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THE MUNICIPAL LAWYER MAGAZINE

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PRESIDENT'S LETTER

Each One Must bring One!

Sherrry Benford, President



Our San Francisco Conference was awesome! Thank you for all your hard work.

A special thank you to our Immediate Past President Steve Moore. He has been enthusiastic and tireless in his work for IMLA. I have big shoes to fill – I'll try my best!

Anchorage, Alaska is next ~ as we travel to our northern most state, I would like to thank the Program Planning Committee and IMLA staff for an exciting educational program and our Alaskan colleagues for a most beautiful venue.

We are a membership organization. Members are our life's blood. As we move forward we must work to increase our membership. We should be passing along our knowledge and wisdom to a new generation of public sector lawyers. As I said at our board meeting in San Francisco, this journey starts with one step, "Each One Must Bring One".

Introduce a new colleague to IMLA. Bring one to our next conference. Pass on information about our association. Bring a friend along. When I became the Law Director of the City of Shaker Heights, Ohio in 1992 my assistant asked if I would continue our City's membership in IMLA (then NIMLO – National Institute of Municipal Law Officers). As a former Assistant Law Director of the City of Cleveland I knew the value of this premier organization to city attorneys. As a new Chief Legal Officer for my city, I would discover a wealth of knowledge, wisdom and support because of the membership in IMLA.

As Chair of the Legal Advocacy Committee I have been a part of the organization's process in considering and approving IMLA's amicus participation in significant cases for local government before various courts of appeal and the United States Supreme Court. When your client is in this situation, IMLA is a valuable resource and partner.

Attendance at the conferences came with face to face opportunities to share ideas and information with some of the best people who practice law in this field. I really appreciated the unselfish sharing of experience, problem-solving advice and support from my colleagues.

We serve the public. We do work that is sometimes challenging, exhausting and exasperating but always rewarding.

When I became the General Counsel of the Greater Cleveland Regional Transit Authority in 2000 (a special district member of IMLA) I found the relevance of IMLA to my work continued. Whether you have legal issues relating to employment, construction, federal regulations, ethical or conflicts of interest, constitutional rights or law office management concerns (the list goes on and on) IMLA membership can help you.

Thanks to all of our members who have chosen a career in public service. While I am thanking important people, I must thank John and Colleen Gotherman who guided me through my early years at IMLA. Thanks to the Past Presidents who have served as role models and mentors. A special heartfelt thanks and salute to my dear departed friend and Past President Susan Rocha, who was an exceptional leader pushing us to be a better, more inclusive organization! In the words of Lily Tomlin "The road to success is always under construction". Queen Susan – we are continuing the work.

Remember, let's increase membership – Each One Must Bring One!

We think it only appropriate to mention here that Sheryl has just been named as a 2014 YWCA Women of Achievement Award recipient. Now in its 38th year, the YWCA Women of Achievement Awards honor a select group of Greater Cleveland women who have made extraordinary accomplishments through career success, community service, dedication to the YWCA mission, leadership and mentoring.

Congratulations, Sheryl!

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Erich Eiselt is IMLA Assistant General Counsel and Editor. He is attorney of record on the *amicus* brief recently filed by IMLA's legal team.

FROM THE EDITOR:

IMLA
THE MUNICIPAL LAWYER MAGAZINE

From the Editor:

As spring grudgingly makes its way across much of the Lower 48, this issue of Municipal Lawyer looks ahead to our upcoming gathering in Alaska. Appropriately we meet Dennis Wheeler, who migrated from modest beginnings in Kodiak to the bright lights of Anchorage, where he now runs the Law Department.

Staying North of the 49th parallel, we examine Canada's momentous Supreme Court decision holding that restrictions on soliciting and accommodating prostitution impermissibly endanger sex workers.

Our features include a proposal for more productive public meetings, a discussion of recurrent issues in municipal water supply and (another) explanation of key legal considerations for public employers when hiring or firing.

This issue's Practice Tips provides insights into what might seem innocuous-handling electronic information requests.

In Second Look, we evaluate the relative sway of Federal and state preemption over municipalities.

We also cover dogs and cats (Code Enforcement), the war on electronic cigarettes (Ordinances), the argument over protecting public employee testimony (Supreme Court) and the implications of e-communication for privacy and personal connection (ListServ).

And we describe the diligent work of IMLA's Amicus Committee in making a close call (Amicus Corner).

We look forward to reconnecting with many of you in The Last Frontier next month-

IMLA Editorial Board

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

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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.

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To Submit An Article, please contact the **Editor, Erich Eiselt**, **at eeiselt@imla.org** with a brief description of your topic. Municipal Lawyer is published 6 times per year, and feature articles should be between 2,500 and 4,000 words in length. Submitted articles are subject to review by IMLA staff, and IMLA reserves the right to edit articles (for style, clarity, length, etc.).

We look forward to hearing from you!

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

Hiring and Firing—A Dose of Caution for 2014

by Larry Lee and Dan Perkins



Since the beginning of the modern workplace, prospective employees have arrived at a job interview with the sole objective of presenting themselves as the best candidate for the position. Of course, there are exceptions. One client told us that an applicant for an accounts payable position with the city's finance department emphasized that she was more of a "people person," and less a "numbers person." Another client related an event in which the prospective H.R. specialist told the City Manager in his interview: "Seven handicapped parking spaces next to the front door? What, are you having a wheelchair convention or something?" When a public employer asked an I.T. applicant about details concerning certain programming language, the interviewee said, "I don't know, is it on my resume?" while simultaneously leaning over to get a peek at his own cv.

This odd behavior is not limited to conversation. A candidate at her final interview for the position of Administrative Assistant took a call on her cell phone during the meeting and then sent out a text while being asked a question. And an interviewee in the middle of the dialogue announced he hadn't yet had lunch and proceeded to consume a half-eaten sandwich in the interviewer's office.

There is no greater decision for an organization's potential success and failure than when an employer vets potential candidates for a job. This is as true in the governmental arena as in a private company: a productive workforce is critical to the entity's success and execution of its goals and policies. Exceptional employees are highly responsive, caring, ambitious, and ultimate team-players. Poor performers usually are inefficient, focused only on job security and income, and/or demonstrate a "me first" mentality.

I.Reducing Liability with Prospective Hiring

A public employer's decision to hire the wrong candidate can and will magnify the risk for potential and future liability. Due diligence, within legal boundaries, is critical to identify the best candidate for the job, while at the same time follow a fair and impartial process to reach the ultimate hiring objective. In order to avoid exposure to future "failure-to-hire" claims, the organization's goal should be to bullet-proof the selection process from any subjectivity when deciding whom to hire.

A. Often Overlooked Topics of Concern for Public Employers Looking to Hire

What are the legal boundaries when exercising due diligence in the hiring process? As we know, Title VII, the Americans With Disabilities in Employment Act (ADEA), and multiple other state and federal statutes prohibit employers from asking about such taboo subjects as an applicant's national origin, age, or whether the interviewee intends to start a family. In twenty-one states and the District of Columbia, it is illegal to base a hiring decision on the candidate's sexual orientation.

A surprising number of public employers are not aware of other, less obvious pitfalls. Despite their best intentions, they often expose their state or local government to significant risks of litigation over hiring decisions.

1. Recent EEOC Focus Background Checks, Credit Checks and Pre-employment Screening Tests

For over three decades, Human Resource managers have used extensive pre-employment screening tools. In the 1990's and early 2000's, the Myers-Briggs psychological tests gained widespread popularity among private

employers, and police and fire organizations nationwide have employed physical skills testing for decades. While background and credit checks had been used sporadically in the past, their use has grown steadily over the last five years. In response, the EEOC has heightened its scrutiny of pre-employment screening methods; the indiscriminate use of such testing is no longer the "no-brainer" it once was.

The recently amended EEOC Guidelines regarding an employer's use of background checks and credit checks reveal the federal government's expectations. The Commission has placed all employers on notice that pre-employment screening methods, if not carefully administered, may implicate state and federal equal employment laws and expose the employer to increased risks of discrimination lawsuits.[1] Two recent district court decisions involving private companies highlight the dangers that all employers, including those in the public sector employers, face.

In one case, the EEOC filed a federal lawsuit against a private entity claiming that its use of background checks and credit checks caused the company to reject African Americans and Hispanics for employment at a significantly higher percentage than white applicants.[2] The company was able to prevail on summary judgment because it demonstrated to the federal judge that it maintained a well-run, multi-tiered process for conducting background checks, drug tests, and credit checks--as well as a solid database of information pertaining to those screening devices that ultimately disproved the EEOC's claims.[3]

In another federal lawsuit, a private employer escaped liability under the Americans with Disabilities Act (ADA) after a rejected applicant claimed the employer's requirement that applicants reveal any criminal history caused it to "regard him as disabled" based on his history of convictions for drug-related offenses.[4] The employer prevailed because of facts unrelated to the specifics of the background check policy and because it was able to use the plaintiff's criminal history as a legitimate, non-discriminatory reason for refusing to hire him, Further, the company was able to demonstrate that it consistently and fairly applied the procedure to all applicants, took great care to avoid asking for too much unnecessary information, and judged the criminal background reports on a case-by-case basis rather than instituting a blanket rule or practice that precluded the hiring of any applicant with a criminal conviction.

While background and credit checks had been used sporadically in the past, their use has grown steadily over the last five years. In response, the EEOC has heightened its scrutiny of pre-employment screening methods; the indiscriminate use of such testing is no longer the "no-brainer" it once was.

These hot topics are likely to remain areas of focus in 2014. On July 24, 2013, nine state attorneys general[5] wrote a letter to the EEOC expressing disapproval of the federal agency's position, set forth in the Commission's Enforcement Guidance No. 915.002, that a bright-line use of criminal background checks violates Title VII's disparate impact provisions. On November 5, 2013, the State of Texas as plaintiff affirmatively filed a federal declaratory judgment action against the EEOC formally challenging the Commission's Enforcement Guidance on the ground that its policy exceeds its authority.[6] Though the issues are far from resolved, public employers must take notice that bright-line tests may subject them to continued EEOC scrutiny.

2. Constitutional Considerations. State, county and municipal employers face more legal risks than private employers because of their governmental status and the spectrum of federal claims which can be asserted against localities under 42 U.S.C. § 1983.[7] While some of these claims involve significant burdens of proof established by decades of litigation under Title VII and state anti-discrimination statutes,[8] many other potential claims (such as "due process" and First Amendment claims) are lurking in the government workplace. Likewise, the pool of potential defendants (including individual public servants) and the available remedies are often far broader, exposing public employers and their decision-makers to the prospects of uncapped compensatory and punitive damages. Therefore, public employers must be especially careful to minimize these additional risks when making hiring decisions.

Free speech retaliation and Section 1981 discrimination claims are some of the more "common" claims that expose public employers in failure-to-hire cases. Most public employers have enacted policies and hiring procedures to minimize the risks of these types of lawsuits by avoiding politically sensitive topics in applicant interviews and training management level employees to avoid making decisions using acquired data that could implicate discriminatory considerations.

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Larry Lee is a partner in Fisher & Phillips' Denver office, focusing on employment litigation, counseling, and defending employers against claims of discrimination, retaliation, wrongful termination and breach of contract. Before entering private practice he was a senior employment attorney the Colorado Attorney General's Office. He is a graduate of the University of Denver Law School.

Dan Perkins litigates a wide range of employment law issues for Fisher & Phillips' Denver office. He has tried to verdict more than 25 jury trials in a wide array of state and federal venues, including the Fifth Circuit. He was previously a senior attorney in the Texas Attorney General's Office, specializing in employment litigation matters at the trial and appellate level.

Still, many public employers overlook some of the less common pitfalls that could land them in the middle of a failure-to-hire lawsuit. These include:

Political Association: *Trujillo v. Huerfano Co. Bd. of County Comm'rs*, 349 Fed.Appx. 355 (10th Cir. 2009) (unpublished) – Plaintiffs claimed that the county board declined to hire them for two open foreman positions in part because of their political affiliation as Democrats. The Board of County Commissioners prevailed on summary judgment, but the case is a textbook example of how political allegiances can infiltrate the hiring process, and serves as a warning to public officials to guard against allowing political affiliation to color their hiring procedures.

It is easy for public employers to consider that political affiliation is a form of "freedom of association" protected by the First Amendment. While not as common as the typical free speech retaliation claim, freedom of association claims often arise after an election result in a "changing of the guard," or, as in the *Trujillo* case, when employees find themselves aligned with their boss's opponent. While some jobs may be politically sensitive and require a particular allegiance,[9] most such jobs do not, particularly at the local (county and municipal) level.[10]

Right to Privacy: Although there is no substantial case law chronicling claims of failure-to-hire cases premised on a federal constitutional right of privacy (courts have generally left it to the states to protect privacy interests of that sort),[11] public employers must nonetheless consider pre-employment requests for information that might implicate state and federal privacy concerns.

For instance, many employers have begun requesting job applicants to provide social media (Facebook, Twitter) account login information, or have requested to review social media pages over the applicant's shoulder in an effort to gain valuable personal information that may be used in the hiring decision. Not only do such requests implicate state privacy laws, but in the case of public employers, may also implicate First Amendment free speech and Fourth Amendment search and seizure provisions.[12] Since March of 2012, several state legislators and two U.S. senators have introduced various forms of legislation to outlaw the practice. Presently, twelve states[13] have enacted social media privacy legislation prohibiting employers from requesting access to employee and applicant accounts, and in twenty or so others, legislation is already pending or will be introduced.[14]

qoute

3. Drug Testing for Prospective Employees

The U.S. Supreme Court has held that both blood and urine collection are minimally intrusive procedures that do not infringe upon the rights of job applicants when they are conducted in the context of an employment environment (such as where applicants must go to a doctor's office to provide a sample) without direct observation by the tester.[15] In many states, employers have the legal right to test job applicants for drugs or alcohol but only if the applicants are informed that the testing is part of the interview process for all employees, and in most cases, the testing cannot be conducted until the applicant has been offered a conditional position.

Most states require employers that are conducting pre-employment drug tests to utilize a state-certified laboratory to administer the tests, and require that all applicants for the same job be tested similarly. Public employers must take care to ensure a fair and impartial administration of drug test policies to avoid discrimination claims premised on Title VII, equal protection, and state constitutional grounds.

4. State Labor Laws

While the National Labor Relations Act did not traditionally apply to non-union employers, the NLRB has applied its decisions to cover all employees. It is good practice, even in states without such laws, for public employers to be aware of NLRB decisions and the impact they may have on your hiring decisions.

B. Best Practices for Avoiding Liability in Hiring Decisions

1. Do not ask a prospective employee about arrest records or include them in background checks. If your Human Resources department is going to conduct a criminal background check on an applicant, then limit the search only to convictions and deferred adjudications.
2. Never ask questions about political affiliations, religious persuasion, or other controversial subjects.
3. If possible, have someone other than the decision-maker conduct reference checks and gather background information; use the same process for every applicant.
4. Ensure that pre-employment tests and other selection procedures are properly validated for the positions and purposes for which they are used, and ensure that they are administered without regard to any protected class, including race, color, national origin, sex, religion, age (40 or older), disability, and sexual

orientation.

5. Always resist the temptation to ask about health issues or other such information that could give the appearance of discriminatory intent and implicate ADA or Genetic Information Non-discrimination Act ("GINA") issues.[16]
6. Be familiar with federal and your state's privacy laws, paying particular attention to constitutional provisions that guarantee any citizen's right to privacy.
7. Tailor background checks, applicant drug testing policies, and other privacy-impacting and pre-employment procedures narrowly to avoid overbreadth challenges and to reduce disparate impact claims. Doing so will provide a strong defense against an attack on your employment policies in court or to the EEOC if a future claim is based on discrimination.

II. Factors to Consider When Deciding to Terminate

Despite using best practices to hire the most qualified person with the greatest potential to succeed, any hired employee may still turn out to be a bad fit. No employment decision has more potential to land your public entity in court than the decision to terminate an employee. However, if handled correctly, even the most contentious of terminations can avoid a lawsuit or at the very least, vindicate of your decision in with a summary judgment or a defense verdict at trial. The key to litigation-proofing your agency's termination decisions is to do the legwork necessary *from the beginning of the hiring period to the time of the employee's discharge* that demonstrates that the employer 's termination was based on well-documented and legitimate organizational reasons which were not discriminatory or illegal.

In January 2013, the EEOC released its Charge of Discrimination statistics for fiscal year 2012.[17] Unsurprisingly, termination of employment cases topped the list—by a large margin—for adverse action most likely to result in the filing of a discrimination charge. Given this fact, it is imperative that public employers develop explicit, fair, and defensible termination practices and procedures, and follow them consistently from beginning to end for every employee. Doing so may not eliminate your exposure to charges of discrimination and lawsuits, but it can drastically reduce those claims and put you ahead of the game.

A. Issues All Public Employers Should Consider

1. The First Amendment

When making a termination decision, public employers must consider the implications of First Amendment free speech protections. While private employers enjoy broad rights to curtail unwanted speech in the workplace, governmental employers do not. Therefore, the astute decision-maker faced with a supervisor's proposal to terminate an employee will always assess or investigate potential disciplinary action with an eye toward figuring out whether the affected employee has engaged in protected speech. It is not be enough simply to document the existence of a legitimate reason for termination. Instead, good public managers will probe the relationship both inside and outside the workplace. For instance, social media conversations are becoming an increasing source of protected statements in First Amendment cases.

In *Shepherd v. McGee*, No. 03:12-cv-02216-HZ (D. Or. Nov. 7, 2013), a state entity won summary judgment against a former employee's claim that she had been fired for making statements of public concern in a Facebook rant: The Oregon Department of Human Services had terminated the child protective services worker after she complained on social media site about clients she serviced and expressed her personal views on a variety of issues pertaining to child welfare. The federal district court assumed her comments were matters of public concern, but found that because the employee's comments reflected a bias the Department was required to avoid, it had a legitimate interest in terminating the plaintiff, despite the protected nature of her speech. *Shepherd* was a relatively easy call for the district court to make, but it illustrates the ever-increasing infiltration of public employees' personal lives, opinions, and speech into the daily activities of public employment and the potential liability that can exist when public entities do not carefully scrutinize their termination decisions.

