to authorize municipal search warrants in state statutes regulating searches in criminal proceedings, Chapter 542, RSMo 2013, and no conflict with the court's constitutional responsibility for establishing court rules of practice and procedure.[48]

In Mo.Att'y Gen. Op. 178, *Hensley, December 8, 1978*, the opinion indicates the municipal courts do not have power to commit individuals pursuant to §552.020 or 552.040, RSMo 2013. The opinion does not address the ability of a municipality to take other remedial actions or if those actions may be precluded by state preemption. A municipality may have jurisdiction to enact ordinances that permit competency evaluations and procedures for municipal court similar to processes permitted by state courts. The opinion makes it clear that municipalities do not pay the costs associated for state psychiatric examination services and therefore lack jurisdiction to refer individuals for these services. Further, the Missouri Department of Mental Health no longer provides these services as a courtesy to the municipal court in Kansas City. With the state's reduction in psychiatric emergency department services and acute care beds, the result is that mentally ill individuals are now incarcerated in our local jail systems. The responsibility for these individuals has shifted from the state system of care to local communities.

If a municipality adopts an ordinance granting jurisdiction to municipal judges to act in a manner consistent with state statute, the financial burden attached to caring for those individuals will shift to the municipality. It is unlikely a municipality would be able to compel a state-run facility to accept transfer of individuals found in need of care or those seeking evaluation by order of a municipal judge. For many municipalities, the cost of evaluation, treatment, and care is a significant financial obligation to put upon an already thin municipal budget. However, there is a considerable amount of literature advocating that early intervention and mental health treatment will realize net gains in government expenditures over a period of time. Recently the Health Care Foundation of Greater Kansas City released a report in which it estimates the cost of mental illness in the greater Kansas City area.[49] The report indicates that the incarceration of mentally ill persons in Kansas City results in costs of $8.2 million to the criminal justice system.[50]

V. Promising Practices in Other Jurisdictions

Other jurisdictions have adopted policies which place greater authority in the hands of the municipality to assess and mental competency and deal with treatment. Ohio grants jurisdiction to municipal judges to order competency evaluations through statutory language.[51] In Seattle, the municipal court has the authority to order competency evaluations and has also established a special competency docket in order to provide a more stable evaluation process. The Seattle Municipal Mental Health Court has an initial competency assessment process that involves the public defender, a defense social worker, and a court-employed mental health professional. These assessments precede a formal competency evaluation. The Seattle Municipal Mental Health Court has also established stages of competency examination: initial competency assessment, transfer to inpatient unit for stabilization, jail based medication and treatment; and establishment of "Sell" hearings[52] to determine medication over objection and a return to court stage once the person has been restored to competency. There are three mental health courts within the Boston Municipal Court Department. Participation in the mental health court is for individuals who have been placed on pre-trial probation or post-disposition probation, and have serious mental health issues or co-occurring mental health and alcohol/substance abuse issues. When competency is an issue, after consultation with an attorney, participation may be available as a term of release.[53]

VI. Conclusion

The movement of mentally ill persons out of state mental health institutions and into jails and prisons is a function of two events: the de-institutionalization of mentally ill persons to community-based less restrictive mental health treatment, and the reduction of funding for state inpatient psychiatric and substance abuse treatment facilities. This constructs our current crisis situation where seriously mentally ill persons, oftentimes also requiring substance abuse treatment and possessing behavioral problems, revolve through the jail systems. Deficient inpatient stabilization care options, lack of funding for substance abuse treatment, and the inability to force medication compliance have created a legal quagmire for judges, prosecutors and defense attorneys. Seemingly a municipality, like Kansas City, could be authorized to adopt new city ordinances that would enable the municipality to better address the needs of those lacking mental competency to stand trial. One option is to create a mental health wing in the jail to provide treatment, mental health stabilization and a continuum of care in the community post release. Another possibility would be the creation of a formalized process to transfer persons from municipal courts to the state probate divisions to determine incapacity and guardianship for commitment to a mental health facility. There are creative solutions to the problem. Providing more tools to municipalities to address the incarceration of mentally ill persons will hopefully result in a safer community for everyone.

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Notes

1. Thanks are due to the following individuals who provided their insight and expertise to this article: Sean O'Brien, Professor; University of Missouri-Kansas City School of Law; Bruce Eddy, Jackson County Mental Health Levy; and the Honorable Daniel Wheeler. Several other beneficial suggestions have been incorporated in the article without further attribution. The authors are responsible for any mistakes or omissions which may remain.
2. Section 552.020 RSMo. 2014. (1) No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense as the incapacity endures. (2) Whenever a judge has reasonable cause to believe that the accused lacks mental fitness to proceed he shall, upon his own option or upon motion filed by the state...by order of record, appoint one or more private psychiatrists or psychologists...for purposes of performing the examination in question, to examine the accused.
3. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
4. The City of Kansas City, Missouri encompasses approximately 315 square miles and is located within four counties: Cass County, Clay County, Platte County and Jackson County. The majority of cases referred to the Kansas City, Missouri Municipal Court are from Jackson County.
5. Bureau of Justice Statistics Special Report. *Mental Health Problems of Prison and Jail Inmates,* September 2006; Doris J. James and Lauren Glaze.
6. Resource Development Institute. (2011, May) *Prevalence of Mental Illness in the Kansas City Regional Correctional Center, March 2011*; Kansas City, MO.
7. "Emotionally Disturbed Person" a police term to describe a person believed to have a mental illness.
8. "...a peace officer may take a person into custody for detention for evaluation and treatment for a period not to exceed ninety-six hours only when such mental health coordinator or peace officer has reasonable cause to believe that such person is suffering from a mental disorder and that the likelihood of serious harm by such person to himself or others is imminent unless such person is immediately taken into custody." § 632.305.3 RSMo, 2013
9. *Id.*
10. The Health Insurance Portability and Accountability Act (HIPAA) enacted to protect the privacy of individually identifiable health information and the wrongful disclosure of health information. *See* 42 U.S.C. § 1320d-6.
11. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
12. Missouri Supreme Court Rule 37.15(b) If an arresting officer has not released a person, the court shall order the person released upon the person's written promise to appear unless the court finds:
(1) The promise alone is not sufficient reasonably to assure the appearance of the person; or
(2) The person poses a danger to a crime victim, the community or any other person.
13. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
14. *Id.*
15. RSMo 552.020, 2013. 1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried convicted or sentenced for the commission of an offense so long as the incapacity endures.
16. *Sell v. United States*, 123 S. Ct. 2174, 2185 (2003).
17. §552.030.1 RSMo 2013.
18. *Id.*
19. Chapters 630-632 RSMo (2013).
20. Chapter 632 RSMo (2013).
21. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
22. State ex rel. Kelly v. Trimble, 247 S.W. 187 (Mo. 1922).
23. Kansas City v. Henderson, 468 S.W.2d 48, 50 (Mo. 1971).
24. "Of particular note is Section 552.080 which specifies that costs of examinations, reports, and expert testimony are to be paid by the county in misdemeanor cases of the state in felony cases. Significantly, no provision is made for the payment of costs from a city treasury to a state institution in cases involving violations of city ordinances." Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*
25. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
25. *Id.*
26. *Id.*
28. "While at first blush the term 'any judge' might seem to include municipal court judges, a further reading of the statute precludes this conclusion. The statute plainly indicates its inapplicability to municipal court proceedings, where the state is not a party, but its repeated and consistent references to "the state". See also section 552.020(6) and (8); Section 552.030(2) and (4)." Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
29. United States v. DiGilio, 538 F.2d 972, 989 (3d Cir. 1976).
30. *Id.*
31. Miller v. State, 498 S.W.2d 79, 87 (Mo. App 1973).
32. State v. Wilkerson, 330 S.W.3d 851, 855 (Mo.App. W.D. 2011). In *Wilkerson*, 330 S.W.3d 851, the appellate court found that the trial court erred when it adjudicated the defendant's competency to stand trial without a mental health examination because due process requires that a defendant may not be tried unless he is competent to stand trial. Wilkerson, an inmate at the Tipton Correctional Center, was charged with endangering a correction employee and refused to cooperate with the mental examination. The trial proceeded without the examination and the defendant was convicted. The court held that the purpose of § 552.020, RSMo is to protect the constitutional due process rights of criminal defendants not to be tried while legally incompetent.
33. Drope v. Missouri, 95 S. Ct. 896 (1975).
34. *Drope*, 95 S. Ct. at 904.
35. *Id.*
36. State v. Bradshaw, 593 S.W.2d 562, 568 (Mo.App. W.D. 1979)
37. *Id.*
38. Cooper v. Oklahoma, 116 S. Ct. 1373, 1384 (1996).
39. The Missouri Constitution requires adoption of home rule charter. MO. CONST. ART. VI, § 19. The charter is a limitation on authority rather than a grant of authority. See, *e.g.,* Tietjens v. City of St. Louis, 222 S.W.2d 70 (Mo. 1949); *see also*, Skaggs v. City of Kansas City, 264 S.W.3d 694 (Mo.App. W.D. 2008)
40. State ex rel. Petti v. Goodwin-Raftery, 190 S.W.3d 501, 505 (Mo. App. E.D. 2006).

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A Privileged Posse: Protecting the Attorney-Client Privilege When Engaging With Third-Party Contractors

By Robert C. Widner, Widner Michow & Cox, LLP, Centennial, Colorado



Municipalities have historically contracted with private companies to deliver municipal services to citizens.[1] More recently, entire functional departments of local government that were once staffed by municipal employees and viewed as delivering the municipality's core services are managed or serviced by third-party contractors.[2] In the performance of these contracted services, the contractor's personnel will oftentimes be integrated into the municipality's administrative employee staff and the contractor's personnel will attend daily or routine meetings alongside the municipality's staff and municipal attorneys. For example, a contractor engaged to provide code enforcement services will meet with municipal supervisory staff and the municipal attorney to receive direction on how to abate nuisances on a particular troublesome property. A contract engineer may be asked to provide an explanation of technical issues necessary for the understanding of the municipal manager and the municipal attorney and will be asked to assist in devising litigation strategy. A contractor providing day-to-day street repair services may be asked to attend a meeting to discuss a recent judicial decision and its effect on the municipality's street repair program and to also receive instructions on how to best manage municipal liability.

Incorporating third-party contractors into the attorney-client relationship can create a risk of waiving the confidentiality afforded by the attorney-client privilege. Once waived, the communications once believed to be protected by the attorney-client privilege may be subject to a risk of disclosure during litigation or even through a state open records request.[3] This article examines the issue of protecting attorney-client privilege when third-party contractors are engaged by the municipality and offers practical recommendations on how to manage contractor relationships in an effort to protect confidentiality.

General Rule -Attorney Client Privilege

The attorney-client privilege[4] encourages full and frank communication between clients and their attorneys.[5] It is through an avenue of confidential communication between the client and the attorney that clients can be counseled on how to conform their conduct to the law.[6] The attorney-client privilege of confidentiality is described as: "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived."[7]

The privilege protects both communications from the client to the lawyer and from the lawyer to the client.[8] The party seeking to invoke the attorney-client privilege bears the burden of establishing its applicability and the lack of waiver of any privilege.[9]

The attorney-client privilege is routinely extended by the courts to protect the confidentiality of communications that are shared with administrative personnel of the law office or law firm employed to directly assist the lawyer in the provision of legal advice and services to the client.[10] As a result, administrative assistants and law clerks who assist lawyers in performing their tasks on behalf of the client are clearly within the scope of the attorney-client privilege.[11]

For corporate entities such as municipalities, an employee's communication to its attorney is protected under the attorney-client privilege where "an employee of a corporation ... is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the com-

munication is the performance by the employee of the duties of his employment."[12] Once the communication is privileged, the communication may be shared with other employees acting within their scope of their employment without resulting in a waiver of the attorney-client privilege.[13]

As a general rule, the disclosure of an otherwise privileged attorney-client communication to a third party waives the privilege.[14] Such waiver can be voluntary or even inadvertent[15] and, because the privilege is in derogation of the search for truth, courts will strictly construe any exception to the privilege.[16] However, limiting the confidential protection of communications only between employees of the corporation ignores the reality that clients may often engage non-employees to assist in providing the information needed to prepare competent attorney advice and counsel. For this general reason, many courts have recognized two different exceptions to the general rule that the attorney-client privilege is waived by disclosure to third parties: (1) the "interpreter theory;"[17] and (2) the "functional equivalent theory."