2. Due Process Considerations

Although not as newsworthy recently as free speech lawsuits, due process claims (substantive and procedural) are often asserted by terminated public employees, particularly in states where the at-will nature of government employment has either been replaced by a "for cause" standard, or where public employees have been granted property or contractual rights by virtue of a handbook, collective bargaining agreement, or verbal assurances by the employing agency.[18] Typically, such claims are premised on the theory of "property interests" for continued employment. However, an increasing number of terminated employees have been eschewing traditional "property interest" considerations to argue the existence of a "liberty interest," which requires no legitimate expectation of continued employment.

A case in point is *Stallings v. City of Johnston City,* No. 13-cv-422-DRH-SCW (S.D. Ill. Nov. 4, 2013). Although the bar is high for plaintiffs seeking to assert a liberty interest claim,[19] in *Stallings* a former city employee survived a motion to dismiss by specifically alleging that her former supervisors at the City made defamatory statements about her in connection with her termination, thus implicating her federally-protected liberty interest in her reputation and right to work in the field of her choosing. Though the litigation is still in its early stages, the plaintiff cleared an early procedural hurdle and will have the opportunity to develop facts to support her liberty interest claim. Public employers should always guard against making potentially defamatory statements in the workplace, such as accusations of criminal conduct, bad faith, or ill motive without the facts to back them up. Failing to do so will open the door to potentially supportable due process claims.

3. Discrimination/Retaliation and Fair, Consistent Treatment

Traditional discrimination and retaliation issues (particularly under Title VII) remain a constant source of concern for

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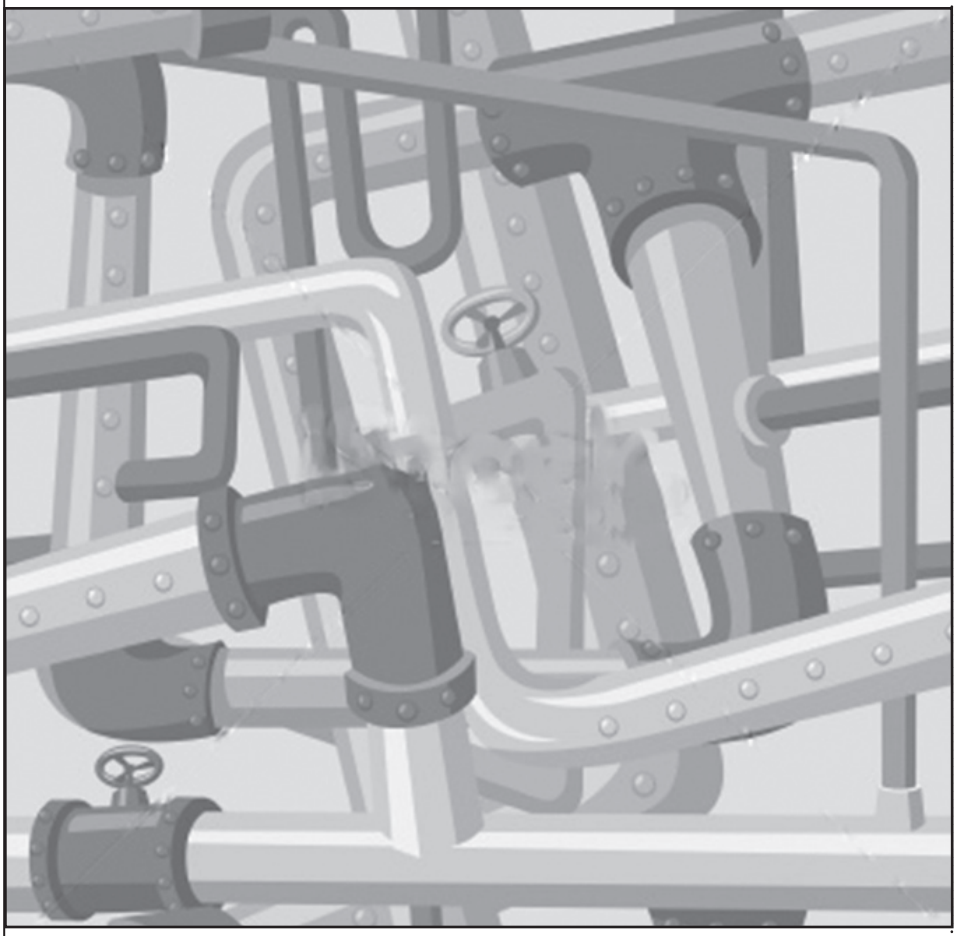
Common Problems (And Solutions) For Municipal Water Suppliers

by Jane Tsamardinos



Local governments provide a myriad of services to their residents, including municipal water. While there are a host of benefits to providing water to consumers both inside and outside municipal boundaries, municipal officials frequently encounter numerous pitfalls when administering a water system. Whether local governments are faced with a consumer refusing to pay a water bill, a damaged pipe in need of immediate repairs, or requests for refunds, municipalities are faced with unique challenges when engaged in the water business. As such, water and sewer systems are a frequent topic of discussion amongst our members. During the "The Nuts and Bolts of Municipal Water and Sewer Systems" presentation at NYCOM's 2013 Fall Training School, attendees raised a number of issues commonly encountered when managing their water works systems. This article will address three issues raised by Conference attendees as common problems for municipalities that provide water service to consumers both inside and outside the village.

Entering Private Properties to Investigate or Make Repairs

Water utility employees frequently need to enter a customer's home to examine or repair a water meter. This often happens when a meter is broken, incorrectly registering water use. However, users are occasionally unwilling to allow the water system employees to enter their homes or premises. In such situations, the meter remains unfixed, and the local officials have no idea what to charge the consumer. Local government officials have several options for address this situation. Absent the consent of the property owner or tenant or exigent circumstances, municipal officials may not enter onto private property. A municipality can be held liable for trespass, regardless if the municipality is mistaken in its belief that it has a right to enter.[1]

Invoking Police Power to Enter Property

Can a local government rely on its police powers to enter someone's property? While courts have recognized that a municipality may utilize its police powers to address situations injurious to public health and welfare, it may not use police powers to "assuage a municipal annoyance."[2] In other words, a municipality can rely on its police powers to address urgent situations that require immediate action. The court in *Hahn v. City of Rensselaer* held that the City was not liable for entering a customer's home to inspect a water problem in the basement that was a potential public health and safety hazard.[3] The City had acted in accordance with various sections of its building code vesting the City with discretion to take such action as is necessary to protect the public, including inspection of property deemed to be hazardous to the public.[4] The court held that the City exercised reasonable judgment in light of the circumstances and was immune from liability for trespass.[5] While the City's actions were upheld in that decision, in light of the potential for liability for trespass, in addition to bad publicity, local governments should have a legitimate, exigent need to enter the property without permission. It is highly unlikely that a municipality could invoke its police powers to enter a premises without permission to investigate a water meter or connection without evidence of an emergency situation that requires immediate attention by the local government.[6] In other words, entering private property should be a last resort and in response to an emergency or imminent threat to the public. In all other instances, local governments should seek a court order before entering private property without consent.

Charging A Flat Rate to Encourage Meter Repairs

Without an emergency impacting public health and welfare, a local government can alleviate this situation by relying on its authority to establish a system for calculating water rents. A municipality could create a "rate class" encompassing individuals with broken meters that deny access to their homes, requiring payment of a flat rate for use of municipal water.[7] A system of user fees may be established with varying rates to be charged to different classes of users so long as the municipality abides by constitutional equal protection guarantees and there is a rational basis for a distinction amongst users.[8] Moreover, when "usage is incapable of calculation with exactitude, discrepancy in charges between various properties ... may be tolerated so long as a rational basis exists with respect to the rents assessed."[9] Thus, if a city or village is unable to calculate the actual use, it could charge a flat rate so long as there is a rational basis for that rate. Villages establish the system for setting water rates, including all penalties and late charges, by local law pursuant to Village Law §11-1116. Villages may reserve the right, within the text of the local law, to amend rates from time to time by resolution. Cities should look at their charter for guidance on how to adopt and amend water rates.

Charging a flat rate to users who will not allow water system employees to repair their water meters could encourage these property owners to allow entrance for such repair, especially if the flat rate far exceeds the property owners' actual water use. Even in an opposite scenario, where the flat rate is lower than the actual use of water, charging a flat rate guarantees that the municipality receives at least some revenue from those consumers. In addition, a local government could develop an estimate of a property owner's use of water based on previous meter readings or water bills. Municipalities should explicitly state in its rules, policies, or local laws the method it will use to arrive at such an estimate. It is advisable for a municipality to make several attempts, in writing, to gain access to the home and remedy the situation with the property owner prior to charging a flat rate or estimated water bill.

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Refunds

Cities or villages may be approached by water consumers requesting refunds alleging billing errors, improper charges, a breach of contract on the part of the municipality, or simply because they can not pay their bill. Local governments are not authorized to forgive delinquent water charges, as this would constitute a gift of public funds in violation of Article 8, Section 1 of the New York State Constitution. However, where a municipality operates a water works system and sells water to consumers, it acts in a quasi-private, as opposed to governmental capacity, governed by the same rules that apply to a private entity. Consequently, a municipality could be held liable for breach of contract in certain instances.[10] For instance, if a municipality fails to supply water that is not pure and wholesome as governed by Department of Health regulations,[11] it has breached an implied warranty of fitness and its customers would have a valid claim for breach of contract. In that instance, an aggrieved customer would be entitled to a refund after submitting a valid claim to the municipality.[12]

In addition, if a city or village inadvertently charges a property owner not connected to the system, he or she would be entitled to a refund if the payments were made by mistake and as the result of the property owner's lack of care.[13] Refunds may also be given in cases of extreme hardship and where the customer was not responsible for excess consumption of water.[14] For instance, if a property owner consumes a large amount of water due to a subterranean leak in a water pipe located below the property, a municipality could properly refund that property owner for the excess amount of water used as a result of the leak.[15] Refunds may also be given in the event that the municipality uses an incorrect assessed valuation in computing water rents[16] or improperly applies new, higher water rates retroactively to its customers.[17] In other words, refunds are permissible where the customer is not responsible for the excess or improper charge, or where the municipality was negligent.

Villages and cities are not obligated to provide refunds until a formal claim for a refund is presented to the village board or city council.[18] However, there is no requirement that a consumer file an official Notice of Claim or initiate formal legal action to request a refund. Rather, the consumer must furnish a written request describing the basis for the refund. These claims should be fully investigated prior to providing a refund or agreement to a settlement. Because these claims result from a contract between the consumer and the municipality, they are governed by a six-year statute of limitation.[19]

There are two cases that discuss when the cause of action accrues for water refunds, with seemingly inconsistent holdings. In *Subin v. City of New York*[20], the trial court held that

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the cause of action accrues at the time payment is made, while New York's 2nd Department, Appellate Division held in City of *White Plains v. City of New York*[21] that the cause of action accrues at the time the governing body audits and rejects a claim from the consumer. While the claim in *Subin* was relatively small and not contested by either party, the claim in *City of White Plains* was large and the amount was in dispute. Therefore, depending on the circumstances surrounding a particular claim, a court could apply the accrual standard in either *Subin or City of White Plains.* The exact timing of the statute of limitations accrual will determine whether or not a claim is time-barred. There is no authority for a governing body to waive the statute of limitations for a particular consumer.[22] Local governments should consult with their municipal attorneys to determine the appropriate time of accrual.

Terminating Water Service

It is well settled that a city or village may terminate water service to any consumer for failure to pay water rents. Section 11-1116 of the Village Law specifically provides for enforcement of collection of water rents via termination of service upon adoption of rules, regulations, or local laws that explicitly authorize termination. Cities may also adopt local laws or charter provisions that allow termination of water for failure to pay. However, there are two important factors to consider prior to terminating water service. First, a municipality may not terminate a utility service without due process.[23] The courts have recognized that when a property interest in a utility such as water service is created, the consumer must be notified prior to termination and be afforded an opportunity to voice concerns, discuss billing errors, or provide evidence of any hardships that may have impacted his or her ability to pay.[24] In *Pilchen v. City of Auburn*, a tenant successfully sued the City for due process and equal protection violations because the City failed to provide the tenant with an opportunity to be heard and refused to allow the water bill to be placed in the tenant's name to avoid termination in the future.[25] Even though the landlord/property owner in *Pilchen* was ultimately responsible for making the water payments, the tenant, as an occupant of the property and user of the water, was deemed to have a property interest subject to due process protections. In light of the holding in *Pilchen*, local officials need to notify both the property owner and tenants prior to shutting off water. The Office of the State Comptroller has similarly opined that a municipality should not terminate water service without notice and an opportunity to pay any arrears.[26] Thus, municipalities should ensure that they have adopted rules, regulations, or local laws that afford consumers with reasonable notice prior to termination, as well as an opportunity to address any concerns, contest charges, or set up payment plans with the municipality.

Local governments must alsoconsider the public health implications of shutting off water to a property that is currently occupied... With no source of potable water, the property could be deemed "unfit for human occupancy" and condemned by the local code enforcement officer, leaving occupants homeless until water is restored.

Local governments must also consider the public health implications of shutting off water to a property that is currently occupied. Local and county health department officials frequently have serious concerns when water is shut off. As such, it is advisable for cities or villages terminating water in an inhabited property to consult with the local department of health prior to shut-off. Policies regarding termination of water and public health concerns vary from county to county and some county departments of health may have more stringent policies regarding termination of water for inhabited properties or properties subject to additional state regulations, such as motels or mobile homes. In addition, the New York State Property Maintenance Code states that "when a structure or equipment is found to be unsafe, or when a structure is found unfit for human occupancy, or is found unlawful, such structure shall be condemned pursuant to the provisions of this code."[27] With no source of potable water, the property could be deemed "unfit for human occupancy" and condemned by the local code enforcement officer, leaving occupants homeless until water is restored. While there is no duty to find housing for individuals, some municipalities have created relocation programs for displaced tenants, charging the cost of relocation back to the landlord.[28] In addition, a municipality may wish to utilize the Red Cross or assistance from county agencies to find temporary homes for individuals displaced due to termination of water. In light of these concerns, terminating water in inhabited properties should be assessed on a case by case basis and considered a last resort as a means of enforcement.

In addition to shutting off water due to non-payment, termination may be necessary when the municipal water supply is at risk of depletion. Upon reasonable notice, termination of water is permissible when consumption from an outside user is threatening the municipal water supply.[29] When a municipality operates a water system, it may not deny a resident access to water when an adequate supply exists[30] and there is no authority for a municipality to

terminate water service to a resident that it feels is consuming too much water.[31] However, a municipality may deny permission to an outside user to connect to its water system where there is evidence that allowing the connection will endanger the water supply to residents.[32] Sale to outside users should always be limited to any excess water supply that remains after the needs of resident consumers have been adequately met.[33] However, if a city or village terminates water to an outside user for reasons other than lack of supply or failure to pay water rents, it may incur some liability to the customer.[34]

Conclusion

Municipalities that operate a water works system should be aware of these common pitfalls and have policies in place to adequately address them. Furthermore, providing notice to consumers of any policies regarding termination of service, the use of flat rates or estimated billing, and the issuance of refunds could potentially stop problems before they start. Taking a proactive approach can help alleviate stressful, and potentially litigious, situations and ensure that the local government provides this vital service more efficiently.

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Notes

1. *See* Volunteer Fire Association of Tappan Inc v. County of Rockland, 101 A.D.3d 853, 855 (2d Dep't 2012).
2. *See* Village of Lansing v. Pyramid Companies, 51 A.D.2d 414, 417 (3d Dep't 1976).
3. Hahn v. City of Rensselaer, 563 N.Y.S.2d 155, 157 (2d Dep't 1990).
4. Id.
5. Id.
6. *See* id.
7. N.Y. Gen. Mun. Law §94; *see* Town Board of Town of Poughkeepsie, *supra*; Town of Watertown v. State of New York Department of Environmental Conservation, et al., 176 A.D.2d 1166, 1167-68 (1991).
8. N.Y. Const., Art 1, § 11; Elmwood-Utica House v. Buffalo Sewer, 65 N.Y.2d 489 (1985); Op. St. Compt No. 1980-91. Op. St. Compt No. 1979-307.
9. *See* Rezek v. Village of Richmondville, 24 A.D.3d 1169, 1170 (3d Dep't 2005) *citing* Matter of Frontier Ins. Co. v. Town Bd. of Town of Thompson, 285 A.D.2d 953, 956 (3d Dep't 2001).
10. *See* Canavan v. City of Mechanicville, 229 N.Y. 473 (1920).
11. 10 NYCRR Part 5.
12. Op. St Compt. No. 1979-880.
13. Op. St Compt. No. 1979-235.
14. Op. St Compt. No. 1980-543
15. Id.
16. Op. St Compt. No. 1987-39.
17. Op. St Compt. No. 1980-761.
18. Op. St Compt. No. 1979-235.
19. CPLR § 213(2); *See* Opns St Compt No. 79-405. It is worth noting that the court in *Village of Scarsdale v. New York City Water Bd.* (33 A.D.3d 1011 (2d Dep't 2006) held that when a claim by a municipal water board for payment in arrears is predicated on a contract for the sale of goods, the four year statute of limitations set forth in the Uniform Commercial Code would apply.
20. 229 N.Y.S 628 (Municipal Court of New York, Borough of Manhattan 1928).
21. 63 A.D.2d 396, 403 (2d Dep't 1978).
22. Op. St Compt. No. 1979-405.
23. *See* Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978).
24. *See* Pilchen v. City of Auburn, 728 F.Supp.2d 192, 198 (N.D.N.Y. 2010).
25. Id. at 200-201, 202, 204.
26. Op. St. Compt. No. 1981-369.
27. New York State Property Maintenance Code § 107.1.
28. *See* N.Y.C. Charter § 26-301; Albany City Code § 255-49.
29. Op. Atty. Gen No. 1999-31.
30. *See* Torsoe Brothers Construction Corp v. Board of Trustees of the Village of Monroe, 81 Misc 2d 702 (Sup Ct. 1975).
31. Op. St. Compt. No. 1980-178.
32. *See* Toan v. Village of Perry, 297 N.Y. 710 (1947).
33. Village Law § 11-1120; *see* Kennilworth Management Co. v. City of Ithaca, 63 Misc 2d 617 (Sup. Ct. 1970).
34. *See* Fraccola v. City of Utica Board of Water Supply, 70 A.D.2d 768 (4th Dep't 1979).