Courts throughout the United States often apply one or both theories, or derivations of the theories, when examining a claim of waiver of the attorney-client privilege due to the involvement of a third-party in the attorney-client relationship.[18] The court's consideration of a challenge involves a case-by-case evaluation based on the factual circumstances underlying the relationship of the parties, the parties' actions, and the legal advice at issue.[19] It is incumbent on the municipal attorney to become acquainted with the applicable jurisdiction's approach to addressing possible waivers of the attorney-client privilege where third parties are involved. Notwithstanding which theory may be applied in a given jurisdiction, similar steps can be taken to help insure extension of the attorney-client privilege to communications between the municipal attorney and the client's third-party contractors to avoid the potential of a waiver of the privilege.

The Interpreter Theory

The interpreter theory is widely credited to the decision in *United States v. Kovel*.[20] *Kovel* involved an attempt to challenge the extension of the attorney-client privilege to protect communications between the client and the attorney with a third-party advisor. In *Kovel*, an accountant hired by a law firm to assist the firm with tax issues related to a client's pending litigation matter refused to testify about his communications with the client of the law firm. In finding the third-party advisor to be cloaked with the attorney-client privilege, the Second Circuit Court of Appeals recognized that there are situations "where the lawyer needs outside help" in advising the client and such outside help will provide more effective communications between the client and the attorney. The court pointed out the efficiency of having the presence of the accountant, "whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer," and that such presence "ought not destroy the privilege..."[21] The court analogized the use of an accountant to a foreign language interpreter that would assist the attorney in communicating with the client; hence, the appellation of the "interpreter theory." The court explained "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service ... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists."[22]

It is incumbent on the municipal attorney to become acquainted with the applicable jurisdiction's approach to addressing possible waivers of the attorney-client privilege where third parties are involved.

Kovel is often cited for the proposition that non-attorney advisors consulted for the specific purpose of assisting in fashioning legal advice will not jeopardize the attorney-client privilege. Critically important to the protection of the attorney-client privilege is that the communication is made for the specific purpose of assisting in producing legal advice from the attorney to the client. Where the participation of the third party fails to bear a direct connection to the delivery of legal advice, such as only delivering general assistance to a client for financial planning or public relations issues that are only tangential to the client's need for legal advice and counsel, the privilege may be extinguished.[23]

Functional Equivalent Theory

In re Bieter Company,[24] a decision of the Eighth Circuit Court of Appeals, is often followed by courts when evaluating whether communications between a corporation's attorney and a corporation's consultant can be protected by the attorney-client privilege. *In re Bieter Company* involved a challenge of an attorney-client privilege claim asserted to protect the confidentiality of communications between legal counsel and a consultant hired to provide real estate

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advice to the client. The consultant in *In re Bieter Company* attended meetings with the attorney and attended meetings on behalf of the client as the client's representative. The court in *In re Bieter Company* found that, "when applying the attorney-client privilege to a corporation or partnership, it is inappropriate to distinguish between those on the client's payroll and those who are instead and for whatever reason employed as independent contractors."[25] According to the Eighth Circuit, communications may fall within the privilege as long as: (1) the independent consultant is the "functional equivalent of an employee;" (2) the communications with the consultant are related to the consultant's duties; (3) the communications are for the purpose of preparing legal advice for the client; and (4) the communications were treated as confidential.[26] Because the real estate consultant at issue in *In re Bieter Company* was intimately involved on a daily basis in the client's business, attended meetings as the client's representative, and "was in all relevant respects the functional equivalent of an employee," the court extended the attorney-client privilege to protect communications between the corporation's attorney and the consultant.[27]

Following *In re Bieter Company*, other courts have applied the functional equivalent theory to communications involving a wide variety of non-client, third-party contractors.[28] The functional equivalent theory properly recognizes that corporate entities commonly seek outside consultants and contractors to perform services that are not otherwise available from personnel within the corporation. To the extent that the consultant or contractor is "in all relevant respects" the functional equivalent to an employee, the courts will often extend the attorney-client privilege.

Conclusions: Protecting the Privilege in Contractor Engagement

Recognizing that courts will employ a case-by-case evaluation when considering the extension of the attorney-client privilege to communications with third-party contractors,[29] there can be no guarantee that a given contractor relationship with the attorney will withstand a challenge of the attorney-client privilege. However, understanding that courts may look to the interpreter theory (*Kovel*) or functional equivalent theory (*In re Bieter Company*) in addressing these challenges, structuring the duties of the third-party contractor and managing the interactions between the municipal attorney and the contractor may aid in protecting the privilege. Municipal attorneys should consider advising clients to address all of the following in order to protect the client's interests when incorporating third-party contractors into situations that might involve the attorney-client privilege:

1. Expressly state in the client's contracting agreement with the third-party contractor that the contractor's duties will include meeting with the client's municipal attorneys to explain and interpret information and data relevant to the contractor's work and that the contractor's interpretations and explanations may be used in providing legal advice to the client. This representation would be exceedingly appropriate for contractors engaged in technical areas of expertise not possessed by the municipal attorney, such as engineering, public utilities, and water resources.
2. Expressly state in the client's contracting agreement with the third-party contractor that the contractor's duties will include working in concert or as a member of the municipal team with the municipality's staff and the municipal attorney in providing information needed to devise legal strategy and legal advice. Use some caution, however, in describing the third-party contractor as "functionally equivalent to an employee" or otherwise referring to the contractor as an employee of the municipality.[30]
3. Use caution when consenting to the attendance of third-party contractors at meetings involving matters that will likely lead to legal advice for which the protection of the attorney-client privilege may be desired. Excuse from attendance third-party contractors who are not reasonably necessary to an evaluation of the issues and to assisting the attorneys in rendering legal advice. Maintain a record of attendees at meetings and seek to identify in the notes of the meeting what contributions were made by the third-party contractor in assisting in the development of legal advice for the client. Ask yourself if you can reasonably argue that the third-party contractor's personnel in attendance can be recognized as interpreters of information necessary for the legal advice or the functional equivalent to employees of the client.
4. Include in the contracting agreements with independent contractors provisions imposing obligations of confidentiality for both oral discussion and confidential documents.
5. Use meeting agendas, if practicable, which will identify that a purpose of the meeting is to assist the municipal attorney in the development of legal advice for the client. In this regard, consider making available pre-printed, self-adhesive labels to hand out to meeting attendees to affix to all attendee notes and other documents which will identify that the notes and documents are confidential and were prepared as part of a consultation with the municipal attorney for the benefit of the municipality.

Use caution when consenting to the attendance of third-party contractors at meetings involving matters that will likely lead to legal advice for which the protection of the attorney-client privilege may be desired.

Notes:

1. Stephanie Rozsa & Caitlin Geary, *Privatizing Municipal Services*, Nat'l League Of Cities Municipal Action Guide (2010), available at http://www.nlc.org/documents/Find%20City%20Solutions/Research%20Innovation/Economic%20Develop ment/privitizing-municipal-services-gid-10.pdf.

2. *Id.*; *see also Top Ten Facts about P3s*, Nat'l Council for Public Private Partnerships, undated, available at http://www.ncppp.org/ppp-basics/top-ten-facts-about-ppps/ ("the average American city currently works with private partners to perform 23 out of 65 basic municipal services.") As just two of many examples, the City of Centennial, Colorado, incorporated in 2001, contracts with a variety of private companies to provide public works, animal control, code compliance and legal department services and, in addition, manages an intergovernmental agreement with county government for the delivery of all law enforcement services to the city. The City of Sandy Springs, Georgia, decided to contract for all government services except public safety upon the city's incorporation in 2005. *See* David Segal, *A Georgia Town Takes the People's Business Private,* N.Y. TIMES, June 24, 2012, at BU1.

3. State statutory open records provisions commonly exempt from public disclosure communications and documents protected from disclosure by state law or court rule which includes non-disclosure due to attorney-client privilege. See, e.g., COLO. REV. STAT. § 24-72-204(1)(a)&(c)(2014) (exempting from disclosure documents protected by state law and rules of the state supreme court which include attorney- client communications) and COLO. REV. STAT. § 13-90-107(1)(b)(codifying the attorney client-privilege and stating "[a]n attorney shall not be examined without the consent of his client as to any communication made by the client to him or for his advice given thereon in the course of professional employment.").

4. For a comprehensive examination of the historical underpinnings of the attorney-client privilege, *see* Geoffrey C. Hazard, Jr., *An Historical Perspective of the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

5. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

6. United States v. BDO Seidman, 492 F.3d 806, 815 (7th Cir. 2007).

7. See In re Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 324 (S.D.N.Y. 2003).

8. *Id.*; *see also* Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y.1995).

9. *In re* Foster, 188 F.3d 1259, 1264 (10th Cir. 1999).

10. 3 JOSEPH M. MCLAUGHLIN, WEINSTIEN'S EVIDENCE § 503.01 (2d ed. 2003).

11. *Id.* at § 503.12[3][b].

12. Harper & Row Publishers v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970).

13. *See* Bank Brussels Lambert, 160 F.R.D. at 442; Santrade, Ltd. v. General Elec. Co., 150 F.R.D. 539, 545 (E.D.N.C. 1993).

14. See United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997) ("A client can waive the privilege by voluntarily disclosing his attorney's advice to a third party.").

15. *In re* M & L Business Machine Co., 161 B.R. 689, 693 (D. Colo. 1993) ("the attorney-client privilege is lost if the substance of the confidential communication is disclosed to a third party, even inadvertently.").

16. *BDO Seidman*, 492 F.3d at 815.

17. Also recognized in some treatises and judicial decisions as the "agency theory."

18. Michele D. Beardslee, *The Corporate Attorney-Client Privilege: Third Rate Doctrine for Third Party Consultants*, 62 SMU L. REV. 727 (2009).

19. *See* Upjohn v. United States, 449 U.S. 383, 392-93, 396-97 (1981); Horton v. United States, 204 F.R.D. 670, 672 (D. Colo. 2002) (court requires a "detailed factual showing" to support claimed privilege).

20. 296 F.2d 918 (2d Cir. 1961).

21. *Id.* at 922.

22. *Id.*

23. *See*, *e.g.*, Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002) (an accounting firm's tax advice provided to the lawyer's client failed to demonstrate any relationship to the lawyer's legal advice); United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999) (investment banker was not considered as interpreting information or improving the comprehension of communication between the client and the lawyer); *In re* Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp.2d 321 (S.D.N.Y. 2003) (confidential communications between lawyers and public relations consultants hired by the lawyers to assist in handling media matters related to the client's legal problems are protected by the attorney-client privilege, notwithstanding that the lawyers were not always present in meetings with the client and the public relations firm).

24. 16 F.3d 929 (8th Cir. 1994).

25. *Id.* at 937.

26. *Id.* at 939-40.

27. *Id.* at 938.

28. For just a few of many cases applying the functional equivalent theory, see, e.g., United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) (consultant insurance advisor; case includes extensive citations to other courts applying the functional equivalent theory); RoDa Drilling Co. v. Siegal, 552 F.3d 1203 (10th Cir. 2009) (accountant); Fed. Trade Comm'n v. Glaxosmithkline, 294 F.3d 141 (D.C. Cir. 2002) (public relations firm advisors as functional equivalent to employees); Horton v. United States, 204 F.R.D. 670, 672 (D. Colo. 2002) (property management company not functionally equivalent); *In re* Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 219 (S.D.N.Y. 2001) (public relations firm); McCaugherty v. Sifferman, 132 F.R.D. 234, 239 (N.D. Cal. 1990) (financial consultants as functional equivalents of employees).

29. *See supra* note 18.

30. Caution may be warranted when acknowledging in the client's contracting agreement that the third- party contractor serves as an independent contractor and, when seeking to recognize that the relationship for purposes of seeking attorney-client protection, the client recognizes the relationship as "functionally equivalent to employment." *See generally* http://www.irs.gov/Businesses/Small-Businesses-%26-Self- Employed/Independent-Contractor-Self-Employed-or-Employee which highlights the Internal Revenue Service's admonitions and potential impacts of misclassifying an independent contractor as an employee. Unfortunately, arguing that an independent contractor is the "functional equivalent of an employee" to garner protection by the attorney-client privilege may possibly aid in an argument that the contractor should be more properly characterized as an employee.

(This article was prepared by Mr. Widner as a requirement for admission as a Local Government Fellow with the International Municipal Lawyers Association.)



Ten Years of the Roberts Court: Impact on State and Local Government

By Lisa Soronen, Executive Director, State and Local Legal Center, Washington, D.C.

John Glover Roberts, Jr. became the 17th Chief Justice of the United States Supreme Court on September 29, 2005. Roberts Court decisions have affected everyone from average Americans to Guantanamo Bay detainees to state and local government. This article provides a brief analysis of how the Roberts Court has impacted 10 areas of interest to state and local government: federalism, preemption, race, free speech, religion, public employment, qualified immunity, death penalty, Fourth Amendment, and gun control.

Federalism

Much of the Court's docket every term involves the relationship between the federal government and state and local government, which makes it difficult to generalize about federalism decisions. However, the early years of the Roberts Court were not dominated by particularly significant federalism cases.

In the Court's October 2011 term federalism was at issue in the two big cases. In *NFIB v. Sebelius,* 132 S. Ct. 2566 (2012), the Court was asked to decide whether the Affordable Care Act individual mandate and Medicaid expansion were constitutional. *Arizona v. United States*, 132 S. Ct. 2492 (2012), involved a challenge to four provisions of Arizona law designed to crack down on illegal immigration.

The big cases in the Court's October 2012 term involved federalism too. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court was asked to decide the constitutionality of the Defense of Marriage Act requirement that marriage for federal purposes be defined as between a man and a woman. In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the fate of Section 4 (and, practically speaking, Section 5) of the Voting Rights Act was in the Court's hands.

Federalism fared well in three of the four cases. Notably, in *NFIB v. Sebelius*, while the Affordable Care Act remained mostly intact, the individual mandate was deemed to violate the Commerce Clause on the ground that Congress lacks the power to compel a person to engage in commerce. And for the first time ever, the Court concluded that a federal law exceeded Spending Clause authority because it was coercive. In *Arizona v. United States*, while the Court held that three provisions of Arizona immigration law were preempted, it concluded the most controversial provision ("show me your papers") wasn't clearly preempted. Following *Shelby County*, Section 5 of the Voting Rights Act is currently inoperable.

All state and local governments do not necessarily want a result that favors federalism in all cases. This is probably best illustrated in environment cases where states are often suing each other or otherwise involved on both sides of the case. Notably, in probably the most significant environmental case the Roberts Court has decided to date, *Massachusetts v. EPA*, 549 U.S. 497 (2007), several states and local governments asked the Court to force EPA to regulate carbon dioxide emissions in new motor vehicles, and it did.

Preemption

The Court's preemption docket in the last few years has been very thin. The Court's lone preemption case of the October 2014 term was *Oneok v. Learjet*, 135 S. Ct. 1591 (2015). The Court held the Natural Gas Act does not preempt state-law antitrust lawsuits alleging price manipulation that affect both federally regulated wholesale natural-gas prices and non-federally regulated retail natural-gas prices.

Recent preemption cases have often considered very narrow issues. For example, the issue in *American Trucking Association v. City of Los Angeles*, 133 S. Ct. 2096 (2013), was whether the Federal Aviation Administration Authorization Act preempted provisions in concession agreements between a port and short-haul trucking companies that required trucks moving cargo in and out of the port to affix placards with a phone number for complaints to each truck and to submit a plan for off-street parking for the trucks.

And, particularly recently, unanimous opinions in preemption cases have been common. For example, *American Trucking Association v. City of Los Angeles* was unanimous as was *National Meat Association v. Harris,* 132 S. Ct. 965 (2012). In that case the Court held that the Federal Meat Inspection Act expressly preempted a California law regulating the treatment of non-ambulatory pigs at slaughterhouses.

Cuomo v. Clearing House Association, 557 U.S. 519 (2009), is good example of a broader, more divided Roberts Court preemption case. The Court held 5-4 that federal banking regulation did not preempt states from enforcing their fair-lending laws against national banks.

A series of preemption cases involving drug labeling are also noteworthy. In *Altria Group Inc. v. Good*, 555 U.S. 70 (2008), the Court held federal law does not preempt state law deceptive practice claims in connection with the advertising of "light" and "low tar" cigarettes. In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Court held federal law does not preempt state torts claims imposing liability on drug labeling that the FDA had previously approved. But in *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011), the Court held that federal drug regulations applicable to generic drug manufacturers preempted state-law tort claims alleging a failure to provide adequate warning labels. And in *Mutual Pharmaceutical v. Bartlett*, 133 S. Ct. 2466 (2013), the Court held that state-law design-defect claims that turn on the adequacy of a drug's warnings are preempted by federal law.

Race

Part of the Roberts Court agenda is to decide cases involving race. The best evidence is the lack of circuit splits in *Shelby County v. Holder, Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), involving the constitutionality of the University of Texas' affirmative action plan, and *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015), involving whether disparate impact claims are possible under the Fair Housing Act.

The Roberts Court can be fairly characterized as using a sledge hammer or a pick when issuing decisions in cases involving race, depending how broad and significant the question in the case. While the outcomes in *Shelby County v. Holder* and *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), holding that states may ban affirmative action through voter-adopted amendments to their state constitutions, were predictable, they are probably the best examples of sledge hammer decisions.

Fisher v. University of Texas at Austin and *Ricci v. DeStefano*, 557 U.S. 557 (2009), are two examples of the Roberts Court taking a pick to chip away at race-based decision making. In *Fisher* the Court held that the lower court improperly deferred to the University's argument that its race conscious admissions policy was narrowly tailored. In *Ricci v. DeStefano* the Court held that the City of New Haven violated Title VII when it discarded tests favoring white and Hispanic applicants for fear of a disparate impact lawsuit.

A few employment decisions other than *Ricci v. DeStefano* have made it more difficult for plaintiffs to win civil rights cases. In *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), the Court held that retaliation plaintiffs must prove "but-for" causation, which is harder than proving "motivating factor" causation, which applies to other discrimination plaintiffs. On the same day the Court in *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), defined "supervisor" narrowly (only a person who can take a tangible employment action against the victim), making it more difficult for employees to sue their employers for workplace harassment.

Race-related decision making hasn't always fared poorly in the Roberts Court. In a surprising 5-4 decision in *Texas Department of Housing and Community Affairs*, the Court held 5-4 that disparate impact claims may be brought under the Fair Housing Act.

Free Speech

Many Court commentators have opined that the Roberts Court is pro-free speech. For state and local government this trend is either irrelevant (when a federal law gets struck down) or bad (when a state law or local ordinance gets struck down). The apex of the Court embracing a broad First Amendment is *Citizens United v. FEC*, 552 U.S. 1240 (2008), holding 5-4 that corporations have First Amendment rights regarding political campaigns. More relevant to local governments, a case that poignantly illustrates the Roberts Court preference for more speech rather than less is *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), holding that strict scrutiny applies to content-based sign ordinances. The impact of *Reed* may be particularly significant as *Reed*'s holding will likely be applied to content-based speech in contexts other than signs.

The Roberts Court has generally held that speech most would consider obnoxious or offensive is protected by the First Amendment. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court held the First Amendment protects from tort liability those who peacefully protest on a matter of public concern near a military service member's funeral. In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), the Court struck down California's ban on the sale or rental of violent video games to minors. And in *United States v. Stevens*, 559 U.S. 460 (2010), the Court concluded that a federal statute that criminalizes electronic depictions of animal cruelty is unconstitutional.

The Roberts Court has decided a number of cases that go against its trend of supporting free speech. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held public employee speech related to their job duties isn't protected by the First Amendment. And in *Morse v. Frederick*, 551 U.S. 393 (2007), the infamous BONG HiTS4 JESUS case, the Court held that school officials may prohibit students from displaying messages promoting illegal drug use.

Finally, state and local government have been able to rely on the government speech doctrine to limit their own speech in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), involving a city refusing to display a monument, and *Walker v. Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015), involving a state refusing to allow the Confederate flag on license plates.

Religion

While the Roberts Court hasn't accepted a lot of cases directly involving religion, in the cases it has decided, it has been tolerant of religion in public spaces. One of the more significant religion cases of its tenure is *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In a 5-4 decision the Court upheld Greece's practice of beginning town board meetings with a prayer that was almost always Christian.

The Roberts Court has decided two cases involving fixed structures with religious messages. In *Pleasant Grove City v. Summum*, the Court allowed a town in Utah to keep its display of the Ten Commandments in a public park even though it rejected a park monument of the Seven Aphorisms of Summum. And in *Salazar v. Buono*, 559 U.S. 700 (2010), the Court upheld the transfer of the federal land on which a cross was situated to a private party.

The Supreme Court has long been interested in the use of taxpayer money to fund religious causes and the Roberts Court has been no exception. In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), the Court held that taxpayers had no standing to challenge the constitutionality of tax credits for contributions to tuition organizations that provide scholarships to religious schools. And in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the Court held that a public law school did not have to officially recognize a club that denied gays leadership positions on religious grounds.

Public Employment

Generalizing about public employment decisions is easy because the Court has only decided about one public employment case every other term. All have been decided in favor of public employers except the narrowest case it has considered to date.

The most significant public employment case is *Garcetti v. Ceballos*. In a 5-4 decision the Court held that public employees have no First Amendment

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Can a City Sue HUD under the Fair Housing Act?

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

The Eleventh Circuit's decisions in *City of Miami v. Wells* Fargo & Co.,[1] *City of Miami v. Bank of America Corp.*,[2] and *City of Miami v CitiGroup, Inc.*,[3] hold that if cities plead carefully, and adequately demonstrate proximate causation, cities can recover from predatory lenders for lost property taxes and increased code enforcement, fire-fighting, and policing expenses attributable to race-based predatory home mortgage lending practices. The theory of liability is that race-based home lending discrimination has a racially-disparate impact on foreclosures, which increases city expenses associated with vacant homes in minority neighborhoods.

Crucial to the result was the Eleventh Circuit's conclusion that cities have both constitutional and statutory standing to seek relief under the Fair Housing Act.[4]

These important cases could also help cities in their struggle against racist landlords and developers, as well as lenders, to further fair housing if we can articulate damages to the city as a corporate entity proximately caused by the racially discriminatory housing practices.