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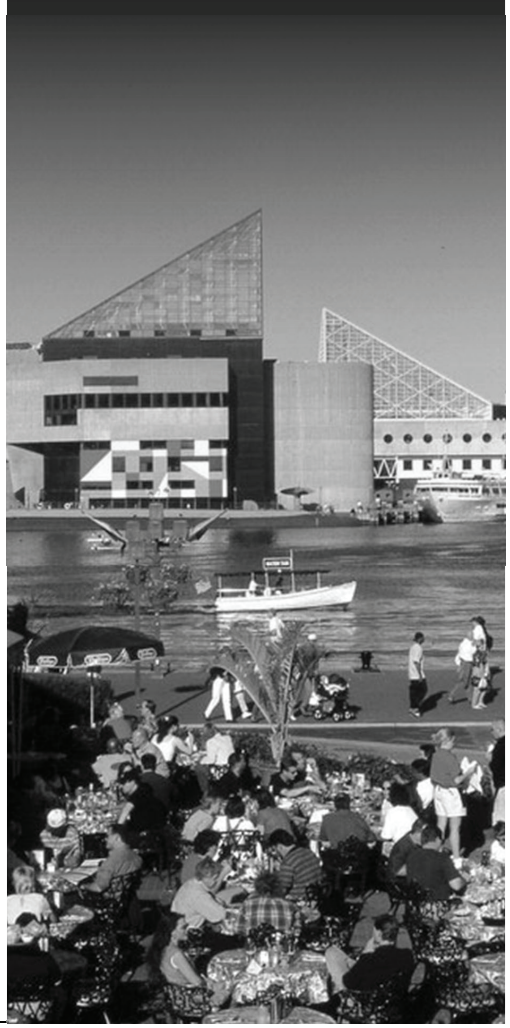

Beyond Three Minutes: An Expanded Legal Framework for Public Participation

by Matt Leighninger

Three Minutes at the Microphone
How outdated citizen participation laws are corroding American democracy

Most people dislike public meetings. This is true for both the public officials who preside over them and the citizens who attend them. But over the last two decades, a wide range of participatory meeting formats and dynamic online tools have emerged – so why do we continue conducting public business in such an outdated fashion?

There are a number of reasons, but one is the legal framework that governs public participation. At the local, state, and federal levels, these laws can stifle innovation, fail to ensure transparency, and discourage public officials and employees from reaching out to citizens. When combined with other kinds of engagement opportunities, traditional public hearings can work, mainly by providing a sense of closure and validation to public debate on an issue. But since our legal framework supports only the bare minimum of deliberation, the pressure of dealing with contentious policy issues falls squarely on a format that isn't up to the task. The consequences go far beyond miserable meetings: as the relationship deteriorates between the people and their public institutions, the legitimacy and financial sustainability of governments continue to decline.

New needs, old processes

If you attend a public meeting, it is easy to see why no one enjoys the experience. The vast majority of these gatherings are run according to a formula that hasn't changed in decades: officials and other experts present, and citizens are given three-minute increments to either ask questions or make comments. There is very little interaction or deliberation. Turnout at most public meetings is very low – local officials often refer to the handful of people who typically show up as the "usual suspects." But if the community has been gripped by a controversy, turnout is often high, and the three-minute commentaries can last long into the night. On most issues, the public is either angry or absent; either way, very little is accomplished.

For 21st Century citizens, who are more skilled and educated than their predecessors, who have access to endless quantities of information through their smartphones, and who are used to having a wide array of choices open to them, these old meetings seem like a waste of time; there is little for them to learn, and little they can contribute.

Most of the laws governing public participation are at least thirty years old; one of the most notorious, California's Brown Act, just turned sixty. They predate the Internet as well as many innovations in face-to-face engagement, and it is unclear how they apply to:

– Use of Twitter and other social media platforms by public officials and public employees;

– Participation by public officials and public employees in neighborhood online forums, email listservs, and other online arenas;

– Participation by public officials and public employees in small-group dialogue and deliberation as part of larger public engagement efforts;

– Use of online tools to announce and proactively recruit for public meetings (rather than the old formula still found in many laws, which require governments simply to post a notice about a meeting in a city bulletin); and

§ Collaboration between public institutions and private, nonprofit, charitable, and faith-based institutions in organizing and supporting public participation.

In all of these scenarios, our laws ought to uphold values such as transparency, privacy, inclusion, fairness, and freedom of speech.

In the Knight Foundation's "Soul of the Community" study, researchers found that attending a public meeting was more likely to reduce a person's sense of efficacy and attachment to community than to increase it. At the federal level, the poorly structured "town hall meetings" on health care reform in the summer of 2009 led to a number of highly publicized clashes between constituents

and Members of Congress, and were widely viewed as being detrimental to the policymaking process. In legislative hearings, school board meetings, zoning hearings, and city council proceedings all over the country, democracy is dwindling, three minutes at a time.

Reframing the relationship

Many local leaders understand the implications of this shift. They know that the financial pressures facing local governments, school systems, and other public institutions are not just the result of the recent economic downturn. "If we think we're going to come out of this recession and expect everything to go back to normal, we've got another thing coming," says Harry Jones, county executive of Mecklenburg County, North Carolina. "We need to reach out and reframe our relationship with citizens – the people who are the ultimate source of our revenues."

To support this new relationship, our public participation laws ought to support newer, more meaningful forms of citizen engagement. Over the last two decades, Jones and many other local leaders have pioneered a new generation of participation practices. These range from much more intensive, deliberative face-to-face meetings to a burgeoning array of online tools and arenas. The most successful of the face-to-face efforts rely on proactive, network-based recruitment to bring more than the "usual suspects" to the table. They use small, facilitated groups that allow people to explain why they care about an issue, become more informed about it, consider a range of policy options, and decide how they can contribute to problem-solving – in addition to making recommendations to government. In some cases, as with the practice of Participatory Budgeting, citizens vote on how public money should be spent. Neighborhood and school online forums have emerged that employ some of the same tactics, giving leaders the chance to interact with sustained networks of citizens. And online tools have been established that allow people powerful and convenient ways to report problems, generate and rank ideas, work in small action teams, and visualize options for public budgeting and land use planning.

We must free public officials and employees to engage the public without abandoning the goals of transparency and accountability. We must enable government to reach out to its constituents, adapt its practices and expectations, and repair the relationship. The success and even the survival of our governments may depend on it.

Many of these efforts have been initiated by people and groups outside government, from community foundations to neighborhood organizers to universities to Chambers of Commerce. But whether or not they are led by public officials, most of these efforts occur outside the scope of official citizen participation processes and the laws that govern them.

Revising the legal framework

Over the last year, a working group that includes representatives from the International City/County Management Association, American Bar Association, International Municipal Lawyers' Association, National League of Cities, National Civic League, Policy Consensus Initiative, and Deliberative Democracy Consortium have worked to produce new legal tools for public participation. These include:

–A model public participation ordinance for local governments

–A model public participation act for state governments

–A document describing local policy options and techniques for strengthening public participation.

The intent of these tools is not to offer cookie-cutter solutions for city councils and state legislatures, but to encourage them to at least consider their options. This would be a great help to city attorneys and other legal advisors, who often have to make recommendations without clear laws, legal precedents, or policymaker intentions.

The legal tools crafted by the working group are intended to allow innovation, not require it. "We took as our inspiration the laws on alternative dispute resolution (ADR) enacted during the 1980s and 90s," says Lisa Bingham of Indiana University, a public administration scholar who has taken the lead for the working group in the drafting process. "Simply by authorizing public agencies to use mediation, facilitation, and other ADR processes, those laws resulted in a dramatic proliferation of these practices at every level of the legal system."

The same is needed for public participation techniques. We must free public officials and employees to engage the public without abandoning the goals of transparency and accountability. We must enable government to reach out to its constituents, adapt its practices and expectations, and repair the relationship. The success and even the survival of our governments may depend on it.

Model Municipal Public Participation Ordinance

Whereas, direct and active participation in self-governance is a widely held value in the United States; and

Whereas, knowledge and talent are widely dispersed in society, and all benefit when those skills and abilities are

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Matt Leighninger is Executive Director of the Deliberative Democracy Consortium (DDC), a collaboration of more than 50 foundations and universities advancing democratic practice. He has worked on public engagement for over 100 communities, the National League of Cities, the American Bar Association and others.. His first book is "The Next Form of Democracy: How Expert Rule is Giving Way to Shared Governance – and Why Politics Will Never Be the Same."

directed toward common goals; and
Whereas, public participation and collaboration may enhance local government's effectiveness, expand its range of options, improve the quality of its decisions, and enlist the problem-solving capacities of the general public; and
Whereas, public agencies and municipal authorities may collaborate with the general public and state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders to accomplish public work and deliver public services more efficiently and effectively, and
Whereas, there have been dramatic changes in the techniques of public participation and the technology allowing for greater transparency of government both through broadcast media and the internet;
Now, therefore, the city of _____ enacts the following Public Participation Ordinance:

Section 1: Definitions
For all purposes under this Act,
a) the phrase "public participation" is defined to include "public engagement," "community engagement," "citizen engagement," "public hearing," and "public comment" and includes, but is not limited to, any form of in-person, technology-aided, or online communication that provides for discussion, dialogue, or deliberation among participants, allowing residents to engage meaningfully in local problem identification, and/or problem solving related to community challenges, problems, and opportunities.
b) "Policy process" means any action in developing, implementing, or enforcing public policy, including but not limited to identifying and defining a public policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, rulemaking, project management, and assessing the impacts of decisions.

Section 2: Public Participation Policy
a) It is hereby declared a matter of public policy that the active public participation of community members to offer comments, ideas and recommendations, both individually and collectively, on public challenges, problems and opportunities is a public good and will be pursued in the interest of the health, prosperity, safety, and welfare of the community, and in the pursuit of effective and trusted governance. Further, as these ends are best achieved by community members who have the opportunity to become informed and to jointly deliberate on public matters prior to offering their ideas and recommendations, that such deliberative opportunities are to be offered when and where possible, and public input received will be considered in final decision making by the appropriate agency body.
b) The city and its municipal departments may use any process that meets the principles for public participation set forth in Section 3 in addition to statutorily or federally required forms of public input such as notice and comment or public hearings for public participation.
c) The city shall adopt and make publicly available a Public Participation Policy to guide the city's use of participation strategies and techniques to satisfy the principles for public participation set forth in Section 3.

It is hereby declared a matter of public policy that the active public participation of community members to offer comments, ideas and recommendations, both individually and collectively, on public challenges, problems and opportunities is a public good pot...

Section 3. Principles for Public Participation
a) The following principles govern meaningful and effective public participation:
1. **Planning Ahead**: Public participation is an early and integral part of challenge and opportunity identification, planning and design, budgeting, and implementation of city policies, programs, and projects.
2. **Inclusive Design**: The design of a public participation process includes input from appropriate local officials as well as from members of intended participant communities.
3. **Authentic Intent:** A primary purpose of the public participation process is to generate public views and ideas to actually help shape local government action or policy.
4. **Transparency:** Public participation processes are open, honest, and understandable. There is clarity and transparency about public participation process sponsorship, purpose, design, and how decision makers will use the process results.
5. **Inclusiveness and Equity**: Public participation processes identify, reach out to, and encourage participation of the community in its full diversity. Processes respect a range of values and interests and the knowledge of those involved. Historically excluded individuals and groups are included authentically in processes, activities, and decision and policymaking. Impacts, including costs and benefits, are identified and distributed fairly.
6. **Informed Participation**: Participants in the process have information and/or access to expertise consistent with the work that sponsors and conveners ask them to do. Members of the public receive the information they need to participate effectively with sufficient time to study.
7. **Accessible Participation**: Public participation processes are broadly accessible in terms of location, time, and language, and support the engagement of community members with disabilities.
8. **Appropriate Process**: Each public participation process uses one or more engagement formats that are responsive to the needs of identified participant groups and encourage full, authentic, effective

and equitable participation consistent with process purposes. Participation processes and techniques are well-designed to appropriately fit the legal authority, scope, character, and impact of a policy or project. Processes adapt to changing conditions as projects move forward.
9. **Use of Information**: The ideas, preferences, and/or recommendations contributed by community members are documented and given consideration by decision-makers. Local officials communicate decisions back to process participants and the broader public, with a description of how the public input was considered and used.
10. **Building Relationships and Community Capacity**: Public participation processes invest in and develop long-term, collaborative working relationships and learning opportunities with community partners and stakeholders. This may include relationships with other temporary or ongoing community participation initiatives.
11. **Evaluation**: Sponsors and participants evaluate each public participation process with the collected feedback, analysis, and learning shared broadly and applied to future public participation efforts for continuous improvement.

Section 4. Public Participation Specialist
The mayor/city manager shall designate a public participation administrator to assist in the implementation of this ordinance and to provide ongoing training in public participation processes for city employees, members of city advisory boards and commissions, and such others as may be determined by the mayor/city manager.

Section 5. Public Participation Advisory Board
a) Establishment. A public participation advisory board for the City of _____ is hereby created.
b) Purpose and Intent. The purpose of this board is to advise the city council on the design, implementation, and evaluation of public participation processes for determining community goals and policies and delivering services.
c) Duties and Responsibilities. The board shall have the following duties and responsibilities:
1. Develop and propose to the city council a multi-year plan for public participation to guide the public participation policies, protocols, practices, and assessment of the City of _____;
2. Develop guidelines and recommendations to the city council that support inclusive participation and a diversity of viewpoints in public engagement processes; and
3. Provide advice and recommendations to the city council regarding the implementation of public participation guidelines and practices.
4. Review public participation process evaluation results to provide advice and recommendations to the city council regarding continuous improvement of public participation policies and practices;
5. Provide an annual report to the city council regarding the status of public participation activities.
d) Composition. The public participation advisory board shall consist of numbers of members and terms consistent with the practices of the appointing authority. The appointing authority shall give due consideration to recognized qualifications and experiences in the field of public participation and shall designate representatives reflecting the diversity of interests of the broader community.
e) Procedure. A majority of the board shall constitute a quorum. The commission shall adopt such rules and bylaws as appropriate to further govern its proceedings.
f) Meetings. The board shall hold regular meetings as may be provided by its bylaws, and may hold special meetings on the call of the chairperson or at the request of the city council.

Model State Public Participation Act: An Amendment to the State Administrative Procedure Act and Government in the Sunshine Act
Comment: Some states include municipalities as agencies subject to the Administrative Procedure Act. Others do not. The model would need to be adapted to each state's context. In each state, the Act should incorporate by reference that state's statutory definition of state agency or municipal authority (city, town, county, water district, etc.).
Whereas, direct and active participation in self-governance is a widely held value in the United States, and
Whereas, knowledge and talent are widely dispersed in society, and all benefit when those skills and abilities are directed toward common goals; and
Whereas, public participation and collaboration enhance the Government's effectiveness, expand its range of options, improve the quality of its decisions, and enlist the problem-solving capacities of the general public; and
Whereas, public agencies and municipal authorities may collaborate with the general public and state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other non-governmental stakeholders to accomplish public work and deliver public services more efficiently and effectively, and
Whereas, there have been dramatic changes in the techniques of public participation and the technology allowing for greater transparency of government both through broadcast media and the internet, and
Whereas, existing statutory requirements place limits on the interaction between public agencies, municipal authorities, and members of the general public;
Now therefore, the [state] Administrative Procedure Act and Government in the Sunshine Act shall be amended as follows:
Now therefore, the state of _____ enacts the following Public Participation Act:

Section One: Definitions
For all purposes under this Act,
a) For all purposes under this Act, the phrase "public participation" is defined to include "public engagement," "community engagement," "citizen engagement," "public hearing," and "public comment" and includes, but is not limited to, any form of in-person, technology-aided, or online communication that provides for discussion, dialogue, or deliberation among participants, allowing residents to engage meaningfully in local problem identification, and/or problem solving related to community challenges, problems, and opportunities.
b) Municipal authorities may include [to be defined]
c) State agencies may include [to be defined]
d) "Policy process" means any action in developing, implementing, or enforcing public policy, including but not limited to identifying and defining a public

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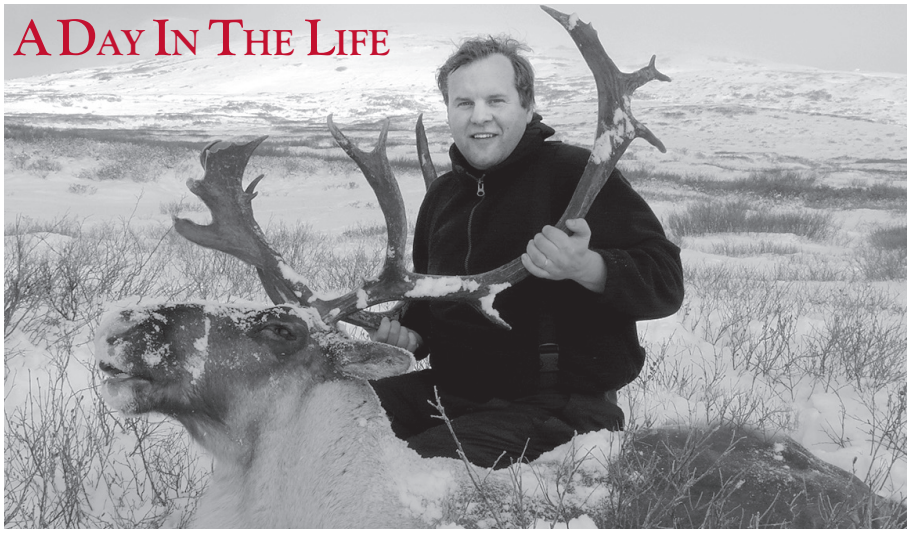
A Day In The Life



Dennis Wheeler, Municipal Attorney, Anchorage, Alaska

ML: Given IMLA's upcoming conference is in Anchorage, we're particularly pleased to speak with you. Were you actually born and raised in the Last Frontier?