On note of caution: If cities have the right to correct discriminatory practices using the Fair Housing Act, it will be just a matter of time before plaintiffs, perhaps including the U.S. Department of Housing and Urban Development ("HUD"), start asserting that a city that does not aggressively litigate all potential claims against third parties under the Act has failed to satisfy its duty to affirmatively further fair housing.

But there remains another question raised by these decisions: Could HUD itself be a potential defendant in a Fair Housing Act administrative complaint and suit brought by a city for inhibiting a city's fair housing efforts? If so, HUD's investigation[5] and conciliation[6] processes process might be entertaining at the administrative stage. But let us pass to the possibility of litigation.

Key precedents supporting a tentative affirmative answer to whether a city could sue HUD for a Fair Housing Act violation are decisions such as *Darst-Webbe Tenant Association Board v. St. Louis Housing Authority;*[7] *NAACP v. HUD;*[8] and *Dean v. Martinez*.[9] These cases held that HUD has an independent statutory duty to affirmatively further fair housing beyond the duty of regulated entities such as cities,[10] and that HUD's failure to perform its duty was actionable, at least to the extent of obtaining injunctive or mandamus relief.

There is a clear waiver of sovereign immunity for mandamus actions against federal agencies to compel them to perform non-discretionary statutory duties,[11] which courts have also recognized can be used to impose mirror-image relief that could be characterized as injunctive.[12]

The *City of Miami* decisions together with the above-cited line of cases recognizing that HUD can be sued under the Fair Housing Act, provide a defensible basis for going to federal district court to prevent HUD from impermissibly interfering with a city's own fair housing efforts – if the HUD conduct can be characterized as non-discretionary and encompasses a duty to the City.

The *City of Miami* decisions seem to provide the necessary authority for asserting that cities are in the zone of the Fair Housing Act's protection, such that HUD's duty includes a duty to the city. Being non-discretionary is an important qualification, because most HUD decisions impacting cities will be discretionary. The discretionary actions can be appealed for abuse of discretion, arbitrariness, and illegality under the federal Administrative Procedure Act[13] if they are final agency actions. But too often, HUD and other federal agencies' actions escape judicial review because they are not "inal." The Mandamus and Venue Act provisions, 28 U.S.C. § 1651, provide an alternative basis for obtaining judicial review, but only for non-discretionary federal actions against which there is no alternative avenue for seeking relief.

Cities will need to identify specific non-discretionary duties that HUD owes to them under the Fair Housing Act in order to obtain equitable relief against HUD for violating such duties.

But with the possible exception of getting coercive monetary civil contempt sanctions against a federal agency in the most extreme of situations,[14] section 1361 will not provide for monetary relief against a federal agency.

So, might a city be able to characterize an unlawful HUD mandate as a taking, an inverse condemnation, for which the federal government has waived sovereign immunity and for which monetary compensation is available?[15] Would diminished property values of city-owned land be recognized as compensable under the Fifth Amendment's Takings Clause, as was the reduction of property tax revenues recognized by the 11th Circuit's *City of Miami* decisions as compensable damages under the Fair Housing Act? Federal jurisprudence will sometimes find a compensable taking to have occurred even where a regulatory taking does not eliminate all or a property's economic value, but the factors for finding a compensable "noncategorical" regulatory taking are complex and fact-specific.[16] Will the Court of Claims be sympathetic to cities' claims for compensation for a "noncategorical" regulatory taking? Or will it hold that the unlawfulness of the challenged HUD action deprived the loss of a "public purpose" – making it non-compensable except perhaps as a tort – if the Federal Tort Claims Act allows for recovery under the facts?[17]

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PRACTICE TIPS

Apps in the Hall: Counseling the Local Government Regulator in the On-Demand Economy

By Catherine Lizotte, Senior Assistant Corporation Counsel, Boston, Massachusetts

Start-ups and existing companies alike are developing innovative and technology-enabled ways to deliver services traditionally regulated by local government at breakneck speed. Whether their apps allow one to request on-demand valet service or trash pickup, to rent a home or to pay a parking meter, these companies are choosing two distinct paths to entering the market: assertively courting municipalities before they launch their businesses, in the hopes of garnering enough support to ward off heavy-handed regulation, or thrusting their services on the market and waiting for municipalities to react. With the wealth of commentary on the inherent tension between the disruption economy and existing regulatory schemes, and the highly publicized standoffs between local governments and sharing economy heavyweights Uber and Airbnb, it can be easy to portray municipalities as slow-moving and intractable, trying to stifle change by clinging to archaic regulatory powers. Yet at an increasing pace city halls are experimenting with new ways to improve the delivery of municipal services to constituents, either by tapping into the resources of the startup sector or by developing their own technology-enabled solutions.

The catch, of course, is that local governments may only act within the bounds of their legal authority--and as regulatory bodies, are charged with enforcing laws that have not caught up with current technologies. Or, even if they are not constrained legally, cities and towns may face pressure from industry incumbents to preserve traditional regulatory schemes. These realities place government counsel in the sometimes unenviable position of having to advise his or her client when the extent of the city's regulatory reach is simply unclear.

Whether a municipality's ultimate decision is to prohibit or allow a new technology or service, or to pursue its own innovation agenda, resolving the legal questions involved is a process fraught with ambiguities. As counsel navigating these murky waters, you can better define your analytical approach and give informed advice to your clients by considering the following recommendations:

Understand what your client is being asked to regulate before it does (or doesn't).

While determining what your client is attempting to regulate may seem like an obvious task, often the government's interest in regulating a new service is not immediately apparent. The use of online platforms to facilitate transactions ordinarily conducted between individuals in the context of a defined use or industry creates a wrinkle. As sites that enable peer-to-peer transactions may view themselves as information clearinghouses rather than industry players subject to traditional rules, it is necessary to ask yourself what service or use is actually being offered.

For example, cities that have sought to regulate sites like Airbnb have done so because they seek to regulate the uses of property that the short-term rental arrangements facilitated by Airbnb create. As the platform connecting the parties to the transaction, Airbnb, through its hosts, is subject to the local policy's restrictions. Other app-provided services, however, are more difficult to define. Sites like RelayRides and FlightCar, which connect car owners with prospective renters in an "online marketplace," may or may not qualify as car rental companies subject to local or state licenses and taxes. On-demand valet companies like Luxe and Zirx, whose employees service customers' valet and parking requests at any location, more closely resemble traditional valet providers that may require local licenses to operate. The difficulty for counsel in advising municipal regulators lies in differentiating between the use or service that is offered and the technology that enables it.

Whether your client ultimately decides to regulate or to refrain from regulating, either because the new technology does not constitute a use or service within its regulatory jurisdiction, because some other form of self-regulation inherent in the peer-to-peer model lessens the need for government oversight, or for some other non-legal (but equally valid) reason, a thoughtful consideration of the nature of the service that a new technology facilitates and its ability to be regulated will provide you with a solid foundation for establishing a policy that will be defensible if you face a legal challenge down the road.

Determine the boundaries of your legal authority.

Once you decide that a new technology or service is subject to government regulation, you will need to determine whether it can be regulated locally or whether state or federal preemption concerns apply. Resolve these questions by examining state statutes that grant or prohibit local authority and by considering the expansiveness of your municipality's home rule powers.

Remember that multiple levels of regulation may coexist. As recently demonstrated by the wave of pending state bills that propose to regulate transportation network companies like Uber even in places where municipalities have passed similar laws, it is clear that legislators are seeking to bring statewide uniformity to rules governing those new services that operate across jurisdictional lines. Unless expressly prohibited from regulating--as in Wisconsin, where a newly enacted state law expressly prohibits local regulation of TNCs--municipalities can enact ordinances that share regulatory responsibilities with the state as long as they do not conflict with state laws. TNCs operating in Chicago, for example, must comply with both a city ordinance requiring a local license and imposing strict requirements concerning drivers, insurance, and vehicle inspections, and a state law which applies to TNCs throughout Illinois and imposes a similar but less comprehensive set of conditions.

As new technologies continue to be developed and introduced, multiple levels of government will likely continue to share regulatory responsibilities, as they establish

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Current Cases of Interest

By Monica Ciriello, Ontario, 2015

Non-Disclosure Has To Be "Material" To Challenge Full and Frank Disclosure

***Port Clements (Village) (Re),* 2015 BCSC 1675 (CanLII) http://canlii.ca/t/gl6wn**

The Village of Port Clements ("Village") obtained an order from Justice Melnick, pursuant to s.129(5) of the *Community Charter* to permit the Mayor and two Councillors to discuss and vote on Village Bylaw's and an Official Community Plan Bylaw, despite having a conflict of interest. The *Community Charter* allows a municipality to make an application to court where, due to the conflicts of interest, it is unable to achieve the quorum necessary to conduct business. Residents of the Village seek to set aside the order by Justice Melnick on the basis that the Village failed to disclose all the relevant and material facts related to the conflicts of interest and involvement of the Mayor and Councillors.

HELD: Application of the Residents is dismissed.

DISCUSSION: The Court examined whether the Residents had standing to seek to set aside the order of Justice Melnick. The Residents assert that they have standing to bring the application on the basis of the test for public interest standing established by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. The Village contends that there is not a serious issue to be tried, and there are other mechanisms by which the Residents can challenge the decisions made by Council. The Court held that public interest standing is desirable to ensure the legality of the action taken by the Village.

The Court agrees with the Residents that as a general matter, the Village had a duty to disclose all facts that were 'relevant and material' to its application under the *Community Charter*. Relying on *Wilder Estate v. Davis Co.* (1994), CanLII 2239 (BC CA), the Court indicates that there is an obligation on an applicant to make a full and frank disclosure of all material facts and a corresponding authority by the court to set aside the order where there has been a failure to do so. It is not disputed that the Village did not disclose the information that the Residents say should have been disclosed. As the Court of Appeal addressed in *Politeknik* and *Environmental Packaging*, it is confirmed that in order to set aside an ex parte order on the basis of non-disclosure, the non-disclosure has to be "material". The Court held that the non-disclosed facts outlined by the Residents would not have affected the outcome of the *Community Charter* application and in addition s. 129 does not provide any direction as to what information is to be contained in an application. The Court concluded that it was not persuaded on the evidence that the Village intentionally omitted or misrepresented relevant facts as the Residents suggest.

Restrictive Covenant Against Prior Developer is Not Obsolete and Continues to Limit New Development

***Natura Developments Ltd. v. Ladysmith (Town),* 2015 BCSC 1673 (CanLII) http://canlii.ca/t/gl6wl**

Natura Developments Ltd. ("Natura") submitted a permit application to the Town of Ladysmith ("Town") for permission to develop 27 townhouse units on property it owned. The existing zoning application allowed for 29 townhouse units. However, there was a restrictive covenant that was registered against the title to the land that limited development to 15 townhouse units. The Town passed Bylaw 1875 to change the zoning of the property to limit development to 15 townhouse units. Natura seeks an order quashing Bylaw 1875, on the grounds of illegality as well as an order under s. 35 of the *Property Law Act*, that the restrictive covenant registered against the title of property be cancelled.

HELD: Covenant is valid and enforceable under s.35 (2) of the *Property Law Act.*

DISCUSSION: Justice Bracken indicates that the application to cancel the covenant must be determined before further argument is heard respecting the challenge to the Bylaw. Section 35(1)(e) of the *Property Law Act* grants the court authority to modify or cancel a restrictive covenant, and s. 35(2) sets out five grounds on which such modification may be ordered. Natura argues that the covenant is obsolete, is impeding the reasonable use of the property without practical benefit to others and is invalid, unenforceable, or expired.

Justice Bracken begins by considering whether the covenant is obsolete. Natura argues that the covenant is obsolete as it serves a defunct purpose, namely to "commit a previous developer to a particular multi-unit phased development." Justice Bracken relies on both *Portrait Homes Ltd. v. Strata Plan LMS 1191* and *Murrayfield Developments Ltd. Brandon* when determining that the intended use of property should be considered in determining whether a charge is obsolete. The case law stands for the proposition that a court should find a charge to be obsolete only where it can no longer serve its original, intended purpose.

The fact that the configuration of the property has changed since the imposition of the covenant does not itself render the covenant obsolete. Justice Bracken found that the covenant continues to serve its intended purpose, namely, granting the Town control over

the nature and density of development occurring on the property. Justice Bracken next considers if the covenant impedes the reasonable use of the property. Concluding that the covenant does provide practical benefits to the Town, by binding the owner of the property to the specific process for development and by granting the town the ability to better ensure that the property is used consistently with community needs and the public good.

Finally, Justice Bracken indicates that the restrictive covenant is not sterile; the covenant merely binds the owner of the property to a specific process for obtaining development approval. Nothing in the covenant suggests that this process is now unavailable to Natura. For these reasons, Justice Bracken declines to cancel the covenant.

When Employers Provide Generous Employer Benefits, Rights in the *Employment Standards* Code Do Not Disappear

***Canadian Union of Public Employees, Local 38 v Calgary (City of),* 2015 ABCA 280 (CanLII) http://canlii.ca/t/gl05v**

The City of Calgary ("City") identified its 'secondary' vacation banks as a significant financial liability. Secondary vacation banks consist of earned but unused vacation time in excess of the six week maximum permitted by the parties' collective agreement that employees may carry over into subsequent years. The financial liability arises because an employee using banked vacation time is paid at his/her current rate of pay, not at the rate he/she was earning when the vacation time was banked. As a result the City introduced a policy that required employees to use banked vacation time for time off before using other banked time. Concerned that the policy breached the collective agreement and the Employment Standards Code ("Code"), the Canadian Union of Public Employees Local 38 ("CUPE") filed a policy grievance heard by a Board of Arbitration ("Board"). CUPE used City employee Mr. Costello's circumstance to illustrate the City's policy.

HELD: Appeal and cross-appeal dismissed.

DISCUSSION: The Board used a 'basket of benefits' approach to conclude that the policy did not violate the collective agreement or s. 37(1) and 38 of the Code. It held that the collective agreement benefits were more generous than the Code, therefore s.37 and 38 of the Code did not apply. CUPE sought judicial review.

The reviewing judge agreed that the policy complied with the Code and the collective agreement. However, the Board's interpretation of s.3 of the Code in Mr. Costello's particular circumstance was not defensible in law and did not meet the standard of reasonableness. If an employer agrees to provide more benefits than under the Code, or takes on an obligation or duty greater than under the Code, the greater benefits or obligation under the agreement must be followed. The rights in the Code do not disappear in the process of comparison. The City appealed, and argued that s. 37(1) and 38 do not apply because the collective agreement provides benefits superior to those found in the Code. CUPE asserted a cross-appeal arguing that the policy was unreasonable.

The City submits that when comparing like-benefits to like-benefits between a collective agreement and the Code, the 'basket of benefits' approach used by the Board should have been shown deference by the reviewing judge. This Court in *Blair v. Alberta (Employment Standards Code Officer),* 1995 ABCA 221 held that s. 9 and 10 (now s.3 and 4) preserved the Code's statutory benefits and incorporated them within any greater rights or entitlements found in a collective agreement. The City argued that *Blair* is factually distinguishable, because in *Blair* the comparison was between two entirely different benefits. The Court followed *Blair* and held that trying to determine whether like-benefits or obligations fit within a 'basket' can be problematic, a better approach is to determine whether a statutory right is being breached. CUPE's cross-appeal was dismissed. In conclusion, the policy is valid as long as its application to an individual employee conforms to the Code's provisions in sections 37 and 38.

Crematorium Application Held To Be in the Public Interest

***Miller v Powassan (Municipality),* 2015 CanLII 57753 (ON OMB) http://canlii.ca/t/gl5p6**

The Chief Building Official issued a building permit to Whispering Pines Funeral Home ("Whispering Pines") for a "Detached Garage/Crematorium" in the Municipality of Powassan ("Municipality"). After issuing the permit, the Municipality realized it had failed to publish a notice of approval informing the public that the approval was subject to a statutory appeal period. The garage/crematorium was built but the crematorium was not operating at the time the Municipality published the required notice. Two appeals were received, one from Eastholme Home for the Aged ("Eastholme") and a second from a resident, Ms. Miller.

HELD: Appeals dismissed.

DISCUSSION: Pursuant to s.84(1.1) of the *Funeral, Burial and Crematorium Services Act* ("Act") a local municipality must determine if an application for the establishment of a crematorium is in the public interest. Under s. 84(1.2) of the Act, the local municipality may hold a public hearing to determine if the approval is in the public interest.

Eastholme appealed on the basis that funding from the Province and surrounding municipalities could be jeopardized if it cannot be operated in an environment that benefits its residents. Eastholme was concerned with the fresh air requirement imposed by the Ministry of Health and Long Term Care ("MOH"), with the crematorium being 170 metres away. Ms. Miller was not opposed to a crematorium, but opposed to the location at Whispering Pines, arguing that the Municipality did not take proper steps when the application was approved.

Easholme's objection to the pollutants from the crematorium was dismissed. Easholme presented no evidence from the MOH or the Ministry of the Environment ("MOE"). With no evidence, the Board held that they must defer to the MOH/MOE in terms of both statutory mandate and expertise. Pending the Ministry's determination, that is not a ground on which the Board may refuse this application. Therefore, with the approval of the Municipality and no evidence from the MOH or MOE the Board is led to conclude that the application is "in the public interest" so far as the relevant Act is concerned.

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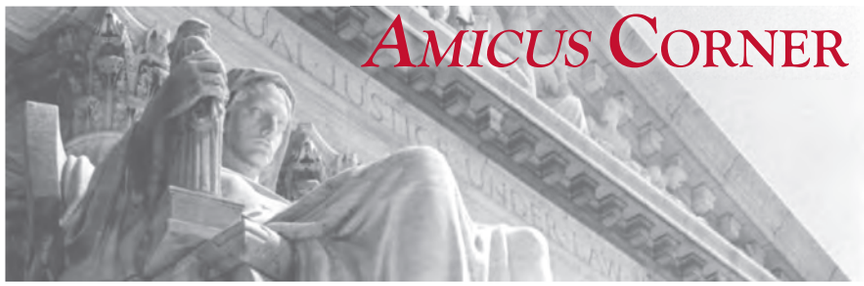

Reed's Aftermath: Strict Scrutiny on Every Corner?

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

Introduction

The Supreme Court's decision in *Reed v. Town of Gilbert*, decided on June 18, 2015, is shaping up to be one of the most significant cases for local governments in years, requiring municipalities across the nation to review and in most cases, rewrite their sign codes. On its surface, *Reed* was about the Town of Gilbert, Arizona's regulations that treated temporary directional signs, ideological signs, and political signs differently in terms of size and duration. The Court concluded that the Town's ordinance regulating these signs was content-based on its face and therefore subject to strict scrutiny (which is almost always a death knell for regulations, as it was in this case). Prior to *Reed*, municipalities and courts had understood that strict scrutiny would generally not apply to a sign ordinance unless the government was discriminating against viewpoints or subject matter. *See Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2238-2239 (U.S. 2015) (Kagan, J. concurring) (discussing circumstances in which the Court had previously applied strict scrutiny to content-based regulation). On this point, Justice Kagan, who concurred in the judgment only, notes:

> To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended [45] function.
>
> And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one.

Reed v. Town of Gilbert, 135 S. Ct. 2218, 2238-2239 (U.S. 2015) (Kagan, J. concurring) (discussing prior Supreme Court cases applying intermediate scrutiny to laws similar to the one in question).

Lower Courts' Application of *Reed*

As the lower courts grapple with the implications of *Reed,* it is becoming increasingly evident that, at least so far, *Reed* seems to be about a lot more than just signs. After only a few short months, *Reed* has already been used to strike down a panhandling ordinance, a prohibition against robocalls, a ban on voters posting photos of their completed ballots on social media, and regulations distinguishing between on-premise and off-premise signs. Given the fact that the Supreme Court granted certiorari and remanded a First Circuit panhandling case to be decided in light of the *Reed* decision, it is not entirely surprising that lower courts are interpreting *Reed* broadly. *See Thayer v. City of Worcester,* 135 S.Ct. 2887 (U.S. 2015).

Panhandling

While those in the First Circuit wait for the decision in *Thayer* after its remand, the Seventh Circuit has already weighed in on the issue of content-based panhandling ordinances in light of the *Reed* decision.[1] *See Norton v. City of Springfield,* No. 13-3581, 2015 U.S. App. LEXIS 13861 (7th Cir. Aug. 7, 2015). *Norton* involved a city ordinance that prohibited panhandling in its "downtown historic district" and defined panhandling as an "oral request for an immediate donation of money." *Id.* at *2. The plaintiff argued that this prohibition was a form of content discrimination while the city contended that the ordinance did not make any distinctions based on the content of the speech. *Id.* The Seventh Circuit originally agreed with the city, noting that the regulation does not "interfere with the marketplace of ideas, that it does not practice viewpoint discrimination" and that it was therefore not content based. *Id.* at *2-3.

On a petition for rehearing, the court deferred consideration until the Supreme Court decided *Reed,* and on rehearing, the panel reversed its original holding, concluding that "*Reed* understands content discrimination differently...[and] effectively abolishes any distinction between content regulation and subject-matter regulation" and that in light of *Reed,* contrary to its earlier holding, the ordinance was in fact content based. *Id.* at *4. Judge Manion concurred with the panel's decision in *Norton,* but wrote separately to indicate that in his belief, *Reed* overruled the Supreme Court's decision in *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), at least on its point that "the principal inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at *5-6 (Manion, J. concurring).

Other First Amendment Applications of *Reed*

As noted, it's not altogether surprising that a court would apply *Reed* to a panhandling ordinance in light of the decision to grant certiorari in *Thayer* and remand the decision for further consideration in light of *Reed*. Some of the other decisions applying *Reed* are more unexpected, however. For example, in *Rideout v. Gardner,* the legislature was concerned about voter buying and coercion and therefore passed an amendment to a statute prohibiting voters from posting photographs of their completed ballots on social media. *Rideout v. Gardner*, No. 14-cv-489, 2015 U.S. Dist. LEXIS 105194, 2015 DNH 154 (D.N.H. Aug. 11, 2015). After discussing the *Reed* decision, the

New Hampshire district court concluded that regardless of the legislature's good intentions, the statute in question here was also content-based on its face. *Id.* at *24. The court reasoned that the only images that were prohibited by the statute were those of a marked ballot, whereas unmarked ballots and copies of ballots could be shared without restriction, thus making the restriction content-based and subject to strict scrutiny (which it could not survive). *Id.*

Another somewhat unusual application of the *Reed* decision came out of the Fourth Circuit. *See Cahaly v. Larosa*. No. 14-1651, 2015 U.S. App. LEXIS 13736 (4th Cir. July 1, 2015). In *Cahaly*, a political consultant was arrested for violating the South Carolina anti-robocall statute, which restricts robocalls that are unsolicited and of either a consumer or political nature. *Id.* at *2-3. The Fourth Circuit concluded that the Supreme Court had recently "clarified the content-neutrality inquiry in the First Amendment context" in *Reed v. Town of Gilbert* and that under that framework, the South Carolina anti-robocall statute was unconstitutional. *Id.* at *9-10. The Fourth Circuit reasoned that the anti-robocall statute only applied to robobcalls made with a consumer or political message but not calls made for another purpose and was therefore content-based on its face and could not survive strict scrutiny. The court noted that *Reed* abrogated Fourth Circuit precedent in this area that had previously held that "when conducting the content-neutrality inquiry, '[t]he government's purpose is the controlling consideration.'" *Id.* at 9.