Yes, I was born in Kodiak, Alaska, an island beauty most famous for its fishing and bears, but also its Russian influences and, more recently, as a commercial rocket launching site. I may be the only municipal attorney in the nation who spent his early days living in a Quonset hut – a very popular housing option in Alaska that took advantage of the military's downsizing after WWII. If you know what they look like, you'll appreciate how living in one helps you think outside the box.

ML: We hereby ask any other IMLA members who spent formative years in a Quonset hut to identify themselves—but for now, you are definitely a "class of one." How did you get from Kodiak to Anchorage?

I was taken off "the Rock" and moved to what we fondly refer to as "Los Anchorage" (many Alaskans will tell you Anchorage is only an hour's drive from Alaska). Alaska has no law school, so I tripped around the Pacific Northwest, got a law degree and ended up in the small coastal town of Seward (winter population approx. 2,500; summer population., with cruise ship in town, 7,500). I took the Bar exam in July of '93. The Bar results do not come out until November, so I spent the in-between time substitute teaching at the high school, coaching, fishing, painting apartments, and learning to bake bread. Once licensed, I doubled the number of lawyers living in town and business boomed. I then sold out five years later, took a job as an assistant municipal attorney in Anchorage, then became one of the deputies. I then went to the State's Attorney General's Office and from there on to our State's version of a public utility commission prior to taking this job.

Pull Qoute

ML: And how did you wind up running the Anchorage Law Department?

On the eve of his inauguration, the Honorable Mayor Dan Sullivan called and asked if I'd be the Municipal Attorney. I'm not sure if I was his first or last choice. Given the timing of his call, I've decided not to ever ask. I think I benefited from a couple of attributes. Mayor Sullivan was on the Anchorage Assembly during my first stint with the City, so he was familiar with my work. I had also always tried to maintain cordial and helpful relations with all the Assembly members. Thus, I think I had both the experience and demeanor he was looking for.

ML: Undoubtedly true on both counts. Tell us about the department—how big is it and how do you divide up responsibilities

This office has 11 attorneys in the civil division and 14 in the criminal division. The criminal division handles the majority of misdemeanor offenses charged within City limits. Felonies and misdemeanors charged by state law enforcement entities (Troopers, International Airport Police, University Police) are handled by the State's District Attorneys. Our total staff fluctuates around 55-60 people.

In addition to the typical municipal law work, our civil division also runs the DUI/OUI/Driving without Insurance/Scofflaw vehicle impoundment and forfeiture program. It's been successful in reducing drunk driving. It has been very helpful in getting people with over $1000 in unpaid tickets (scofflaws) to pay up.

ML: Congratulations on that success. What does "Anchorage" consist of, in terms of potential municipal legal activity?

We do have a great buffet of legal issues for a city our size, in part due to the following:

We are in a relatively new State (1959) and are relatively new ourselves (the city and borough unified into the Municipality in 1975). Because of this there are a number of land claims issues that are still unresolved.

We own and operate one of three electric utilities within our boundaries, as well as a water and sewer utility.

We own and operate our landfill and also operate one of three or four refuse collection companies within our boundaries.

We own and operate a municipal airport.

We have nine unions representing our employees.

Our Port is responsible for off-loading and distributing about 80% of the goods that come into Alaska.

The state-run international airport is within our boundaries, as is the state-owned railroad's main terminus, as well as a National Park and a National Forest.

The Joint Base Elmendorf- Richardson (Air Force and Army) is within our boundaries and is a significant presence here – both in terms of land ownership and economic impact.

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CODE ENFORCEMENT

Animal Control. Put A Leash On It

By David Wesner, Corporation Counsel, Danville, Illinois

I am currently involved in a situation centering on animal regulation in my municipality. The situation got me to thinking about the extent of animal regulation that a municipality may think is feasible as compared to the extent that the citizens expect or need.

My municipality contracts out for animal control services. We have used a local not-for-profit since before I began working for my municipality, which was over seventeen years ago. Recently, they have gone through a transition of directors which has led to many severe problems. The problems resulted in almost all of the Board members resigning from the Board. The resulting chaos has caused them to terminate their contract with the City for animal control services. My Mayor immediately began conversations with the Chairman of the County Board to determine if the City and County could work together through the County Animal Shelter to provide those services, to an extent based on the fact that the County provides such services to other municipalities within the County. Those discussions have led to an interim agreement which will exist until an Intergovernmental Agreement can be prepared setting out the detail of how the City and County will work together to allow for animal control within the City. Considering the extent to which those services will be required (since my municipality is the largest in the County), the conversation questioned how exttensively the City will be asking the County to enforce the City's animal control ordinance. The result of that conversation was that we would look over our ordinance and make a determination on which provisions would be important to continue enforcing.

The following types of regulations are in my ordinance, which are likely typical of most ordinances on animal regulation: licensing; running at large or leash law; cruelty; dangerous; vicious; females in heat; hoarding; farm animals; and exotic animals. Some of these provisions are a given and must be enforced, such as classifying and regulating dangerous and vicious dogs. To not continue those regulations would leave the public at risk. Other provisions will receive significant attention because they cover animals at risk, such as cruelty and hoarding. The remaining provisions, maybe less critical to enforce although I'm sure not without debate from citizens, such as licensing, exotic animals, farm animals and females in heat.

One of the provisions that I believe to be a lower priority licensing. I recognize that licensing may be beneficial for proving ownership and getting impounded animals back to their rightful owners. However, having another agency issue and track licenses with limited staff availability may be difficult at best. And, as the County is responsible for rabies tags, we may be able to work with the issuance of those tags to hopefully achieve the same result as if licenses specific to my municipality were still being issued. So, that requirement is likely to fall by the wayside.

Another provision that could be eliminated from enforcement, or at least minimized depending on the actual circumstances of a call, would be a dog running at large. My experience is that, many times, these calls involve dogs that may be roaming the neighborhood but aren't being aggressive or causing issues with people. An animal running at large involves significant staff time in trying to locate the animal and impound it. Depending on staffing levels, the County would likely not be able to manage dealing with these types of calls.

One of the items that came up in our initial discussions with the County was related to cruelty. The Director of the county shelter indicated that they would not be doing welfare checks. She indicated that their experience was that most calls concerning no food or water did not rise to the level of what would be considered cruelty. My experience was the same. Most owners that we cited indicated that they provided water and food. They would indicate that the dogs would turn their food and water bowls over such that it might appear to an enforcement officer or a neighbor that the owner was not taking care of the animal. Any enforcement officer or municipal attorney who has dealt with the public for a long period of time can get a sense from talking to someone if they appear to be a good or bad owner. Having said that, if the situation described involves other potential serious issues, an enforcement officer would likely be sent to observe the conditions and assess whether actual enforcement is necessary. Another aspect of cruelty that I believe would need to continue to be addressed and enforced is hoarding. As we know, hoarding is a situation that may result from the mental condition of the person involved, which seriously impacts the health of the animals living with the person. If not addressed, the health and welfare of both the hoarder and the animals are placed in serious jeopardy.

One of the regulations which may have some good debate on whether

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Federal Preemption of State Preemption of City Powers

by Pete Haskel

Can the U.S. tell a state not to interfere with a city's authority? If so, when? If so, should it?[1]

State Preemption of Local Government Authority

Classic situation for a Home-Rule City. The city wants to [regulate firearms][offer municipal broadband service][protect consumers from predatory sales or lending practices] [etc.], but the state legislature adopts a law preempting the local power to act on that subject. Sometimes, it might be a state agency that adopts preemptive regulation under delegated legislative powers. Either way, the city is rendered powerless to act.

Federal Preemption of State Authority

Of course, the federal government can preempt state legislative powers in a matter that is properly subject to federal regulation. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983) (federal law can preempt state law if federal legislation shows congressional intent to occupy the field or state law actually conflicts with federal law); *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (federal executive power over foreign policy preempts California's Holocaust Victim Insurance Relief Act). Federal agency regulations can preempt state laws too, so long as the subject is within the scope of agency authority. *See Fidelity Federal Savings-. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes").[2]

Federal Preemption of Local Power

Of course, federal preemption of state law includes preemption of local ordinances enacted on the same subject by cities throughout the state – there is no question that when it preempts state laws Congress simultaneously preempts ordinances of cities. "[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

Federal Preemption of State Preemptive Authority?

So, in an area in which there is federal regulatory authority, can the federal government enact legislative or regulatory provisions that prevent a state from preempting local government power?

Yes, if Congress acts with unmistakable clarity. Can federal agencies accomplish the same result through regulations?

Back in the 1980's a fierce legal battle raged in courts across the nation over the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")[3]. One issue was whether Congress intended FIFRA to limit states' powers to restrict local regulation of pesticide labeling or use. The resulting judicial opinions touched on our subject. Among them:

> The [federal] legislative history does not demonstrate a clear congressional intention to preempt traditional local police powers to regulate the use of pesticides or to *preempt state power to distribute its regulatory authority between itself and its political subdivisions*. 7 United States Code section 136v is phrased to authorize states to adopt more stringent regulations.

People ex rel. Deukmejian v. County of Mendocino, 36 Cal.3d 476 at 492 (Cal. 1984) (emphasis added). This of course suggests that if Congress had clearly expressed its intent to "preempt state power to distribute its regulatory authority between itself and its political subdivisions" Congress could have done so.

The US Supreme Court decision that eventually settled the scope of FIFRA preemption approached our issue from the opposite direction, observing, "On the other hand, it is sufficiently clear that under the opinion announced by the court below, the State would have been precluded from permitting local authorities to regulate pesticides." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991). The Court did not decide whether Congress could have precluded the state from preventing local regulation.[4]

Later in the majority opinion, and particularly in Justice Scalia's concurrence, the Court edges closer to (but does not quite reach) our issue – still focusing on arguable restrictions on state powers to delegate rather than on possible federal restrictions on state power to limit local government powers. For example Justice Scalia remarks:

> This reasoning is unpersuasive. As an initial matter, it would still have to be shown under ordinary canons of construction that FIFRA's delegation of authority to "State[s]" would not therefore *allow the States in turn to redelegate some of this authority to their political subdivisions either specifically or by leaving undisturbed their existing statutes that would otherwise provide local government with ample authority to regulate.* We have already noted that § 136v(a) can be plausibly read to contemplate precisely such redelegation. The term "State" is not self-limiting since political subdivisions are merely subordinate components of the whole. The scattered mention of political subdivisions elsewhere in FIFRA does not require their exclusion here. The legislative history is complex and ambiguous.

501 U.S. at 612 (emphasis added).

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PRACTICE TIPS

Requests for Electronic Information: The Top Ten Pitfalls

By Hilary Ruley, Chief Solicitor, Baltimore City

I know all too well that different states have different public information laws because I reviewed *all* of them in preparing to speak on the panel titled "Electronic Impact on Open Government" at IMLA's 2013 Annual Conference in San Francisco. I addressed the types of electronic documents, highlighting the multitude of software programs and hardware devices in use and the metadata they create. I concluded that trying to create a standard national policy to address the problems posed by requests for electronic information misses the opportunity for each municipal government to balance the desire for transparency with its available resources. A uniform approach also naively ignores the comparatively nimble legislative and regulatory process at the local government level, which allows for relatively quick solutions tailored to each government's needs.

Yet, what do municipal attorneys do with the existing requests for documents, particularly electronic documents, which clog their in-boxes and pile up in office mail? Although each local government is unique in how it wants to handle the volume and type of requests it receives, there are many similarities in requests for electronic information, no matter the jurisdiction. While there may not be a universal roadmap we all can follow when answering a request for electronic documents, experience reveals common problems we should try to prevent.

Here are the top ten pitfalls municipal attorneys should avoid when counseling a client about a request for electronic information:

10. Not understanding metadata. Metadata is the usually hidden information associated with what you see on your computer screen or mobile device. If I have lost you already, think about a spreadsheet. The government data is what your client types into the cells in the spreadsheet. The numbers for the rows and the letters for the columns are information created by the software program and visible on the screen. Metadata is the information tied to the spreadsheet that you cannot see automatically on the screen: author, file creation date, last edited and last saved dates.

9. Not redacting (or, if you are in some jurisdictions, reviewing) metadata. In most jurisdictions, public information laws are silent on how to treat metadata captured by a request for information. Consider redacting the metadata if it is financially and technologically feasible by purchasing a software program that erases the metadata from the electronic document. If this is too cumbersome, and your jurisdiction allows, release the information in a PDF or TIFF file or as a hard-copy document. If you are in a jurisdiction (*e.g.*, Arizona, Washington, Maryland, Montana, Connecticut, New York) where metadata has been addressed in statutes or by the courts, review the metadata in your documents to decide if you want to redact some of it.

8. Not understanding your jurisdiction's laws about information concerning public business contained on private devices. There is no national consensus on when e-mails (or other electronic information) concerning government business contained on private devices must be produced in response to a request for documents. In a recent Illinois case, the appellate court ruled that if a councilmember was sending or receiving a message about public business from a personal device while engaged in a council meeting with a quorum present, then the message was subject to the records law. *See City of Champaign v. Madigan*, 2013 Ill. App. 4th
120662, 2013 Ill. App. LEXIS 481 (Ill. App. Ct. 2013). If you are practicing outside of Illinois, does a similar rule apply to your clients? If so, you need to advise your clients to allow their personal devices to be searched for relevant electronic information. In any case, counsel your clients to keep separate work, campaign and personal e-mail/Facebook accounts. This makes the process of searching for responsive information easier regardless of the applicable law. It also prevents personal information from being captured when work devices or work e-mail accounts are searched.

7. Not discussing who owns proprietary information in software. Make clear in each contract to purchase or license software (or hardware that runs with unique software) which party owns the information keyed or uploaded into the software. Many contracts will be clear that the vendor owns the software code because it is proprietary and commercially valuable. But the contracts also need to address what happens to the information placed in the software system by the government or the vendor. You do not want your client to be unable to provide information it created because it cannot run a particular report or otherwise extract that information from the software it purchased. In a Connecticut case, a court held that it was illegal to purchase a software program that did not allow the government to make its information available to a requestor as readily as it had done prior to the purchase. *See Office of Health Care Access v. Freedom of Info. Comm.*, 2005 Conn. Super. LEXIS 962, *4 (Conn. Super. Ct. 2005)(unreported). The court

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Is a Public Employee's Subpoenaed Testimony Protected Speech under the First Amendment?

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

On April 28, 2014, the Supreme Court will hear oral argument in *Franks v. Lane*,[1] the first public employment First Amendment case the Court has taken up since *Garcetti v. Cebellos*.[2] As with any employment case, there are two sides to the story in *Franks*. According to the Respondent employer, Edward Lane, the former director of a program for at-risk youth, was laid off pursuant to a reduction in force that was necessitated by budget cuts.[3] Lane on the other hand, claims that he was fired in retaliation for his subpoenaed testimony in violation of his First Amendment rights.[4] Before diving into the issues and arguments presented in *Franks*, it is important to understand *Garcetti*; the decision in *Franks* will either rely on *Garcetti*, or chip away at the protections *Garcetti* has afforded to municipal employers.

In 2006, the Supreme Court ruled in *Garcetti v. Cebellos* that statements made by a public employee as a part of his or her official duties are not protected under the First Amendment.[5] The Court explained that in order to establish a claim of retaliation for protected speech under the First Amendment, a public employee must show, among other things, that he or she "spoke as a citizen on a matter of public concern."[6] The Court acknowledged the importance of balancing the government's interest as an employer against the employee's First Amendment right as a citizen, explaining:

> A government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations... At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens...
>
> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.[7]

If the rule were otherwise, the Supreme Court warned, that the judiciary would be displacing the employer's supervisory role, which, as the Court noted, finds no support in its precedents.[8] Thus, the rule under *Garcetti* establishes that a government employee whose speech is made pursuant to his official duties is not speaking as a citizen and that speech is therefore not protected under the First Amendment.[9]

Franks, like *Garcetti*, involves a public employee who was subjected to an adverse employment action. In both cases the employees argued they faced these adverse actions in retaliation for their speech, in violation of the First Amendment.[10, 11] While *Garcetti* involved an employee who claimed he was reassigned to another position and denied a promotion as a result of a memorandum he wrote pursuant to his job duties, in *Franks*, the employee claims his employment was terminated as a result of testimony he provided pursuant to subpoena.[12] The crucial distinction between *Franks* and *Garcetti* is whether the fact that the employee's speech was made pursuant to subpoenaed testimony changes the analysis for the purposes of the First Amendment.