Meanwhile, in the Second Circuit, the eastern district of New York recently applied *Reed* to an ordinance prohibiting people from standing in public right-of-ways and stopping vehicles to solicit employment. *See De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay,* 2015 U.S. Dist. LEXIS 117926, *1-2 (E.D.N.Y. Sept. 3, 2015). The Town maintained that the ordinance did not fall within the purview of the First Amendment because it prohibited conduct, not speech. *Id.* at *27-28. The court disagreed, however, finding that the solicitation of employment is commercial speech. Although the *Reed* decision did not concern commercial speech, the court in *De La Communidad Hispana* nonetheless determined that *Reed* provided the framework to determine whether the ordinance was content based, and concluded that it was because it did not address any type of roadside solicitation except the solicitation of employment. *Id.* at *32-34. The court reasoned that in order for the Town's enforcement authorities to determine if someone had violated the ordinance, those authorities would have to ascertain the content of the speech, *i.e.,* whether the vehicle was stopped "for the purpose of soliciting employment."[2] *Id.* at *34.

Signs: On-Premise v. Off-Premise Distinctions

Thus far, courts are split as to how to apply *Reed* to distinctions in sign codes for on-premise versus off-premise signs. California and Utah federal courts have found that *Reed* simply does not apply to commercial speech and therefore distinctions between on-premise and off-premise signs do not fall under its rubric. *See Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. 15-cv-00093-SI, 2015 U.S. Dist. LEXIS 98520 (N.D. Cal. July 28, 2015); *Citizens for Free Speech, LLC v. Cnty of Alameda,* No. C14-02513 CRB, 2015 U.S. Dist. LEXIS 92998 (N.D. Cal. July 16, 2015); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM, 2015 U.S. Dist. LEXIS 89454, *26-27 (C.D. Cal. July 9, 2015); *Timilsina v. West Valley City*, 2015 U.S. Dist. LEXIS 101949, *17 (D. Utah June 30, 2015). In Tennessee, however, municipalities may need to start revising their sign codes that provide distinctions for on-site and off-site signs as one federal court for that jurisdiction has concluded, for the purposes of a temporary restraining order, that such distinctions are likely content-based and subject to strict scrutiny under *Reed* (and therefore likely unconstitutional). *See Thomas v. Schroer*, No. 2:13-cv-02987, 2015 U.S. Dist. LEXIS 101491 (W.D. Tenn. June 24, 2015).

Turning first to California, in *Contest Promotions,* San Francisco banned off-site signs but allowed signs that were "on-site" and the plaintiff sued, contending that under *Reed* the sign ordinance was subject to strict scrutiny. *Contest Promotions,* 2015 U.S. Dist. LEXIS 98520, at *8. The court disagreed, concluding that *Reed* did not concern commercial speech and therefore the ordinance need only survive intermediate scrutiny. *Id.* at *8-11. The court relied in part, on Justice Alito's concurrence, which provides a "non-exhaustive list of signage regulations that would not trigger strict scrutiny, which included, *inter alia,* '[r]ules distinguishing between on-premise and off-premise signs.'" *Id.* at *10, *quoting Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2234-39 (U.S. 2015) (Alito, J. concurring). Although Justice Alito's list of permissible regulations is contained in a concurrence, the court in *Contest Promotions* relied on the makeup of the Court, noting that Justice Alito's concurrence was joined by two other Justices who had also joined the majority and that still three other Justices concurred in the judgment only, and that those other three Justices "rejected the notion that a content-based regulation must necessarily trigger strict scrutiny..." *Id.* at *10-11. Thus, according to the court, "at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny." *Contest Promotions,* 2015 U.S. Dist. LEXIS 98520, at *11.

Similarly, the court in *Cal. Outdoor Equity Partners v. City of Corona* concluded that *Reed* simply did not apply to the city's ban of off-site commercial billboards. *Cal. Outdoor Equity Partners v. City of Corona,* 2015 U.S. Dist. LEXIS 89454, *3. The court reasoned:

> *Reed* does not concern commercial speech, let alone bans on off-site billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson*, let alone apply it. *Metromedia*, 453 U.S. at 511-14, and its progeny remain good law; the City's sign ban is therefore not patently unconstitutional.

As noted above, at least one federal court has disagreed with the foregoing analysis and has applied *Reed* to regulations that distinguish between on-premises and off-premise signs, even though such regulations pertain to commercial speech. *See Thomas v. Schroer*, 2015 U.S. Dist. LEXIS 101491 at *7. The court in *Thomas* reasoned that *Reed* applied to the Tennessee Billboard Regulation and Control Act's distinctions between on-premise and off-premise signs because "[t]he only way to determine whether a

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Cases



By IMLA Editorial Board

Speech: Ordinance Banning All Activity in Median Strips is Not Narrowly Tailored, Cannot Survive First Amendment Challenge

***Cutting v. City of Portland,* No. 14-1421 (1st Cir. Sept. 11. 2015).**

SUMMARY: Portland Maine will be required to re-think its efforts to curtail panhandling. The City's existing ordinance banning virtually any presence in median strips has been stricken down, not because it is a content-based measure which violates *Reed* and requires strict scrutiny, but because the First Circuit found that it is not narrowly tailored to advance the City's asserted interest in promoting safety.

FACTS: Responding to concerns about safety issues arising due to panhandlers around its thoroughfares, the Portland, Maine city council passed an ordinance in 2012 providing that "No person shall stand, sit, stay, park or drive" on the City's median strips. An exception was made for pedestrians who would be allowed to use medians "only in the course of crossing from one side of the street to the other." Median strips were simply defined as "a paved or planted area of public right-of-way, dividing a street or highway into lanes according to the direction of travel." The ordinance did not differentiate among medians of differing sizes and did not expressly prohibit presence in the streets themselves.

Five people were cited under the ordinance, all for panhandling. They challenged the law as a facial violation of the First Amendment and sought injunctive relief.

The district court found that medians were traditional public fora, similar to parks. It further discerned an unwritten policy by the City to allow political signage to be placed there, while other expression was prohibited. This content-based discrimination implicated *Reed*, which required strict scrutiny analysis: Was the ordinance, including its uneven application, the least restrictive means needed to accomplish the City's goals? The district court answered that question in the negative, found the ordinance to violate the First Amendment and permanently enjoined the City from enforcing it. Portland appealed.

HELD: The First Circuit upheld the finding of a constitutional violation and affirmed the grant of injunction—but on different grounds.

DISCUSSION: The Circuit Court first examined the question of whether median strips are traditional public fora, like sidewalks and parks. Portland's medians had traditionally been used for First Amendment expression, including political campaigns, protests, charitable solicitation and the like, making them public fora—a view also held by the Fourth and Sixth Circuits.

The Court then reviewed the issue of uneven enforcement of the ordinance to answer whether it was content–based. Here, the Circuit diverged from the lower court: even though there were apparent instances where the ordinance had been unevenly applied, the doctrine of "constitutional avoidance" required focus on the law as written, rather than allowing outliers to color the law's legitimacy. On that score, the ordinance was content-neutral because it banned virtually any activity whatsoever on the City's medians. Therefore, it did not need to fulfill strict scrutiny's mandate that it provide the least restrictive solution; the relevant question was whether it was narrowly tailored to accomplish a legitimate governmental interest.

On reflection, the First Circuit found that the ordinance could not survive such inquiry. The asserted governmental interest—safety—did not require a complete shut-down of the City's medians, particularly when some of those medians were 50 feet across. There were other limitations that might better promote safety, such as prohibitions on activities in medians after dark, and prohibitions during snow and inclement weather. Similarly, there were many activities in medians that did not create any safety problems. Even panhandling activities had generated very few safety issues.

The Circuit Court found that the content-neural ordinance violated the First Amendment because it was not narrowly tailored to accomplish a legitimate governmental interest. (The decision therefore cannot be said to be a progeny of *Reed*.)

http://media.ca1.uscourts.gov/pdf.opinions/14-1421P-01A.pdf (last accessed Sept. 22, 2015).

Trials: Miami Has Standing to Sue Bank for Costs and Lost Tax Revenues Due to Predatory Lending Practices

***City of Miami v. Bank of America Corp.*, No. 14-14543 (11th Cir. Sept. 1, 2015).**

SUMMARY: The Eleventh Circuit has cleared the way for Miami to sue Bank of America for costs and lost revenues ensuing from the mortgage meltdown, reversing a lower court's finding that the City did not establish proximate causation between the bank's practices and the City's losses.

FACTS: Following the mortgage crisis, Miami instituted litigation against Bank of America (BOA). It filed two claims under the Fair Housing Act, §§3604(b) and 3605(a), alleging that by engaging in a variety of predatory lending schemes BOA disproportionately caused foreclosures in African American and Latino neighborhoods. This, in turn, the City posited, caused financial harm to the City in the form of increased municipal costs for trash removal, police, firefighters, etc. and reduced tax revenues, and thus it was harmed by BOA's actions.

The district court granted BOA's motion to dismiss, holding that Miami

lacked statutory standing to sue, that the City failed to sufficiently allege proximate cause as required for an FHA claim, and that Miami failed to show BOA caused the City's harm. Miami appealed.

HELD: The Eleventh Circuit reversed the lower court, holding Miami had standing to sue under the FHA, that it had met the pleading standard to show that BOA caused the harm to the City, and that proximate cause was substantiated.

DISCUSSION: The Court began with the threshold issue of standing, noting that BOA had argued Miami lacked standing because it failed to show a causal connection between its injury and BOA's conduct. BOA had countered Miami's charges saying that a number of factors caused foreclosure and blight in Miami, including the general state of the housing market and the actions of myriad third parties, thus attenuating the causal chain. The Circuit disagreed. It noted Miami employed in-depth statistical analysis in its pleading, including showing that in majority-minority neighborhoods (90% or more), BOA loans were 5.857 times more likely to enter foreclosure than in majority white neighborhoods; that African American borrowers were 1.581 times and Latinos 2.087 times more likely to receive a loan with predatory features than a white borrower (e.g. such as high-cost loans like those with an interest rate that was at least three percentage points above a federally established benchmark, subprime loans, interest-only loans, balloon loan payments, loans with prepayment penalties, negative amortization loans, no documentation loans, and adjustable rate mortgages with teaser rates); that African American borrowers with FICO scores over 660 (indicating good credit) were 1.533 times more likely to receive a predatory loan than white borrowers, while a Latino borrower was 2.137 times more likely to receive such a loan; that 21.9% of BOA loans to African American and Latino borrowers were high-cost, compared to just 8.9% of those to white borrowers; and that Latino and African American borrowers were foreclosed on in less time than white borrowers. Based on these facts, the City alleged and the Court agreed, property values decreased, thus depriving the City of tax revenue and increasing its costs. This left the Court with "little difficulty finding" Article III standing. While it acknowledged BOA's argument that other factors could have caused the ultimate harms to the City, it found this set of circumstances "perfectly plausible."

The Court moved on to deal with BOA's argument, and the lower court's holding, that despite Article III standing, the city lacked "statutory standing" under the FHA to bring the suit. One on hand, BOA argued that statutory standing required the city to be within the "zone of interest" of the FHA statute, while the City countered the statutory standing of the FHA is equally as broad as Article III standing. The Circuit held the Supreme Court's older precedent clearly, plainly, and absolutely supported Miami, but acknowledged that more recent cases cast some doubt on those older precedents. It ran through the Supreme Court history, recognizing that the newer cases "gesture[] in the direction of rejecting the [older] holding[s], [but that] a gesture is not enough." Ultimately the Circuit held that the "rule governing [this] situation ... is clear: if a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court . . . the prerogative of overruling its own decisions." It did so and found Miami had statutory standing.

As for proximate cause, the initial sticking point was whether it was required at all – with BOA and the lower court arguing that, under the FHA Miami did need to show proximate cause between BOA's actions and the injuries, and Miami arguing it need not do so. The Court sided with BOA and the lower court on the initial matter, noting that though no Supreme Court case directly answered the whether a proximate cause showing is required, statements by the Court indicated it is necessary to recover damages. These include a comment in *Lexmark* that proximate cause is a "general . . . presum[ption]" in statutory interpretation and in *Meyer v. Holley*, 537 U.S. 280 (2003) that FHA claims are "in effect, ... tort action[s]." However, the Court then went on to agree with Miami's alternate argument that it had shown proximate cause because it evidenced that the injury to the City was reasonably foreseeable given BOA had access to the same statistical tools and generalized published data Miami used to show that the lending practices caused premature foreclosure and, in turn, harm to the municipality. This "empirical data [was sufficient] to raise the pleadings above the speculative level," thus the Circuit overturned the lower court, providing the City with standing to bring its claims.

http://media.ca11.uscourts.gov/opinions/pub/files/201414543.pdf (last accessed Sept. 22, 2015). ML



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ground rules for industries where existing laws fall short. With the introduction of Google's Self-Driving Car and the burgeoning autonomous vehicle industry, for instance, one can envision three levels of government regulation: federal safety standards for driverless cars, state laws governing vehicle operation and registration, and local laws governing their movement along city streets. However regulatory authority is delegated in your jurisdiction, considering each level of government's potential regulatory interest in a new technology or service will aid you in developing your own policy, especially if it involves multiple industries.

Consider flexible but reasonable interpretations of existing law.

You will likely encounter a law that loosely governs the service you are seeking to regulate, but that was enacted by legislators who could not have anticipated the technological innovations that now facilitate those services. The dilemma lies in determining whether the law leaves room for flexible interpretation or whether you must start the legislative process from scratch. Most likely, the app or service that you are examining will operate in a legal gray area.

For instance, the "pop-up" transit company Bridj offers bus service in D.C. and Boston that operates along fixed stops, similar to the traditional "jitney" which often requires local government approval of a specific route. Bridj (which refers to itself as a "jitney-esque" service), however, operates along flexible routes, dictated by customers who use Bridj's app to customize preferred start and end points. It is obviously impractical to require Bridj to obtain approval for each of its custom, changeable routes simply because the service it provides is governed by statutes designed for the streetcars of the 1900s. It would be similarly illogical, however, to take the position that Bridj is exempt from any regulation simply because its business model provides a new method of selecting routes. In this situation, you might take a hybrid approach, interpreting your existing law to require services like those offered by Bridj to obtain government approval to operate, while adopting a more flexible policy that allows for frequent route changes with periodic review.

If your relevant laws are broadly drafted, applying an existing regulatory scheme to a new technology may be an adequate solution, especially if enacting a new law is not palatable to your client. Of course, this approach only works with companies that don't resist attempts to place them into a certain regulatory box. If their position is that they are not subject to any existing regulation, a longer-term legislative or policy solution may be necessary.

Anticipate the unanticipated legal challenges.

You will not be able to anticipate every ancillary effect of your proposed regulation or policy, whether legal or not. Pay attention to what is occurring in other jurisdictions, and keep abreast of evolving policies and lawsuits to help you gauge the potential roadblocks to successful implementation. You may expect opposition from the long-standing industry incumbent that claims that the government has treated it differently from new industry players--or from the new startup that claims it is exempt from government regulation. Sometimes, however, the challenge will come in an unexpected form.

When, last fall, the online vacation rental marketplace HomeAway filed a suit against the city of San Francisco seeking to prevent the city from enforcing its newly-passed short-term rental ordinance, it did so not on the grounds that it was not subject to the city's regulations, but because it claimed that the law's requirement allowing only local residents to rent their properties burdened interstate commerce by excluding HomeAway's customers who were non-resident owners of second homes in the city. While the court ultimately dismissed the suit after finding that HomeAway, as a mere hosting platform that does not participate in the rental transaction, lacked standing to bring claims on behalf of its customers, the case shows the difficulties involved in designing a regulation that is immune from legal challenge, even one by the industry that the regulation seeks to allow.

The development of new technologies will almost always outpace new laws that address them, and local government regulators will continually face uncertainty in their authority to deal with them. The answer, however, is neither to prohibit a new service outright nor to allow it to operate unchecked. Instead, deciphering the government's regulatory authority over a new app or technology requires counsel to take a thoughtful and sometimes creative approach that takes into account existing law, the bounds of existing legal authority, and a host of political and practical considerations. While the larger question of whether government should take a more hands-off approach to regulation remains open, in the short term regulators can adopt policies that are flexible, that maintain industry equity, and that are legally sound. ML

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protection for speech pursuant to their ordinary job duties. In *Lane v. Franks,* 134 S. Ct. 2369 (2014), the Court concluded that public employees have First Amendment protection for subpoenaed speech outside their regular job duties.

Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008), could have been bigger than *Garcetti* had it gone the other way. But the Court held 6-3 that the "class-of-one" theory of equal protection does not apply in the public employment context.

In *Ontario v. Quon*, 560 U.S. 746 (2010), the Court held that the City of Ontario did not violate an employee's Fourth Amendment rights because its search of the employee's text messages was reasonable. Public employers had hoped the Court would rule that the employee did not have an expectation of privacy in his government-owned pager. The Court assumed, but did not decide, that he did.

In *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011), the Court held that public employees have no First Amendment Petition Clause claim unless their petition relates to a matter of public concern.

Fnally, in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court held that the First Amendment prohibits collection of an agency fee from home health care providers, who the Court characterized as quasi-state employees, who do not wish to join or support a union. This case is best known for being very critical of, but not overruling, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The Court has another chance to overrule *Abood* in its October 2015 term in *Friedrichs v. California Teachers Association*.

Qualified Immunity

During the Court's October 2013 term it decided five qualified immunity cases. That term and over the tenure of the Roberts Court state and local government have done well in qualified immunity cases. This is likely for two reasons—the qualified immunity standard is very deferential to government, and the Court tends to not take close cases.

Police in particular have fared well in the Roberts Court. In fact, *Tolan v. Cotton*, 134 S. Ct. 1861 (2014), was the first time in a decade where the Court did not grant an officer qualified immunity.

The Court sent the case back to the lower court concluding that it failed to view the evidence most favorably to the non-moving party, here, a person shot by police. *Tolan* was an anomaly; since then the Court has continued the trend of conferring qualified immunity to officers.

The October 2006 term produced the Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), which held that an officer using deadly force to stop a speeding (though otherwise safely driving) motorist was entitled to qualified immunity. The Court reasoned that using force against a motorist who poses a threat to officers or other motorists violates no clearly established right. In the October 2013 term the Court reaffirmed *Scott v. Harris* in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), also involving the use of deadly force during a high-speed chase.

Two other qualified immunity cases stand out. In *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), the Court held unanimously that an individual temporarily hired by the government to do its work is eligible for qualified immunity. And in *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court held that the *Saucier v. Katz*, 533 U.S. 194 (2001), two-step sequence for resolving qualified immunity claims isn't mandatory; courts can just decide the clearly established prong.

Since 2009, *Pearson* has provided the Supreme Court with frequent opportunities to reverse circuit court denials of qualified immunity, without actually creating new law. This trend is evident in *City and County of San Francisco v. Sheehan,* 135 S. Ct. 1765 (2015), involving whether police should have accommodated a mentally ill person's disability.

While not a qualified immunity case, *Los Angeles County v. Humphries*, 562 U.S. 29 (2010), is of particular importance to local governments. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court had held that local governments can be liable for constitutional violations only when their actions are the result of official policy or custom. In *Humphries* the Court held that *Monell* applies even if the plaintiff is seeking *prospective* relief (i.e., declaratory and injunctive relief) rather than *retroactive* relief (i.e., monetary damages)

Eighth Amendment

The Roberts Court has decided at least 10 cases involving the death penalty. More have favored the defendant than the state at least partially because Justice Kennedy tends to join his more liberal colleagues in these cases.

Five cases in particular are noteworthy. In *Kansas v. Marsh,* 548 U.S. 163 (2006), the Court held that the death penalty may be applied when mitigating and aggravating sentencing factors are both present. In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court held that the Eighth Amendment bars imposing the death penalty for the rape of a child where the child did not die. More recently in *Hall v. Florida,* 134 S. Ct. 1986 (2104), the Court held that if a capital defendant's IQ falls within the standard error measurement for intellectually disabled, the defendant must be allowed to present additional evidence of intellectual disability.

In *Baze v. Rees,* 553 U.S. 35 (2008), the Court held that the lethal injection using a particular three-drug protocol is constitutional. The Court upheld lethal injection using midazolam in *Glossip v. Gross,* 135 S. Ct. 2726 (2015). The Court accepted the trial court's conclusion that this sedative was sufficient to render an inmate insensate to pain, and held that the inmates challenging the practice failed to produce evidence of a viable alternative, as required by *Baze*. In dissent, Justice Breyer, joined by Justice Ginsburg, called for the Court to consider the "basic question" of whether the death penalty is constitutional at all.

Two 5-4 cases involving juveniles and life in prison without the possibility of parole are noteworthy. In *Graham v. Florida,* 560 U.S. 48 (2010), the Court held that juveniles cannot be sentenced to life in prison without the possibility of parole for any crime short of homicide. Then in *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the Court held that a state cannot impose life in prison without parole on a minor without considering mitigating evidence about the defendant's youth. In its October 2015 term the Court will decide whether *Miller* should apply retroactively in *Montgomery v. Louisiana*.

Fourth Amendment

Due to the heavy volume of Fourth Amendment cases it is beyond the scope of this article to discuss the Roberts Court jurisprudence beyond a few generalities.

First, many Fourth Amendment cases are close and involve an odd line up of Justices. For example, in a 5-4 decision in *Navarette v. California*, 134 S. Ct. 1683 (2014), Justice Scalia joined a dissent with the more liberal Justices Ginsburg, Sotomayor, and Kagan, regarding whether anonymous telephone calls are sufficient to establish reasonable suspicion to stop a driver. The four *Navarette* dissenters plus Justice Thomas were in the majority in *Florida v. Jardines,* 133 S. Ct. 1409 (2013), holding that a drug sniff at the front door of a house is a Fourth Amendment search.

Second, Justice Scalia continues to rule in favor of criminal defendants on a regular basis and espouse his own Fourth Amendment theories, most notably his property-rights theory. One of the most important decisions where Justice Scalia did this was *United States v. Jones*, 132 S. Ct. 945 (2012). Justice Scalia's majority opinion reasoned that placing a GPS tracking device on a vehicle was a search under the Fourth Amendment because it is a "physical intrusion" into the protected space of the vehicle owner.