In *Franks*, Lane accepted a job working for the Central Alabama Community College ("CACC" or the "program"), a public employer.[13] He discovered that a then-state representative, Suzanne Schmitz, was listed on his program's payroll but never came to work or performed any job duties for CACC.[14] After numerous failed attempts to get her to come to work, Lane fired her, despite being warned against doing do by CACC's lawyer and president Steve Franks.[15] Lane was later subpoenaed to testify about his interactions with Schmitz before a grand jury and a criminal trial.[16] Thereafter, Lane's employment was terminated.[17] CACC and Franks claim that due to budget cuts Franks laid off 29 probationary employees—including Lane.[18] All but three, however, were called back because Franks realized many of those employees were not in fact probationary.[19] Lane was one of the three who was not called back because, according to Franks, he was a probationary employee.[20] On the other hand, Lane claims he was terminated as a result of his testimony against Schmitz in violation of the First Amendment.[21]

Neither side disputes that Lane was acting pursuant to his official job duties when he investigated the state representative's failure to report to work and ultimately terminated her employment.[22] Relying on *Garcetti*,

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On Being Where You Are

by Kelly Addy

Carole King was probably just waxing romantic when she sang, "So far away. Doesn't anybody stay in one place anymore?"

But she was capturing a glimpse of the future, too. That future is now.

Maybe you remember calling a phone number and asking whoever answered, "Who is this?' That has changed. Now we ask, 'Where are you?"

It seems like a small change. But our relationship to our technology has turned our lives inside out. Even as I sit here in my little office with a magnificent view of the back wall of my fair City's parking garage, I am not alone.

This past year, I watched a federal judge retire suddenly, abruptly, and without a retirement party because he did not realize this new fact of life. He thought the emails he was forwarding to friends were 'just between friends.'

When a friend forwarded his message to someone who was offended by the joke in the email, though, it became a very public matter. Everyone in town, in the state, the nation and the world got to sit at his virtual desk to read the forwarded email. It cast doubt on his fitness to serve as a judge.

After a few months of news updates on the investigation into the matter, the judge hung up his spurs for good. He was a successful trial attorney, teaching at seminars and taking calls from other attorneys who thought he could help them with some problem vexing them. After his ordeal ended he was still described by as "a good and honest trial lawyer and an esteemed trial judge."

This amazing adventure in cyberspace that we have been on for many years now has confounded people far smarter and more powerful than I am. Why is that? What great leap forward do we not understand here?

Maybe we think we are sitting at our little workstations having a private chat with the person we have in mind as we type. We would be closer to the truth if we saw ourselves sitting at mid-court in Madison Square Garden with ten thousand people watching us.

Then we look around and it's still that little office with the nice view. The door is closed. There are no cameras or phones in the room. Aren't we alone? Millions of years of human history have conditioned our bodies and minds to assure us we are.

In our generation, though, we have jumped out of time. We are connected to the whole planet the minute we fire up our trusty desktop and login in as citizens of the world.

Carole was right. Nobody stays in one place anymore.

So I have been on a campaign lately to give this advice to everyone who works for my city and wants to know what I think about something: Call me. Don't send me an email. Pick up that telephone on your desk and call me. Better yet, stop in and visit.

This gives me two advantages over email. First, I start thinking of questions right away. I don't wait until the end of the explanation before I start asking questions about the issue.

We have two people working on the same problem at the same time and we are stretching each other and our common understanding of the problem.

It is not so much back and forth, like a tennis match, as a collaboration of two people trying to understand the problem of the hour better. We are on the same side, reaching for the best result anyone can envision.

Second, I get more information. Part of that is due to the collaborative nature of oral conversation. But I can also hear the voice of the person on the phone or see their face across the table.

Are they nervous or calm, confident or angry? Are they in control of their thinking or having a runaway? All of these things come through over the telephone or in person much better than in an email. I think of them as the old fashioned version of metadata.

Then, too, we haven't created a public record of some half-hatched thought that we both laugh at as soon as either of us (usually me) says it out loud. We question our own understanding more deeply when we hear the hums and murmurs on the other end of the line or see the look watch the face across the table.

We become more conscious of the layers in the question. We are mindful that we might not be seeing everything that we need to see. There is almost always more to it than you thought at first. Talking gets that on the table.

Our Municipal Attorney's List is a great way to do open-source problem solving. Pitfalls and solutions abound online, and when time is short it's my life line.

But my desktop can be a seductive partner, too, giving me only part of the story and not reminding me I have about as much privacy as a disc jockey at a radio station.

It is a worldwide radio station. The microphone is open. You are on the air. What is it you wanted to tell everyone in the world today?

Why can't anybody stay in one place anymore? **ML**





Canada's Prostitution Laws Struck Down by Supreme Court

By Monica Ciriello

I. Introduction

Prostitution, the exchange of sex for money and other consideration, is a controversial subject in most countries, involving complex and contradictory interests, values, and issues. In Canada, prostitution is legal as a matter of law, because there is no statutory prohibition against consensual sex between two adults for consideration.[1] However, there are related laws that make it difficult for sex workers and their clients to engage legally in prostitution: Sections 210-213 of the Canadian *Criminal Code* prohibit many activities surrounding and involving the act of prostitution.[2]

On December 20, 2013, these peripheral barriers to prostitution were struck down. In a unanimous decision authored by Chief Justice Beverley McLachlin, Canada's Supreme Court upheld lower court decisions invalidating sections of the Criminal Code which effectively prohibit prostitution: s.210 makes it an offence to keep or be in a bawdy-house; s.212(1)(j) prohibits living on the avails of prostitution; and s.213(1)(c) prohibits communicating in public for the purposes of prostitution.[3] The Supreme Court held that all three provisions violate the *security* of the person guaranteed by s.7 of the Canadian Charter of Rights and Freedoms. As stated in the Charter--a bill of rights entrenched in the Constitution of Canada--the state cannot deny the right "to life, liberty and security of the person."[4]

Acknowledging the complexities implicit in implementing the decision, the Supreme Court suspended the declaration of invalidity for one year. This suspension in the ruling provides Parliament with a period of twelve months to rewrite the nation's prostitution laws. In the meantime, the anti-prostitution provisions will continue to be enforced under the Criminal Code.[5]

II. Prostitution in Canada

There has been a long-standing debate over the role of the Criminal Code in controlling and/or regulating prostitution. The divergence of opinion in Canada over prostitution and street solicitation is perhaps most visible through the constitutional court challenges initiated in 2007 by three women prostitutes: Terri Jean Bedford, Amy Lebovitch and Valerie Scott. Each of these women has had a lengthy history in the sex trade. Nearly seven years ago, the applicants asked the court to strike down the three provisions of the Criminal Code (prohibiting keeping a common bawdy house; living on the avails of prostitution; and communicating for the purposes of prostitution) because they violate a sex worker's constitutional right to security of the person. They argued that these provisions would contribute to the risk facing prostitutes, as they could become victims of violence, in violation of their rights to security of a person under s.7 of the Charter of Rights and Freedoms. Bedford et al., initially achieved victory at the Ontario Superior Court of Justice.[6] They then secured a partial victory at the Ontario Court of Appeal where it ruled that some, but not all, of the challenged provisions violated the Charter.[7] And in December 2013 they succeeded in full at the Supreme Court of Canada.To summarize, the Supreme Court opinion stated that *Criminal Code* provisions s. 210, s. 212(1)(j) and s. 213(1)(c) prevent prostitutes from implementing certain safety measures, such as having security guards or screening potential clients--factors that could protect them from violence--which therefore violates their security of the person.[8] In writing for the Court, Chief Justice McLachlin stated:

> The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky-but legal-activity from taking steps to protect themselves from the risk.[9]

The Canadian Parliament through its criminal law power holds the primary jurisdiction over prostitution-related concerns. Federal jurisdiction over the criminal law is derived from s. 91(27) of the *Constitution Act, 1867*, which states that the powers of Parliament include: "[t]he Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."[10]

III. Criminal Code

The bawdy-house, procuring, and living-on the avails laws were first introduced in 1892, into Canada's original Criminal Code.[11] The prostitution-related offences regulated within *Criminal Code* s. 210 to s.213 are outlined below.

A. Section 210: Bawdy House:

Section 210 of the *Criminal Code* makes it illegal to keep a 'common bawdy-house'. A 'common bawdy-house' is defined in s. 197(1) to mean "a place that is kept or occupied, or restored too by one or more persons for the purposes of prostitution or the practice of indecency."[12] Courts have interpreted this to mean that virtually any space is capable of being defined as a bawdy-house, from a hotel, to a home, to a parking lot, provided that there is frequent or habitual use of them for the purpose of prostitution or for acts of indecency[13] and that the premises are controlled or managed by individuals selling sexual services.[14] Persons found

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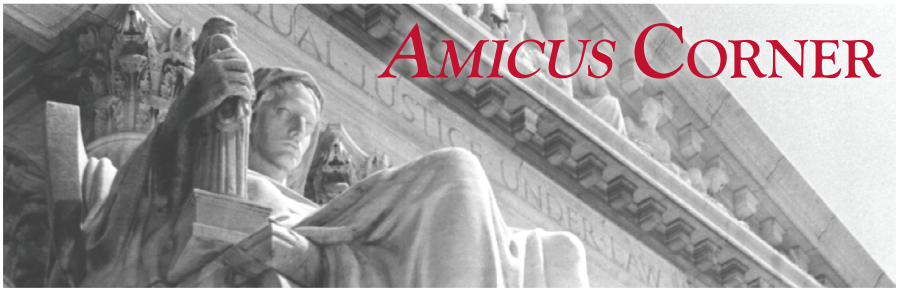

To Enter the Fray or Abstain—That Is the Question

By Erich Eiselt, Assistant General Counsel and Editor

The mission of the IMLA Amicus Committee – to evaluate and identify the cases for which IMLA will provide amicus support—is often relatively straightforward. If the interests of a large number of IMLA members would be adversely affected, and if there are few contrary arguments, IMLA's task is clear. It will take the position benefitting IMLA members, either directly or in association with other organizations such as the State and Local Legal Center.

But occasionally the issues are more ambiguous. In some instances, the reasons why IMLA should take a stand are offset by equally compelling factors that counsel inaction. Then, the Committee's vetting activity becomes more complex, and sometimes less harmonious. The voting process itself can develop into an exercise in advocacy, with members pointing out the merits or pitfalls of IMLA's making an amicus appearance.

That was the scenario in a pair of cases recently considered by the Amicus Committee. *Sebelius v. Hobby Lobby Stores* and *Conestoga Wood Specialties Corp. v. Sebelius* are textbook examples of the complexities which the Committee (and IMLA as a whole) can face when attempting to reach consensus on an amicus position.

Currently, the Supreme Court on certiorari to the Tenth and Third Circuits, respectively, *Hobby Lobby* and *Conestoga Wood* were cases about religious exercise. The plaintiffs are not individual worshippers or even religious entities in the traditional sense. They are privately held, for-profit corporations--successful multimillion-dollar national businesses. Hobby Lobby, headquartered in Oklahoma, is "a leader in the arts and crafts industry" with 13,000 employees and 595 stores across the country, each averaging 55,000 square feet. (http://www.hobbylobby.com/our_company/). Conestoga Wood, based in Pennsylvania, produces kitchen cabinets at five manufacturing facilities around the United States and promotes itself as the "industry leader" with over 1,000 employees (http://www.conestogawood.com/about).

The Green family, founders of Hobby Lobby and several affiliated entities included in the suit, and the Hahns, who started Conestoga Wood some fifty years ago, assert that they are devout Christians whose businesses reflect their Christian values. While Conestoga Woods' website reveals no trace of the founders' Mennonite beliefs, Hobby Lobby's website abundantly expresses religion on the company's home page: "We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, and we trust Him for our future." Among other things, Hobby Lobby's stated commitments include "Honoring the Lord in all we do by operating the company in a manner consistent with biblical principles" and "Providing a return on the owner's investment, sharing the Lord's blessings with our employees, and investing in our community." As a consequence, Hobby Lobby's hundreds of retail stores play Christian music and are not open on Sundays. They do not sell shot glasses or allow their empty delivery trucks to "back haul" beer or alcohol.

The companies and their founding families challenged regulations under the Patient Protection and Affordable Care Act of 2012 (ACA), Pub. L. No. 111-148, 124 Stat. 119, which require all employers with fifty or more employees to provide health insurance including coverage for all FDA-approved contraceptive methods. Plaintiffs specifically object to four of the twenty methods within the ACA-mandated contraceptive group. These included two intra-uterine devices and two morning-after pharmaceuticals ("Plan B" and "Ella"), all of which prevent a fertilized egg from adhering to the uterine wall and are therefore anathema to those who believe that life begins at conception. Under the ACA, if Hobby Lobby and Conestoga Wood did not offer their employees access to these drugs within their self-funded employee insurance plans, the companies faced significant fines.

Plaintiffs attacked the ACA contraception provisions under the rubric of the First Amendment, but via a more targeted remedial mechanism. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §2000bb *et seq.* states that the federal government "shall not substantially burden a person's exercise of religion." If it does impose such a burden, RFRA requires that the government satisfy strict scrutiny: it must demonstrate a "compelling state interest" and show that its approach is the "least restrictive means" of furthering that interest. Under RFRA, if the Christian-centric, for-profit corporate plaintiffs are "persons," they could argue that the ACA and its contraceptive mandate impermissibly burdened their religious exercise and they chose not to provide the objectionable contraceptive methods to their employees.

Thus, at its essence, the issue before the Supreme Court in *Hobby Lobby* and *Conestoga Wood* was whether a secular, for-profit business corporation can be a religious "person" for purposes of RFRA.

Argued before the Court on March 25, 2014, the cases attracted widespread interest and numerous amicus participants. The plaintiffs' position

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Cases



by IMLA Editorial Staff

Pre-Condemnation Environmental and Geologic Testing is a Taking

In a decision greatly increasing the procedural burden on the state when contemplating the exercise of its eminent domain powers, the California Court of Appeal for the Third Appellate District has ruled that the state must initiate eminent domain proceedings before the Department of Water Resources (DWR) can enter onto private properties for the purpose of conducting environmental studies and geological testing.

California seeks to build a tunnel to transport water from the Sacramento-San Joaquin River Delta to central and southern California, and will need to condemn land for the project. Before condemnation, the state needs to conduct environmental and geological studies on hundreds of properties under which the tunnel may be constructed. The testing activities fall into two general categories. "Environmental activities" involve surveys about hydrology, botany, wildlife, and would include taking minor soil samples and observing and trapping wildlife. "Geological activities" involve soil testing which in some cases would include boring into the ground to a depth of 200 feet and then filling in the hole with a permanent cement/bentonite grout. On each of the approximately 150 properties affected, these activities would require entry for up to 60 intermittent 24-hour days over a two year period, during which time equipment may remain on the property.

To facilitate these studies, in 2009 the DWR filed petitions for entry onto a vast number of Delta properties via the state pre-condemnation statutes (Cal. Civ. Pro. Code §1245.010 *et seq.*). Landowners contested the petitions, and the 150 cases were coordinated in San Joaquin County Superior Court. The trial court considered the environmental and geological activities separately. It granted the state permission to enter for environmental activities, conditioning such entry on the state's deposit of de minimis probable compensation for damages or loss of use (between $1000 and $6000 per owner). But the court denied permission to enter for geological activities, concluding that they resulted in a taking for which DWR would need to comply with California Eminent Domain Law.

On appeal, the state argued that the geological activities were not takings, and that the entry statutes were an acceptable constitutional substitute for state eminent domain procedures because the entry statutes provide property owners the same protections as eminent domain procedures. The property owners argued to the contrary: no only were the geological activities a taking, but the environmental testing was as well, requiring full-fledged eminent domain protections.

HELD: The California Court of Appeal decided in favor of the property owners on both types of entry, finding that the environmental entry constitutes a temporary taking and that the geological activities are a taking *per se* because they result in a permanent physical occupancy of private property.

DISCUSSION: The court rejected the state's argument that the pre-condemnation statutes satisfied the requirements of subdivision (a) of article I, Section 19 of the California Constitution. On this issue, the court concluded that the entry statutes are unconstitutional because the California takings clause requires the filing of an eminent domain action, which triggers constitutional protections for landowners including a jury trial to determine just compensation. Therefore, in order to enter the land and conduct the geological activities, the state must first condemn the land and pay for the taking through state eminent domain procedures.

The court held that the order allowing entry for environmental activities amounted to a taking of a temporary easement, requiring condemnation through the eminent domain process. Although the environmental activities did not amount to a *per se* taking, the physical invasion rose to the level of a compensable taking under the multi-factor *Penn Central* test: (1) the degree to which the invasions are intended, (2) the character of the invasions, (3) the duration of the invasions, and (4) the economic impact of the invasions.

Penn Central test supported the landowners' position: "Thus, in this matter, all the factors weigh in favor of finding a temporary taking. The invasion and its consequences are intended by the state similar to a direct condemnation for a temporary easement. The invasion is a physical invasion, "a government intrusion of an unusually serious character. The invasion will take place over a significant period of time, providing a one-year blanket easement to private property for entry by up to eight people for up to 66 days. These characteristics outweigh the preliminary lack of evidence on the invasions' economic impact. In short, if the State intends to take and use a temporary easement, it must directly condemn it."

The Court of Appeals acknowledged the underlying conflict in cases where 'big' state projects are complicated by individual property rights issues, but rejected the state's argument that a shortcut approach to condemnation may sometimes be warranted, explaining that "constitutional rights against the exercise of eminent domain authority are not subject to the convenience of the government."

Property Reserve Inc. v. Superior Court, No. C067758 (Cal. Ct. App. Mar. 13, 2014).

Writ of Execution: Novel Facts Give Rise to Qualified Immunity

In a case involving obvious violations of plaintiffs' Fourth Amendment rights, the Sixth Circuit has nevertheless cleared U.S. Marshals executing a

writ of execution because the legal and factual scenario had no precedent.

"If the facts as alleged in the complaint are true, this case involves an incident that is more like the home raids by Red Guards during China's Cultural Revolution than like what we should expect in the United States of America." So begins the opinion by Sixth Circuit Judge Rogers in this case.

Michael Bray is an ardent anti-abortionist. In 1985 he was convicted in Maryland for damaging several abortion clinics and spent four years in prison. In 1995 he was among several defendants sued by Planned Parenthood Columbia-Willamette (PCCW) for intimidation by threat of use of force under the Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248). A jury found the anti-abortion activists liable for $110 million; after appeals, PCCW was left with an $850,000 award against Bray.

A district court in Ohio subsequently issued a writ of execution authorizing U.S. Marshals to seize specified property from Bray. The writ authorized seizure of Bray's residence in Wilmington, Ohio as well as computers, cameras, other electronics and books within the residence. Aware of the writ and seeking to avoid trauma to their young children, Bray and his wife contacted the Marshals Service and were received with what they described as a spirit of "professional cooperation."

However, at 10:00 am on October 1, 2007, execution of the writ took place without warning. Four U.S. Marshals, at least two County Sheriffs, an agent for the Bureau of Alcohol Tobacco and Firearms, lawyers for PCCW and other unidentified participants appeared at the Bray home. Most of the law enforcement officers were wearing flak jackets. Bray was ordered to remain on a sofa in his front room while various people moved around his house, videotaping its contents and removing numerous boxes of personal property, including family photo albums. When Bray's wife and children returned to the home after school, they too were confined to the house.

In November 2007 a magistrate judge ordered that numerous seized items belonging to the Bray children or third parties be returned to the Brays. PCCW did not comply until July 2009.

The Brays brought suit for unreasonable search (of the home) and unreasonable seizure (of Bray) against PCCW, its law firm (Squire, Sanders & Dempsey), and three U.S. Marshals. Among other things, the Brays alleged that seven armed, flak-jacketed officers came to their home; they required Bray to sit on his sofa for four hours, denying him the use of his cell phone to contact his lawyer; and various unknown individuals roamed around the house, filming its contents.

The marshals moved to dismiss on grounds of immunity (quasi-judicial or qualified) and the lack of a *Bivens* remedy. The district court agreed, reasoning that the writ of execution gave the marshals "authority to exercise a degree of control over both the property being seized, the location wherein the property is located, and, by extension, those present at the location" and finding that the detention of Bray "served reasonable and legitimate safety and operational concerns." Absolute quasi-judicial immunity was appropriate, in addition to qualified immunity, because performing the writ of execution was "so intertwined with the judicial process" that those involved were "considered an arm of the judicial officer who is immune." Finally, filming the home was reasonable to record the condition of the property prior to its sale.

The Brays settled with PCCW and the Squire, Sanders firm but appealed the judgment in favor of the marshals.

HELD: The Sixth Circuit found that the marshals had clearly violated the Brays' Fourth Amendment rights but were nevertheless protected by qualified immunity because those rights were not clearly established at the time of the misconduct.

DISCUSSION: The Court of Appeals catalogued numerous violations of the Bray family's Fourth Amendment rights. First, detaining Michael Bray for four hours without access to his cell phone or lawyer was presumptively improper. He posed no threat whatsoever, as evidenced by the fact that the marshals allowed numerous unarmed strangers into the house. Second, allowing unauthorized persons to enter and roam the house was also a constitutional violation. The writ had merely provided for 'a' representative of the PCCW to be present to help identify proper items for execution. Third, given that the PCCW retinue had no legal right to be one the scene, the wholesale filming of the house and its contents—as well as the Bray family--by other PCCW representatives was clearly unauthorized. Fourth, authorization in the writ to seize all materials written by Bray "both in published and unpublished form" created a strong inference that the real purpose of the raid was constitutionally suspect: to intimidate Bray and confiscate his disfavored writings, which were of negligible commercial value.

Nevertheless, the officers were protected under qualified immunity. In order to avoid this result, the Brays had to allege facts confirming the violation of a constitutional right that was clearly established at the time of the misconduct. Therein lay the problem: the legal question was whether "every reasonable officer" would have known that his actions violated such a right and whether "existing precedent . . . placed the statutory or constitutional question beyond debate."

Here, the legal and factual scenarios presented in the Brays' circumstances had not been addressed previously by the Sixth Circuit or the Supreme Court, so the question was not "beyond debate." While the Court had previously spoken on the issue of detaining occupants in a criminal context—the search for evidence or contraband—it had not dealt with qualified immunity in the case of a civil writ of execution. Therefore a reasonable officer might not have known that his actions were impermissible.

Similarly, the marshals might have thought it acceptable to invite additional PCCW representatives to join the raid; one Sixth Circuit precedent had allowed telephone company representatives to assist officers in the execution of a warrant relating to wiretapping. And if those additional personnel were permissible on the premises, their videotaping of the execution of the warrant was not unequivocally prohibited.

Bray v. Planned Parenthood Columbia-Willamette, Inc., No. 12-4476 (6th Cir. Mar. 21, 2014). ML

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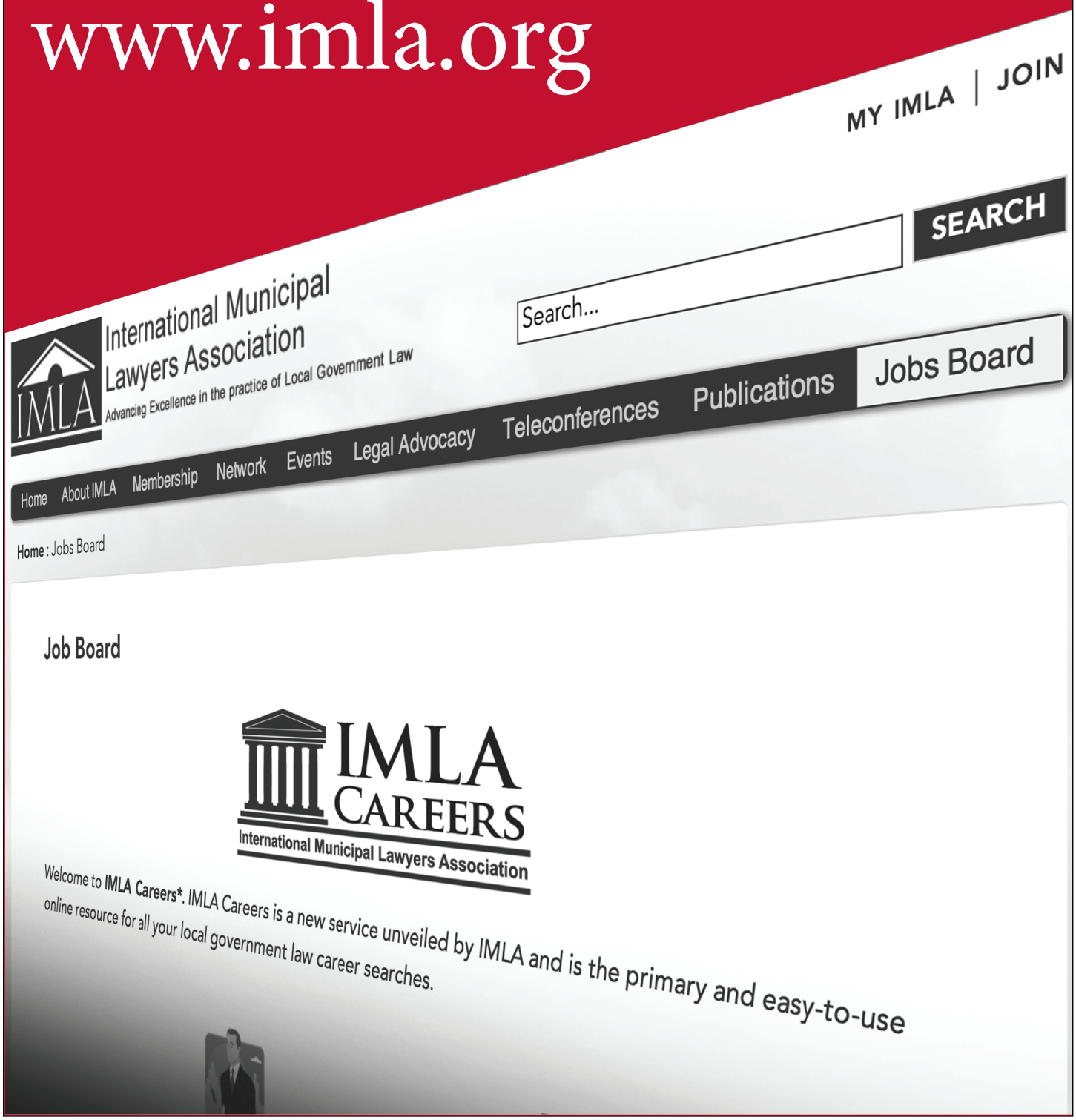

Beyond Three Minutes *Cont'd from page 17*

policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, rulemaking, project management, and assessing the impacts of decisions.
Comment: This section is intended to define these terms for all purposes under a state's statutory code. The intent is to broaden the statutory definition so as to explicitly authorize innovation. Most states use these terms repeatedly across the code, not only in the Administrative Procedure Act, but also in statutes involving land use and transportation planning, the environment, utilities regulation, etc.

Section Two: Public Participation Policy
It is the policy of this state to encourage state agencies and municipal authorities to provide broad, inclusive, deliberative, participatory and meaningful public engagement in the policy process with the general public and stakeholders from the public, private, and nonprofit sectors, including state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders. This act should be construed broadly to promote the fullest opportunity permitted by law to participate meaningfully in governance and the policy process and to provide their Government with the benefits of their collective expertise and information.
Comment: This section establishes that this is a remedial statute to be construed broadly.

Section Three: Commitment to Agency or Municipal Authority Discretion
Each state agency shall and each municipal authority may develop a policy on public participation that will allow broad, inclusive, deliberative, participatory, and meaningful public engagement in the policy process. The choice of a particular form of engagement or sequence of opportunities for the public to participate is committed to agency or municipal authority discretion and not subject to judicial review, provided the agency or municipal authority provides some form of public participation, hearing, or comment as required by law.
Comment: This section is intended to shield agencies and municipal authorities from litigation over the choice of process model, for example, deliberative polling, deliberative town hall meeting, blog, etc.

Section Four: Public Participation Specialist
The head of each state agency shall designate a staff person to be the public participation specialist. This designation may be a collateral duty appointment. The public participation specialist shall be responsible for the implementation of the public participation policy and other provisions of this Act. Each agency shall provide for training on a regular basis for the public participation specialist of the agency and other employees involved in implementing the public participation policy of the agency. The public participation specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.
Comment: This section locates responsibility for public engagement expertise within an agency or municipal authority. The public engagement specialist can obtain training and expertise that he or she can share with other employees in the agency or municipal authority through in house continuing education. This pyramid structure for disseminating training is cost effective.

Section Five: Collaboration
State agencies, municipal authorities, and other public entities may initiate or participate in cooperative agreements with one another, tribes, nonprofit organizations, businesses, other nongovernmental stakeholders, and the general public in carrying out any of their public participation powers and duties under state law.
Comment: This section allows agencies and municipal authorities to collaborate with one another and the broadest public on anything that they could do independently.

Section Six: Public Participation Meetings
a) State agencies and municipal authorities may conduct meetings for the sole purpose of public participation provided these meetings are: (1) open to the general public; and (2) a notice stating in general terms the subject matter of the meeting is posted and/or published according to Open Meeting Law. Members of state agencies and municipal authorities, including a quorum, may attend these meetings and interact with the public, including responding to issues and ideas not specifically identified within the original agenda, provided these issues or ideas originate with the public. Members of public agencies and municipal authorities, including a quorum, shall not engage in decision making, or vote upon or take official action at a public participation meeting.
b) Public agencies and municipal authorities may consider and make use of information from public participation meetings in a subsequent public meeting at which they take official action, provided that records of the general content of the public participation meeting are made public within three (3) days after the meeting, and are public for a period of at least fourteen (14) days prior to official action.
Comment: This section carves out an exception to the Sunshine Act to permit public officials to attend public engagement meetings and participate in discussion, deliberation, or dialogue with members of the public that may inform their later participation and action on public business. ML

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any employer. In the public sector, these concerns are multiplied by the alternative theories of discrimination and retaliation available under civil rights statutes such as 42 U.S.C. §§ 1981 and 1983. In addition to providing a vehicle for state and local employees to bring suit to vindicate their free speech and due process claims, Section 1983 provides an alternative path and an additional weapon for terminated public employees to assert Fourteenth Amendment equal protection claims.[20] Section 1981 and 1983 claims have the added dangers of allowing longer statutes of limitations, no damages caps, no exhaustion requirements (as with Title VII), and the potential for personal liability for individual state officials named as defendants.

Public employers can reduce their exposure to liability under the Equal Protection clause by ensuring that discipline is fairly administered, work rules are consistently enforced, and all adverse employment decisions have a provable and rational justification.

Although such considerations are a function of good management, they also guard against the application of "class of one" equal protection claims that are often alleged when the facts do not support a traditional class-based discrimination claim. *See, e.g.,* Warrington v. Board of County Comm'rs of Mineral Co., No. 12-cv-01193-RBJ (D. Colo. Nov. 5, 2013).

B. Best Practices Prior to Termination.

Although it may never be possible to completely avoid employment lawsuits or charges of discrimination, there are a number of key preventive measures that can be taken to reduce the likelihood of future claims being filed as a result of a termination decisions.

1. Track an employee's work performance in a standardized and consistent way. You don't necessarily have to rely solely upon objective performance measures, but you should always apply performance measures in the same manner for all employees to whom the measures apply.
2. Document performance deficiencies, policy violations, misconduct, and other behavior that may result in disciplinary action (including termination) at the time they occur, not weeks or months later when the termination decision is being made. Contemporary documentation, if done in a clear, concise manner, is credible. "Papering" the file after the fact is not. Such documentation should include the problem as well as the attempt at resolution. Finally, it is always a best practice to keep documented performance items in a safe place.
3. Consider using a flexible progressive discipline policy, and then apply it in a *consistent* manner. Flexibility in this regard means including a provision in your policy handbook noting that discipline may begin at any step on the progression ladder, and that steps may be skipped, depending on the severity of the infraction. When employing such a policy, be certain that deviations from the lockstep progression are justified and consistently applied. Failure to do so will assuredly result in charges of disparate treatment.
4. Avoid "zero tolerance" policies for all but the most egregious of situations (such as theft, assault/fighting, and so on). While these policies look good on paper, they invariably lead to results that can appear "unfair" and encourage affected employees to file charges or lawsuits.
5. Unless the employee has committed a serious misconduct or a violation of policy that unquestionably justifies termination, avoid limiting the reasons for termination to just one or two items. Usually, terminations occur because of a history of poor performance or bad behavior that is not corrected over time. In the termination notice, it is advisable to articulate the history of performance or behavior issues, attempts to correct that behavior or performance, and the failure of the employee to satisfactorily do so when articulating the reason(s) for termination. Of course, always cite the reason(s) for termination using the exact language out of the employee handbook or personnel policies.
6. Consider providing for post-termination appeals. Many municipal employers already require such appeals, particularly those in states with civil service unions, such as fire and police unions. However, in a good number of states, municipal employees other than fire and police personnel may not have union representation or unionization rights, and are often employed "at will." While these employees may or may not have the "expectation of continued employment" that "for cause" and unionized employees tend to have, the existence of a post-termination appeal, even if it consists primarily of a brief review of the reasons for the termination and the employee's rebuttal, will go a long way to reducing exposure to substantive and procedural due process claims.

Conclusion

Whether hiring or firing, municipal employers face numerous pitfalls when making important job-related decisions. In a society where litigation is ever-increasing and government employment (whether local, state, or federal) is seen as a guarantee, astute public employers must be vigilant and carefully scrutinize hiring and firing decisions to maximize the prospects of finding the best person for the job and reduce exposure to valid claims of unfair treatment. Utilizing common sense and taking the time to do thorough investigations of management decisions and fair, competent background checks and reference checks will significantly reduce municipal employers' risks--both of getting sued and being held liable.

Notes

1. In addition, if the applicant is turned down because of a background check or credit check, the Fair Credit Reporting Act continues to require employers (including government employers) to notify the applicant of the reason why, provide a copy of the report, and provide the name and address of the service that conducted the background or credit check and furnished the information to the employer.
2. EEOC v. Freeman, No. RWT 09-cv-2573 (D. Md. Aug. 9, 2013).
3. The EEOC appealed the district court's decision to the Fourth Circuit on November 7, 2013.
4. *See* Rocha v. Coastal Carolina Neuropsychiatry Crisis Serv's., No. 7:12-CV-2-D (E.D.N.C. Oct. 16, 2013).
5. Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah, and West Virginia.
6. State of Texas v. EEOC, et al., No. 5:13-cv-00255-C (N.D. Tex. Div.) (complaint filed Nov. 4 2013)
7. Many states have similar schemes permitting employees to sue to vindicate their state constitutional rights as well.
8. For instance, the burden of proof in a race discrimination claim brought under 42 U.S.C. § 1981 is essentially the same as the burden required under a Title VII claim.
9. *See, e.g.,* Kelley v. Davis, No. 1:11-cv-331-SEB-DML (S.D .Ind. Sept. 30, 2013) (holding that "under Indiana law, party affiliation and personal loyalty to the duly elected officer are appropriate requirements for the effective performance of the office of deputy county assessor").
10. Barry v. Moran, 661 F.3d 696, 703 (1st Cir. 2011) ("Under the First Amendment, nonpolicymaking public employees are protected from adverse employment decisions based on their political affiliation.").
11. Katz v. United States, 389 U.S. 347, 350-51 (1967) ("[T]he protection of a person's general right to privacy—his

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right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual [s]tates.")

12. In 2012, a district court in Minnesota held that Facebook messages and postings are covered by Fourth Amendment privacy protections against compelled disclosure in the context of public school students facing discipline for such postings. *See* R.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp.2d 1128, 1142 (D. Minn. 2012). Further, although in the context of constitutional claims, two other courts have held that employees enjoy an expectation of privacy in Facebook postings sufficient to give rise to a claim under the Stored Communications Act ("SCA"). Crispin v. Christian Audigier, Inc., 717 F.Supp.2d 965, 991 (C.D. Cal. 2010); Ehling v. Monmouth-Ocean Hospital Serv. Corp., No. 2:11-cv-03305, 2013 WL 4436539 (D. N.J. Aug. 23, 2013). The reasoning of these cases provides a strong argument to extend Fourth Amendment protections to applicants for public employment.