Third, the Court has relaxed the restrictions of the exclusionary rule, which bans criminal evidence obtained through a Fourth Amendment violation. This began with *Hudson v. Michigan*, 547 U.S. 586 (2006), holding that a violation of the "knock and announce" rule does not require suppressing evidence, and continued in *Herring v. United States*, 555 U.S. 135 (2009), holding that honest mistakes by police acting "in good faith" were not grounds for suppressing evidence.

But perhaps most significantly the Roberts Court has made it clear that it isn't going to allow new technology to undermine traditional Fourth Amendment protections. For example, in *United States v. Jones*, 132 S. Ct. 945 (2012), the Court unanimously held that putting a GPS device on a car constitutes a search. More recently the Court again held unanimously in *Riley v. California*, 134 S. Ct. 2473 (2014), that police generally need a warrant to search a cell phone incident to an arrest.

Continued on page 30

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Gun control

The Roberts Court has decided two landmark gun control cases, and many anxiously await further gun control rulings. Both were decided 5-4. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court held the Second Amendment protects an individual's right to possess a gun for traditionally lawful purposes, such as self-defense, within the home. In *McDonald v. Chicago*, 561 U.S. 742 (2010), the Court held that the Second Amendment right of individuals to keep and bear arms in self-defense is incorporated through the Fourteenth Amendment to apply against state and local government as well as the federal government. One of the next big issues the Court could decide soon is whether and how state and local government can regulate guns carried outside the home.

Conclusion

State and local government are affected by most Supreme Court cases. That is unlikely to change no matter who is Chief Justice or who is on the Court. The Roberts Court in its first 10 years hasn't shied away from controversial issues no matter who the parties are or who is affected. That is also unlikely to change in the future. But how the Roberts Courts will decide cases over the next decade for state and local government—and everyone else—may be largely in the hands of future Justices who will be appointed over taht time frame. ML

Second Look, Cont'd from page 18

I hope it never becomes necessary for a city to have to find answers to such questions.

Notes

1. __F.3d __, 2015 WL 5102591 (11th Cir. Sept. 1, 2015).
2. __F.3d __, 2015 WL 5102581 (11th Cir. Sept. 1, 2015).
3. __F.3d __, 2015 WL 5102609 (11th Cir. Sept. 1, 2015).
4. A much more difficult question, and one that fascinates me, is whether a city might ever be a 42 U.S.C. § 1983 plaintiff. The answer under current case law probably is never. However, the issue is thoroughly discussed and the current law intelligently criticized in Caswell F. Holloway, IV, Comment, City v. City: The Case for Full Municipal Personhood Under § 1983, 2001 U. Chi. Legal F. 479 (2001).
5. 24 C.F.R. §§ 103.200, *et seq.*
6. 24 C.F.R. §§ 103.300, *et seq.*
7. 339 F.3d 702, 713-14 (8th Cir. 2003).
8. 817 F.2d 149, 157–160 (1st Cir. 1987).
9. 336 F. Supp. 2d 477, 487-88 (D. Md. 2004).
10. *See* 42 U.S.C. § 3608(e)(5) (HUD's duty to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter").
11. 28 U.S.C. § 1361 (district courts have original jurisdiction in nature of mandamus to compel an officer or employee of the United States or any federal agency to perform constitutional or statutory duty owed to plaintiff). The plaintiff must have no alternative statutory remedy, Stanley v. Hogsten, 277 Fed. Appx. 180, 181 (3d Cir. 2008), and entitlement to relief under the underlying statute, aside from section 1361, must be clear and non-discretionary. *See Stevens v. Colt*, 2011 WL 1500599 (11th Cir. 2011) (not officially pub.).
12. *See*, *e.g.*, Woodard v. Marsh, 658 F.2d 989 (5th Cir. 1981), *cert.* denied, 455 U.S. 1022 (1982).
13. 5 U.S.C. §§ 701, *et seq.*
14. Armstrong v. Executive Office of the President, 821 F. Supp. 761 (D.D.C.), *rev'd on other grounds*, 1 F.3d 1274 (D.C. Cir. 1993), *on remand*, 877 F. Supp. 690 (D.D.C. 1995). Any monetary civil contempt sanctions would be paid into the court registry, not to another party in the litigation. 821 F. Supp. At 772.
15. 28 U.S.C. §§ 1346(a)(2) (district courts have jurisdiction for takings claims not exceeding $10,000); 1492(a)(1) (Federal Court of Claims jurisdiction over takings claims exceeding $10,000).
16. *See* Love Terminal Partners v. United States, 97 Fed. Cl. 355, 375 (2011).
17. *See* 28 U.S.C. § 2680. ML

Amicus, Cont'd from page 23

sign is an on-premise sign, is to consider the content of the sign and determine whether that content is sufficiently related to the activities conducted on the property on which they are located." *Id.* at *9 (internal quotations omitted).

Conclusion

So, what do we know in the wake of *Reed*? We know that signs codes that distinguish between non-commercial speech will trigger strict scrutiny regardless of the government's motive or whether the government was discriminating against certain viewpoints or even a subject matter. We also know that municipalities may regulate signs in a number of content-neutral ways, such as regulations pertaining to size, location, lighting, fixed messages versus electronic messages, free-standing signs versus those attached to buildings, and the total number of signs per lot.

But there still remains a fair amount of uncertainty in this area. Are the California federal courts right that *Reed* simply does not apply to commercial speech? There is certainly an argument that they are, given the fact that *Reed* failed even to mention *Central Hudson*, let alone explicitly overrule it and that the Court "does not normally overturn, or so dramatically limit, earlier authority *sub silento*..." Shalala v. Ill. Council on Long Term Care, 529 U.S. 1, 5 (U.S. 2000). So municipalities certainly have a plausible argument to continue to make otherwise constitutional distinctions in the commercial speech area. A related unanswered question in the wake of *Reed* is whether distinctions between on-premise and off-premise signs are content-based as at least one court has held, or if they are content-neutral or possibly not subject to *Reed* because they are regulations pertaining to commercial speech. Justice Alito and perhaps five other Justices seem to believe that such regulations would not be content-based. Time will provide us some clarity and answers to these questions, but it may be that Justice Kagan was prescient with her observation that the Supreme Court will become a "veritable Supreme Board of Sign Review" in the aftermath of the Court's decision in *Reed.*

Notes

1. Although the First Circuit has not yet decided *Thayer,* it did rule on the constitutionality of a panhandling ordinance in September 2015. In Cutting v. City of Portland, the city's ordinance prohibited any person from standing / sitting in a median strip, with the exception of pedestrians crossing the street. *Cutting v. City of Portland*, No. 14-1421, 2015 U.S. App. LEXIS 16206, *2 (1st Cir. Sept. 11, 2015). The First Circuit held that

the ordinance was content neutral as the restriction applied to where the speech took place, not the type of message and therefore concluded that Reed was not applicable. Id. citing Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015).
2. Although the court found that the ordinance was content based under *Reed*, it proceeded to analyze the ordinance under the four prong *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York* framework utilized for commercial speech. *See* De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 10-CV-2262, 2015 U.S. Dist. LEXIS 117926, *53 (E.D.N.Y. Sept. 3, 2015). ML

Inside Canada, Cont'd from page 21

The Board dismissed Ms. Miller's appeal regarding proper steps. Ms. Miller was correct that there was no public meeting regarding the crematorium, but the Act does not require one and notice was eventually published in the local.

Finally, the Board was satisfied that the use was compatible with the surrounding land use, and the strictly controlled regulations under which the crematorium will be allowed to operate.

Board Failed to Provide Sufficient Reasons for Dismissing Appellant's Reasonable Apprehension of Bias Concern

***Faulkner v. City of Mount Pearl,* 2015 CanLII 56308 (NL SCTD) http://canlii.ca/t/gl1tn**

The City of Mount Pearl ("City") issued a development permit to Karwood Contracting Limited ("Karwood") for construction of "affordable seniors housing". Sections 4.12 and 4.13 of the *Mount Pearl Development Regulations, 2010* authorize the City to approve applications and issue development permits. Section 4.13.2. authorizes the City to attach conditions to a permit. The Appellant appealed to the Eastern Newfoundland Regional Appeal Board arguing that the permit did not comply with the Municipal Plan and that two City Councillors were in a conflict of interest. The Board dismissed the appeal.

The Appellant is now appealing the Board's decision. The Appellant argues that the Board erred in law or exceed its jurisdiction by failing to find that two City Councillors were in a conflict of interest and the proposed development contravened s. 5.14 of the *Mount Pearl Municipal Plan, 2010* ("Municipal Plan").

HELD: Referred back to the Board on the issue of reasonable apprehension of bias.

DISCUSSION: The Board did not make an error in law or jurisdiction when it held that the conditional permit did not contravene s. 5.14 of the Municipal Plan. Nor did the Board fail to provide the Appellant a fair opportunity to be heard.

The decision was unreasonable, however, insofar as the Board failed to provide sufficient reasons as to why it rejected the Appellant's position that the involvement by two City Councilors did not give rise to reasonable apprehensions of bias. By virtue of common law and following the principle found in *Stroud v. Newfoundland and Labrador (Central Regional Appeal Board)*, 2010 NLTD 25 the grounds of appeal may include an allegation of a reasonable apprehension of bias on the part of a City Councillor. This authorizes an appeal board to overrule a decision of a municipal body when such a municipality "acts with bad faith or improper bias or fails to follow procedural guidelines that permit proposals to be appropriately considered." The Appellant is entitled to consideration of his concerns of the two City Councillors in question. ML

Mental Health, Cont'd from page 11

41. State ex rel. Mink v. Wallace, 84 S.W.3d 127 (Mo.App. E.D. 2002).
42. Cape Girardeau, a Missouri constitutional home rule city, entered into an agreement with Southeast Missouri State University to construct a multiuse center located on the university's campus, financed by general obligation bonds from special taxes on hotels and motels. In response, a group of hotel and restaurant owners filed suit seeking a declaration that the ordinance authorizing the agreement between the city and university was invalid because the city had no authority to enter into the agreement. Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208 (Mo. 1986).
43. *Id.*
44. The Court held that the ordinance did not violate Mo. CONST. ART. VI, § 19(a) because the state law provisions and charter did not expressly or implicitly prohibit the city from entering into agreements with a state university. *Id.*
45. *Id.*
46. In *City of Kansas City v. Carlson*, the court upheld an ordinance that prohibited smoking in closed public places and places of employment with some exceptions for hotels and casinos. A sports bar and billiard parlor in Kansas City was cited by the city for allowing patrons to smoke. The bar owner contended that the city's ordinance conflicted with Missouri's Indoor Clean Air Act (ICAA) which excluded bars from its definition of public places and therefore affirmatively allowed smoking while the city's ordinance prohibited it. The city maintained that the ICAA did not permit smoking in bars and billiard parlors. Rather, the city contested, that the ICAA left those places unregulated, which created no conflict with municipal ordinances. The court found that a plain reading of the state statute did not support the bar owner's contention that it authorized those places be exempted to permit smoking or made them immune from local smoking regulation. Rather, the court found, the ICAA simply excluded those places therefore meeting its conditions of compliance. City of Kansas City v. Carlson, 292 S.W.3d 368 (Mo.App. W.D. 2009).
47. Frech v. City of Columbia, 693 S.W.2d 813 (Mo. 1985).
48. *Id.*
49. Health Care Foundation of Greater Kansas and the HSM Group, Ltd., (2012, February) *The Costs of Untreated Mental Illness in Greater Kansas City, Executive Report*; Kansas City, MO.
50. *Id.*
51. "In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial." OHIO REV. CODE ANN. § 2945.37(B) (West 2014).
52. *Sell*, 123 S. Ct. 2174
53. http://www.mass.gov/courts/programs/specialty-courts/ ML

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