13. As of October 23, 2013, Arkansas, California, Colorado, Delaware, Illinois, Maryland, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont, and Washington had passed laws restricting employers from requesting social media passwords from employees and/or job applicants.

14. *See* National Conference of State Legislatures, http://www.ncsl.org/research/ telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx

15. Skinner v. Railway Labor Executive's Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

16. If an applicant volunteers information that implicates the ADA, or has an obvious disability, it is permissible to inquire about any reasonable accommodations that may be needed in order to assist the applicant if he/she is chosen for the position (just be sure that the applicant is not ruled out because of the disabling condition or the need for an accommodation, particularly if the applicant is highly qualified for the position).

17. Fiscal year 2013 statistics will be available in early 2014.

18. Typically, municipal charters and state statutes take precedence in determining whether employment of public employees at the local level is "at will" or not. *See, e.g.,* Gomez v. Town of West New York, Civ. No. 2:13-689 (D. N.J. Nov. 4, 2013). However, in states where "at will" employment has been preserved for public employees, promissory estoppel and other implied contract theories are gaining traction to help employees establish the necessary property right to survive dismissal of due process claims.

19. Deprivation of a liberty interest in the employment context may arise when, after an adverse employment action, a public employer stigmatizes the employee by making public comments impugning his [or her] good name, honor or reputation or imposes a stigma that forecloses other employment opportunities. Bd. of Regents v. Roth, 408 U.S. 564, 573-74 (1972).

20. "The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." Tri-Health, Inc. v. Board of Commissioners, 430 F.3d 783, 788 (6th Cir. 2005). ML

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the Eleventh Circuit held that Lane was acting pursuant to his official job duties when he testified and his speech, according to that court, was therefore not protected by the First Amendment.[23] The Eleventh Circuit explained that an employee's speech is not protected under the First Amendment simply by virtue of the fact that it came about as a result of a subpoena or in the context of litigation.[24] The Eleventh Circuit reasoned:

> No one disputes that Lane was acting pursuant to his official duties as CITY'S Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment. That Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment. Furthermore, because formal job descriptions do not control, that Lane's official duties did not distinctly require him to testify at criminal trials falls short of triggering First Amendment protection. Although not dispositive, we consider it pertinent that the subject matter of Lane's testimony touched only on acts he performed as part of his official duties... nothing evidences that Lane testified at Schmitz's trial "primarily in [his] role as a citizen" or that his testimony was an attempt to comment publicly on CITY'S internal operations.[25]

On petition for certiorari to the Supreme Court, the former employee framed the issue in *Franks* as whether a government employer is "free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and *was not a part of the employee's ordinary job responsibilities*."[26] By framing the issue in this manner – i.e., that the testimony itself was not a part of the employee's ordinary job responsibilities - the petitioner is seeking to distinguish the case from *Garcetti*; however, as the Eleventh Circuit noted, the fact that testifying was not one of the employee's job duties should not be dispositive. Rather, the subject matter of that testimony would determine whether the speech is protected under the First Amendment. In its ruling, the Eleventh Circuit disagreed with three other Circuits on this point, necessitating review by the Supreme Court.[27]

The way the petitioner has framed the issue likely leads many to conclude that the Eleventh Circuit's decision resulted in injustice. After all, it seems fundamentally unfair that someone could be fired for testifying in court pursuant to a subpoena. However, as the Court explained in *Garcetti*, public employees should not be given *expanded* rights simply because they work for a governmental entity. An employee who is acting as an employee in the scope and context of his or her employment should be protected by all rights and benefits afforded to any employee (both public and private) under state and federal law. The Constitution should not be used as

a tool to convert an employment dispute into a federal claim simply because the employee works for the government. Were the rule otherwise, it would open the door to significant headaches for government employers, including preventing them from dealing with insubordinate or disruptive employees in the same manner that their private employer counterparts can. Additionally, the Supreme Court's warning in *Garcetti* would likely come to pass if the Court rules in the petitioner's favor: courts would have to sit as super-personnel deciders for a large number of decisions made by government employers, again simply by virtue of the fact that the employer is the government.

IMLA will be submitting an amicus brief in the *Franks* case in support of the Respondent's position to highlight these points.

Notes

1. No. 13-483.
2. 547 U.S. 410 (2006).
3. *See* Lane v. Cent. Ala. Cmty. Coll., 523 Fed. Appx. 703, 710 (11th Cir. 2013).
4. *Id.*
5. *Garcetti,* 547 U.S. at 421.
6. *Id.*
7. *Id.* at 418-19, 421-22 (internal citations omitted) (emphasis added).
8. *Id.* at 423.
9. *Id.* at 421.
10. *Compare Garcetti,* 547 U.S. at 412-15; w/ *Lane,* 523 Fed. Appx. at 710.
11. *See Garcetti,* 547 U.S. at 415; *Lane,* 523 Fed. Appx. at 710.
12. *See Garcetti,* 547 U.S. at 415; *Lane,* 523 Fed. Appx. at 710.
13. *Lane,* 523 Fed. Appx. at 710.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Lane,* 523 Fed. Appx. at 710.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 712.
23. *Lane,* 523 Fed. Appx. at 712.
24. *Id.*
25. *Id.* (internal citations omitted).
26. *See* Brief of Petitioner, Petition for a Writ of Certiorari, No. 138-483, available at: http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/Lane-Petition-and-Appendix.pdf (last accessed on February 27, 2014) (emphasis added).
27. *See* Clairmont v. Health, 632 F.3d 1091 (9th Cir. 2011) (concluding that employee's subpoenaed testimony was not a part of his official job duties and therefore was protected under the First Amendment); Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008) (explaining that a police officer's trial testimony was protected by the First Amendment because, although the testimony stemmed from the officer's official duties, the officer had an "independent obligation as a citizen to testify truthfully."); Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007) (concluding that a public employee's subpoenaed deposition testimony about speech he made pursuant to his official duties was protected speech under the First Amendment). In *Morales,* the Seventh Circuit distinguished between the police officer's speech made in a deposition pursuant to a subpoena versus the exact same speech made to the assistant district attorney in a conversation. *Morales,* 494 F.3d at 597-98. Specifically, the court held that the deposition testimony was protected speech, even though he was testifying about his official duties because testifying in a civil suit pursuant to a subpoena was, according to the Seventh Circuit, "unquestionably not one of [the police officer's] job duties..." *Id.* at 598. The Seventh Circuit recognized the "oddity of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected..." but nonetheless held that *Garcetti* established just such a framework. *Id.* ML

Second Look *Cont'd from page 20*

A few years later, the Court held that "[49 U.S.C.] § 14501(c) does not bar a State from delegating to municipalities and other local units the State's authority to establish safety regulations governing motor carriers of property, including tow trucks." *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 428 (2002). Again, the holding carried the negative implication that Congress could have barred state control over municipal regulatory powers if Congress intended to do so.

The Supreme Court revisited our issue in 2004, holding that Federal Telecommunications Act § 253(a) did not preempt a Missouri law that barred cities from offering telecommunications services because the term "any entity" in the federal law did not unmistakably include a city. The Court was overtly hostile to the idea that federal law could preempt state laws limiting city powers but grudgingly admitted that Congress could do so if it spoke with absolute clarity:

> The municipal respondents' position holds sufficient promise of futility and uncertainty to keep us from accepting it, but a complementary principle would bring us to the same conclusion even on the assumption that preemption could operate straightforwardly to provide local choice, as in some instances it might. Preemption would, for example, leave a municipality with a genuine choice to enter the telecommunications business when state law provided general authority and a newly unfettered municipality wished to fund the effort. But the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607–608, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (internal quotation marks, citations, and alterations omitted); *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory*[5] requires. What we have said already is enough to show that § 253(a) is hardly forthright enough to pass *Gregory*: "ability of any entity" is not limited to one reading, and neither statutory structure nor

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> legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U.S., at 460, 111 S.Ct. 2395, would be fatal to respondents' reading.

Nixon v. Missouri Municipal League, 541 U.S. 125, 140-41 (2004).[6] I have not yet found a Supreme Court decision that allowed federal law to preempt state limits on local government powers. I would appreciate hearing from anyone who has.

Much more recently, when the D.C. Circuit invalidated the FCC's net neutrality regulations, *see Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), Senior Judge Silberman's separate opinion, concurring in part and dissenting in part, 740 F.3d at 659-68, suggested that the FCC's authority to promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment would justify regulations invalidating state laws restricting cities' ability to deploy public broadband services. 740 F.3d at 660, n.2 and accompanying text.[7]

In his subsequent statement about where the FCC would be going on net neutrality after the *Verizon* decision, FCC Chairman Tom Wheeler referred to this portion of Judge Silberman's opinion, saying:

> The Commission will look for opportunities to enhance Internet access competition. One obvious candidate for close examination was raised in Judge Silberman's separate opinion, namely legal restrictions on the ability of cities and towns to offer broadband services to consumers in their communities.

Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules | FCC.gov, http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules (last accessed Feb. 21, 2014).

Unless the Supreme Court distinguishes or overrules the *Nixon v. Missouri Municipal League* standard quoted above, the FCC would need explicit congressional authority to intervene in state control of city power to offer broadband. Of course, the courts instead could simply defer completely to the FCC's view of its own jurisdiction, regardless of statutory text, as they did in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (upholding based on deference to administrative agency interpretation of its jurisdictional statutes the imposition of FCC cell tower location procedural rules on cities in apparent disregard of the Telecommunications Act's limits of FCC power to interfere with local right-of-way management).

Federalism Concerns

If federal preemption of state preemption is permissible, is it wise as a matter of federalism? In the short term cities may welcome federal intervention to shield them from state restrictions. However, that attitude may not be wise in the long term for at least two reasons: First, worms turn. In some future instances cities might welcome a state prohibition against local government involvement in sensitive controversies, perhaps such as immigration control or minimum wage regulation, and want to resist some federal effort to foist responsibility for regulating such hot potatoes on cities. Second, federal preemption of state preemption of local government powers really does seem inconsistent with the federal system. Local governments are for most purposes political subdivisions of their states and, for better or worse, subject to the whims of their state lawmakers. Moreover, as hostile as state legislators may sometimes seem to local government sensibilities, state legislators are usually in closer touch with local concerns than are their federal counterparts.

Notes

1. Can we invent a term for this? "Inverse Preemption"? "Second Level Preemption"? Suggestions welcome at peter.haskel@dallascityhall.com.
2. It has even been held that a federal agency's informal attorney opinion letter could preempt a state constitutional provision. *See* First Gibraltar Bank, FSB v. Morales, 19 F.3d 1032, 1048 (5th Cir.), *cert. denied*, 513 U.S. 876 (1994), *opinion vacated and superseded on other grounds after remand*, 42 F.3d 895 (5th Cir. 1995). I just love citing this case because it is the only case that I have ever won after losing in the Court of Appeals and then having the Supreme Court deny certiorari. It has never been scientifically proven that support from a sympathetic and powerful member of Congress is detrimental to one's federal court litigation position.
3. FIFRA provisions are codified in many provisions of U.S. Code title 7.
4. Instead, the Court focused on whether federal preemption of state law would preclude the state from permitting local regulations. This issue might be relevant to cities without home-rule powers or to counties, special districts, and authorities that act under delegated state legislative power, but this issue does not directly concern home-rule cities.
5. Gregory v. Ashcroft, 501 U.S. 452 (1991), stating that "Congress needs to be clear before it constrains traditional state authority to order its government." *See Nixon*, 541 U.S. at 145.
6. Most lower courts had reached the same result as *Nixon*. *See, e.g.*, City of Abilene. v. FCC., 164 F.3d 49, 51 (D.C. Cir. 1999) ("In deciding this case we shall assume arguendo that Congress, acting within its constitutional authority, may—through the Supremacy Clause—supersede a State law limiting the powers of the State's political subdivisions"), but finding that Congress did not do so in § 253(a) with sufficient clarity. There may have been others, but I've so far found only *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 749 (W.D. Va. 2001) holding that § 253(a) preempted state law and therefore allowed cities to provide telecommunications services.
7. Judge Silberman's approach seems to expand *Nixon*. In *Nixon* the Supreme Court demanded that Congress speak with "unmistakable" clarity before it would find preemption of state law that restricted cities, while Judge Silberman suggests that a general delegation of congressional power would suffice to allow the FCC to supplant a state's powers over its cities' authority. ML

in common bawdy-houses, whether sex workers, other employees or clients, can also be charged. It is also illegal for an owner, landlord, leaser, tenant, occupier or any other person having control of a place to knowingly permit that place to be used as a common bawdy-house.[15] In those circumstances, merely providing accommodation for the purpose of prostitution is 'keeping' a common bawdy-house.[16]

The Supreme Court held that a bawdy-house law violates the sex workers' constitutionally protected right to security of the person. The Court found that s.210 prevents sex workers from working at fixed locations, which would generally create the safest circumstances for engaging in prostitution, as prostitutes can institute safeguards to protect themselves.[17] It is inferred that the current effect of s.210 is to force prostitutes to ply their trade in more dangerous locales (i.e. out-calls in which the prostitute goes to the customer's location and street prostitution).[18] In striking the bawdy house prohibition, the Supreme Court stated that "Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes."[19]

B. Section 212: Procuring and Living On the Avails of Prostitution

The offence of procurement is contained in s. 212 of the *Criminal Code*.[20] Section 212(1) lists various methods intended to prohibit a person from procuring, soliciting, inveigling, or enticing another person to engage in prostitution, and to prohibit the exploitation (economic, physical or otherwise) of those engaged in prostitution.[21] Subsection 212(1)(j) is particularly noteworthy because it was deemed unconstitutional:

> Every one who lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

The living on the avails section targets the person who has an economic stake in the earnings of a prostitute and who lives 'parasitically' off such earnings.[22] Interpreted on its merits, the living on the avails section should only criminalize sex workers' personal relationships where such relationships are characterized by parasitism: The true parasite whom s. 212(1)(j) seeks to punish is someone the prostitute is not otherwise legally or morally obligated to support.[23]

The Supreme Court of Canada determin-ed that this provision violates prostitutes' constitutionally protected right to security of the person because the law is "overbroad."[24] The law punishes everyone who lives wholly or partially on the avails of prostitution, without distinguishing between those who are exploitive and those who might be aiding or increasing the safety and security of prostitutes. Therefore, the current law was deemed to be overbroad and unconstitutional.[25]

C. Section 213: Communicating in Public for the Purpose of Prostitution

Section 213 of the Criminal Law makes it illegal for sex workers and clients to communicate in a public place for the purposes of engaging in prostitution or the sexual services of a sex worker. Enacted originally in 1985, the communicating offence was principally intended to address the public 'nuisance' resulting from street-based prostitution, increase the enforceability of the law, and extend the law to include clients.[26] The nuisance has been recognized as including street congestion, oral harassment of non-participants, and general detrimental effects on bystanders, especially children.

The actual act of exchanging sexual gratification for consideration is not in itself illegal. However, it is illegal to engage in prostitution (or to obtain the sexual services of a prostitute) in a public place. This restriction encompasses stopping or attempting to stop a motor vehicle, and communicating or attempting to communicate in any manner for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute.

The Supreme Court held that s. 213(1)(c) violates the sex workers' constitutionally protected right to security of the person. The prohibited communication is essential to prostitutes' ability to screen cus-tomers for such things as intoxication and propensity to commit violence.[27] It also allows prostitutes to indicate terms and conditions, such as price and condom use. Constraining prostitutes to have such communications in isolated or private locations increases the risk of harm they face as their security is reduced. It therefore violates the security of the person language in s.7 of the Charter.[28]

D. Implications

The Supreme Court suspended the declaration of invalidity for twelve months in order to prevent these areas of prostitution from being unregulated and to give Parliament time to consider a legislative response: "However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians." Therefore, *Criminal Code* sections 210, 212(1)(j), and 213(1)(c) remain valid offences within the law until December 20, 2014.[29]

IV. Jurisdiction

A. Provincial

Unlike Parliament, which has jurisdiction over criminal law matters through s. 91 (27) of the *Constitution Act, 1867*, the provinces have no direct jurisdiction in relation to the criminal law on prostitution. Although the provinces have no jurisdiction over the law, they do control the enforcement of that law. Legislation that merely regulates morality and criminal conduct may be left in provincial hands, but legislation that creates an actual prohibition akin to criminal law must fall under federal jurisdiction.

In Canadian jurisdictions, provincial laws are used to regulate prostitution activities. For example, in Ontario, police rely upon the *Highway Traffic Act* which indicates: "No person, while on the roadway, shall stop, attempt to stop or approach a motor ve-

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hicle for the purpose of offering, selling, or providing any commodity or service to the driver or any other person in the motor vehicle." [30] In Quebec, the *Highway Safety Code* prohibits "pedestrians from standing on the roadway to solicit transportation or to deal with the occupant of a vehicle."[31]

B. Municipal

Canadian municipalities receive authority from the provincial legislature. Therefore, the same restrictions that apply to provincial powers to regulate prostitution in terms of violating federal jurisdiction also apply at the municipal level. Accordingly, municipalities must be careful not to take any measures that might deal with actual prostitution.[32] Canadian municipalities have established by-laws that mirror the provincial highway traffic laws, as well as by-laws that prohibit soliciting or loitering in public without a license. Under these municipal laws, police can issue tickets to sex workers whom they believe to be in violation of the law.

Canadian municipalities also have the ability to make land zoning by-laws for different purposes. This power has been used to restrict the operation of adult enter- tainment, escort services, and body-rub or massage parlours to certain areas of the municipality. Nonetheless, a number of challenges have questioned the validity of certain by-laws in their application to prostitution-related activities. Provided that municipal by-laws do not actually prohibit prostitution, the courts generally uphold these by-laws.[33] In a study in Windsor, Ontario by Eleanor Maticka-Tyndale and Jacqueline Lewis, police were found to be more likely to rely on municipal licensing by-laws governing escorts and escort agencies than on the *Criminal Code*.[34] They provided two reasons for this: first it was easier to issue a ticket or summons under the authority of municipal by-laws than to investigate and build a case to support charges under the *Criminal Code*; and second, municipal by-laws and regulations could be molded to fit local situations.[35]

V. Going Forward

The long-standing debate over the role of the *Criminal Code* in controlling and/or regulating prostitution continues. The divergence of opinion in Canada over prostitution and street solicitation is perhaps most visible through the recent constitutional court challenges. However, with a current conservative government under Prime Minister Stephen Harper, it appears that the door has been at least temporarily shut on decriminalizing activities peripheral to prostitution. The Prime Minister was recently quoted as stating that, "we view prostitution as bad for society and we view its effects as particularly harmful for our communities and women, and particularly for vulnerable women, and we will continue to oppose prostitution in Canada."[36]

With the Supreme Court decision, new legislation may be an opportunity for Canadian municipalities to have an increased role in regulating and controlling prostitution on a local level. This could be done through the introduction of managed areas as seen in many European countries. It has been suggested through several case studies in Europe, particularly Sweden,[37] managed areas could bring significant benefits to the municipality, while providing greater safety to those in prostitution. A managed area is regularly monitored by the police and provides drop-in health services and other related facilitates.[38] Mirroring the approach in the Netherlands, street prostitution is also confined to managed zones, brothels are legal and subjected to a licensing regime operated by municipal authorities governing the location and working conditions.[39] Despite being regulated on a local level, the Ministry of Justice developed a handbook on prostitution to aid municipalities in developing their own policies for dealing with the sex industry, while simultaneously upholding the national standard.[40]

Regardless of the legislation promulgated by the Conservative government, it is possible that we will see Canada looking overseas for examples to emulate in order to establish Canada's policy by December 20, 2014. One would expect the legislation that is passed by the government will reflect the ideologically conservative statements already communicated by the Prime Minister. However, it is also clear that policy alternatives exist overseas that grant nuanced powers to municipal jurisdictions; these alternatives might be viable in a Canadian context under the consideration that conservative principles embrace states-rights and decentralized power to reflect local interest over more centralized national interests. In the end, this may very well lead to a greater role for Canadian municipalities to regulate prostitution.

VI. Conclusion

The current Canadian conservative government faces a wide variety of tradeoffs and options in dealing with prostitution. However, there will always be a view that any federal law is inadequate to deal with prostitution. At the same time, attempts by provincial and municipal jurisdictions to regulate prostitution will be impacted by their continual need to cater to issue-specific areas or area-specific issues and groups, and thus they may be unable to solve the issue on a local scale.

The Supreme Court of Canada decision can be found at: http://scc- csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do

1. Consideration is the interest, benefit, or advantage given in exchange for sex, such as money, food or shelter.
2. *Criminal Code,* (R.S.C., 1985, c. C-46) http://laws-lois.justice.gc.ca/eng/acts/c-46/page-109.html#h-70.
3. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
4. *Canadian Charter of Rights and* Freedoms, Part 1 of the *Constitution Act, 1982,* http://laws-lois.justice.gc.ca/eng/const/page-15.html
5. "Canada Supreme Court strikes down prostitution laws" (20 Dec. 2013) Online: http://www.bbc.co.uk/news/world-us-canada-25468587
6. *Bedford v. Canada*, 2010 ONSC 4264.
7. *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 [Bedford Appeal].
8. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
9. *Id.*

10. Barnett, Laura. "Prostitution in Canada: International Obligations, Federal Law, and Provincial and Municipal Jurisdiction" (14 Feb. 2008) Online: http://www.parl.gc.ca/content/lop/researchpublications/prb0330-e.htm#fedjurisdiction
11. Canadian HIV/AIDS Legal Network, "Sex, work, rights: reforming Canadian criminal laws on prostitution" (July 2005) Online: http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=203
12. *Criminal Code*, (R.S.C., 1985, c. C-46) http://laws-lois.justice.gc.ca/eng/acts/c-46/page-102.html#docCont
13. *R* v. *Patterson*, [1968] S.C.R. 157; *R* v. *Sorko* (1969), 4 C.C.C. 214 (B.C. CA); *R* v. *Rockert*, [1978] 2 S.C.R. 704; *R* v. *Ikeda* (1978), 42 C.C.C. (2d) 195 (Ont. CA); *R* v. *Lahaie* (1990), 55 C.C.C. (3d) 572 (Que. CA); *R* v. *Labaye* (2004), 191 C.C.C. (3d) 66 (Que. CA); *R* v. *Kouri* (2004), 1991 C.C.C. (3d) 42 (Que. CA).
14. *R* v. *Tremblay* [1993] 2 S.C.R. 932.
15. Barnett, Laura. "Prostitution in Canada: International Obligations, Federal Law, and Provincial and Municipal Jurisdiction" (14 Feb. 2008) Online: http://www.parl.gc.ca/content/lop/researchpublications/prb0330-e.htm#fedjurisdiction
16. *Id.*
17. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
18. Alberta. "Prostitution Offences" (4 Feb, 2014) Online: http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Docu ments/RvBedfordpracticeprotocol.pdf
19. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
20. *Criminal Code*, (R.S.C., 1985, c. C-46) http://laws-lois.justice.gc.ca/eng/acts/C-46/section-212.html
21. *Id.*
22. *R v. Barrow* (2001), 54 O.R. (3d) 417.
23. *R v. Grilo* (1991), 2 O.R. (3d) 514.
24. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
25. Alberta. "Prostitution Offences" (4 Feb, 2014) Online: http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Docu ments/RvBedfordpracticeprotocol.pdf
26. Canadian HIV/AIDS Legal Network, "Sex, work, rights: reforming Canadian criminal laws on prostitution" (July 2005) Online: http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=203
27. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
28. Alberta. "Prostitution Offences" (4 Feb, 2014) Online: http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Docu ments/RvBedfordpracticeprotocol.pdf
29. *Id.*
30 Canadian HIV/AIDS Legal Network, "Sex, work, rights: reforming Canadian criminal laws on prostitution" (July 2005) Online: http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=203
31. *Id.*
32. Maticka-Tyndale, Eleanor and Jacqueline Lewis. "Licensing Sex Work: Public Policy and Women's Lives" (2000), *Canadian Public Policy*, Vol. XXVI, No. 4.
33. Barnett, Laura. "Prostitution in Canada: International Obligations, Federal Law, and Provincial and Municipal Jurisdiction" (14 Feb. 2008) Online: http://www.parl.gc.ca/content/lop/researchpublications/prb0330-e.htm#fedjurisdiction
34. Maticka-Tyndale, Eleanor and Jacqueline Lewis. "Licensing Sex Work: Public Policy and Women's Lives" (2000), *Canadian Public Policy*, Vol. XXVI, No. 4.
35. *Id.*
36. Cheadle, Bruce. "Supreme Court prostitution ruling forces policy issue on Harper" (22 Dec. 2013). http://www.theglobeandmail.com/news/politics/supreme- court-prostitution-ruling-forces-policy-issue-on-harper/article16087562/
37 United Kingdom, Home Office. "Paying the Price: a consultation paper on prostitution" (July 2004) Online: http://prostitution.procon.org/sourcefiles/paying_the_price.pdf
38. *Id.*
39. *Id.*
40. Barnett, Laura, Lyne Casavant and Julia Nicol, "Prostitution: A Review of Legislation in Selected Countries" (2011) Online: http://www.parl.gc.ca/content/lop/researchpublications/2011-115-e.pdf ML

Amicus Corner *Cont'd from page 25*

was articulated by Supreme Court superstar Paul Clement in his *Hobby Lobby* brief. Among other things, he made the point that various non-profit entities have already been exempted from the ACA's contraceptive provisions, making it evident that the government has within its arsenal much less restrictive means of achieving its interest – if in fact that interest is even "compelling." Because RFRA doesn't expressly define "person," he looked to the Dictionary Act to find that Congress must have intended that under RFRA,"persons" include for-profit entities. And he warned of the huge sanctions awaiting plaintiffs if they do not comply. (At an ACA-imposed penalty of $100 per day per employee, the Hobby Lobby brief cited an estimated liability of $475 million per year).

The government's argument might be boiled down to "just because any church may also be a corporation doesn't mean that any corporation is also a church." It pointed to the clear legal distinction, evident in corporate law, tax law, criminal law and elsewhere, between an owner or shareholder and its corporation: the beliefs of the shareholder cannot be attributed to the corporate entity. Therefore, while the Hobby Lobby and *Conestoga* individual owners might sincerely hold strong personal religious beliefs, they could not use those beliefs to block federally-mandated healthcare options to the employees of their corporations.

Against this background, the incentives for IMLA to join in the fray were hardly evident at first glance. Whether a for-profit business was able to challenge the ACA's contraception provisions had little to do with the day to day running of a municipal law department. The entire ACA ("Obamacare" to its detractors) issue, with its complex moral and political implacation far too explosive to warrant intervention. Indeed, if contraception and religious exercise were the sole issue, IMLA.

But there's a catch: RFRA was a precursor to its more familiar

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Practice Tips *Cont'd from page 21*

required the government to pay to have the software reprogrammed so that the information sought was easily retrieved. *Id.* at *30.

6. Not discussing document retention. Many states have laws that require the government to keep certain documents forever or for a certain period of time. Now that governments use many software programs and sometimes store data in a cloud or on a server, it is imperative that the client think about retaining that information. Even if there is no state law on retention of e-mails, text messages or drafts of word processing documents, the municipal government should consider a policy to address the retention of this information. Many state courts have looked unfavorably upon governments that have been unable to produce a record in response to a request for information because the information originally stored electronically has not been retained. As a rule of thumb, consider keeping electronic information at least as long as you would keep similar paper information.

5. Not asking the requestor to narrow the scope of the request. In most states there is a mechanism for narrowing the scope of broad requests, either under the law itself or in practice. This can be done for electronic requests by asking the requestor to narrow the timeframe for documents sought, or the number of senders or recipients. A keyword search can be used to pull only responsive documents or e-mails.

4. Searching only e-mails. If your request seeks all "electronic documents" remember that most states have very broad definitions of a "public record." Those broad definitions likely encompass more than just e-mail. There are texts, pins, IMs, tweets, Facebook pages, etc. Do not forget word processing files, spreadsheets and electronic calendars. Tell your client to search all of these when there is a request for electronic documents.

3. Not searching everyone's documents. While we may all sit in front of a computer doing our own typing, having long since abandoned paralegals and perhaps even secretaries and receptionists, our clients likely still work in hierarchical offices. Remember this when you receive a request asking for all documents from a municipal agency. The complete universe of information may not be solely in the files of those *you* regularly contact. The secretaries, subordinates, and manual laborers who fill out the client's workforce may all have documents relevant to a request.

2. Not encouraging your municipality to manage its public relations. Less information is requested by citizens and the press if abundant information is already available on-line. Consider counseling your client about a website where forms, documents, and schedules of government hearings and meetings are readily available. In a controversial situation, encourage your client to make the media its friend and release all the relevant documents that legally can be released and take that opportunity to shape the story. Give the documents context and highlight when there has been careful deliberation about the choices made. Silence breeds distrust and overuse of public information requests.

And the number one pitfall to avoid . . .

1. Not understanding your client's IT structure. Do not be ignorant about how your client creates and stores its electronic information. Each government, and perhaps even each agency within your government, has its own e-mail server and may store documents on the internet or a shared drive. The most important thing to know is whether there is a central agency that has access to all of your client's e-mails or electronic files. Not only will this educate you about where your client's documents are located, but it may matter if your state requires a request to be addressed to the custodian of the documents sought. Is the custodian of the records sought the agency or the government's central information technology office?

Rule 1.1 of the American Bar Association's Model Rules of Professional Conduct mandates, in Comment 8, that a lawyer "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Avoiding these pitfalls is a good first step. ML

Code Enforcement *Cont'd from page 15*

to enforce or not to enforce is the regulation prohibiting the keeping of farm animals within City limits. With more and more communities seeing an increase in the desire for backyard chickens, goats and similar type of animals, more citizens may advocate for not enforcing this restriction. At the same time, citizens will still voice concern over noise, smell and other impacts they may have on neighbors and the surrounding neighborhood.

One of my most memorable cases involved animal regulation. When I first began working for my municipality, I prosecuted violations in circuit court. My cases were set for one afternoon a week. Each of those afternoons, I would bring my binder to court. My binder usually consisted of approximately 120-150 cases, several of which were scheduled for trial. I would always prepare for the trials. But, most often, I would not look at the cases set for initial appearance ahead of time. One afternoon, as the judge and I worked our way through the cases, he opened a file and I turned in my binder to the next case. As I saw the charge, I looked at the judge. He was looking back at me with an expression that said all that needed to be said. I quickly dismissed the case and moved on. The charge was for "cat running-at-large." Needless to say, that was one animal regulation that fell by the wayside a long time ago. ML

Amicus Corner *Cont'd from page 37*

statutory second cousin–RLUIPA, the Religious Land Use and Institutionalized Persons Act. RFRA had been enacted by Congress to confirm religious protections; when the Supreme Court ruled that RFRA could not apply to the states due to 11th Amendment constraints, Congress passed RLUIPA to ensure that state and local activity was also covered. To anyone involved in municipal land use and zoning, the protections afforded religious organizations under RLUIPA are very consequential. It bars state and local governments from enforcing land use regulations that impose a "substantial burden" on "the religious exercise of a person" unless the governmental entity can demon-

strate a "compelling interest." It expressly prohibits a government from imposing or implementing "a land use regulation that totally excludes religious assemblies from a jurisdiction." Under RLUIPA, houses of worship seeking to locate or expand in a jurisdiction cannot be unfairly discriminated against in favor of other uses that generate less traffic or more municipal tax revenues.

The element in *Conestoga Wood* and *Hobby Lobby* that triggered the Amicus Committee's consideration was the same word that animates the Supreme Court argument–"person"–but for very different reasons. If for-profit, secular-but-religiously-managed business entities are held to satisfy the definition of a religious "person" under RFRA, those might conceivably argue that they are also "persons" for purposes of RLUIPA. The consequence of such a result for IMLA members would be that "religiously-minded" commercial enterprises might enjoy increased powers to challenge municipal zoning and land use authorities: could a car wash or bowling alley (or fast food chicken restaurant chain) operated by devout believers assert that zoning restrictions precluding them from building or operating in a given area constituted RLUIPA violations?

It was this concern–that commercial, for-profit businesses like Conestoga Woods and Hobby Lobby might in the future obstruct legitimate municipal land use decisions and policies, under the rubric of a religious "person"–that eventually impelled a majority of the Amicus Committee to vote "yes" on taking a stand. It had nothing to do with the ACA or the moral implications of contraception. The amicus brief was written by the San Francisco law department, under the direction of Buck Delvanthal.

There were dissenters among the Committee. No doubt some members would have wanted a different outcome. But the IMLA membership should rest assured that the Amicus Committee is doing its job conscientiously, and in the best interests of IMLA. (Post-script: Not surprisingly, the Supreme Court argument on March 25 revealed predictable split on the bench. Justices Roberts, Scalia, Thomas and Alito appeared receptive to the corporations' arguments while Justices Ginsburgh, Kagan, Sotomayor, and Breyer seemed to favor the government's position, leaving Justice Kennedy once again as the swing vote). ML

A Day In The Life *Cont'd from page 14*

About half the State's population lives within our boundaries. We have two large hospitals and a University.

And you can catch king salmon in the creek that parallels and runs through the rail yards – within walking distance of our downtown core (okay, this one doesn't generate legal issues, but is a good excuse to leave work early).

ML: That makes for an extremely wide-ranging menu of casework. In addition to the salmon fishing, are there quintessentially local characteristics of your practice?

We have the typical big city problems – including violent crime, loose dogs, and people who insist we don't have jurisdiction over their [fill in the blank] because they think the State is still a Territory and, somehow, that means Admiralty Law must apply. Things that might be uniquely Alaskan:

1) Our solution to the problems with Occupy Anchorage was to have a record-setting winter for snowfall. The Occupiers lost interest once their tents started to collapse and the temps got real, real low–minus 10 degree temperatures take the heat out of protesters. Our SWAT team was prepared to engage them in a snowball fight if they tried to storm our Port – true story.

2) We plow and haul snow October to April, but then back-haul snow into our downtown core in mid-February so we can hold our sled dog races and Running of the Reindeer during Fur Rendezvous.

3) We recently met with a group that is encouraging us to grant permission to hold a moose hunt in one of our crown jewel parks. We had to kill two moose in the park last year in the middle of junior high championship x-country races because the moose were threatening the children. Apparently, moose don't like screaming teenagers any more than I do.

4) We occasionally have a bear maul a tourist or mountain biker on trails near our salmon streams. We debated whether to post and close the trails until the salmon stopped spawning, but once we figured out bears don't read (or just don't care), we gave up on closing the trails. The State closes their trails; they have smarter bears.

ML: Although ursine literacy will not be among the subjects covered, we are all looking forward to the IMLA conference in Anchorage next month—what else should we know about Alaska?

Some people say Alaska has two seasons: winter and construction. Me, I like to think of our seasons as either eternal night or eternal day. When IMLA members come up in May, they will have the chance to see wild animals up close and enjoy daylight until midnight, but should expect traffic delays on what will seem like every road in town.

ML: Compared to the auto congestion in most of the Lower 48, we'll probably find it very manageable. In closing, what do you most enjoy about being Anchorage Municipal Attorney?

I love this job because every day I can see out my window a state-owned parking garage that does not pay property tax (boo, hiss) and a beautiful mountain range beyond it (is it Friday yet?). And, of course, the variety of work. Amazing how often the day is nothing like I planned it to be. ML

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