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Educating Children with Dual Cognitive and Emotional Disabilities

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MY EMPLOYEE SAID WHAT ON FACEBOOK?

By Drew Piersall, Zashin & Rich Co. LPA, Columbus, Ohio

Public employees pose special challenges when they post incendiary messages. The author provides some guidelines for social media policies.

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LEDUCATING CHILDREN WITH DUAL COGNITIVE AND EMOTIONAL DISABILITIES

By Nikki Mitchell, BRN Consulting LLC and Hope Tipton, Family Magistrate, Baltimore County, Maryland

When children with intellectual disabilities also have emotional problems, school systems struggle to fulfill their IDEA responsibilities.

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THE PUBLIC DUTY DOCTRINE—SAGA OF A COMMON LAW RENEGADE

By Erich Eiselt, IMLA Assistant General Counsel

"A Duty to All is a Duty to No One" survives as a common law principle, enabling governments to preserve scarce resources—and fueling fierce controversy in courtrooms.

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EDITOR'S NOTE:

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THE MUNICIPAL LAWYER MAGAZINE

Dear Reader:

While events on the national stage–including the passing of Justice Antonin Scalia and the ever-engrossing antics of presidential aspirants–threaten to steal the limelight, the quiet business of daily civic life continues. In his opening letter, IMLA President Herb Thiele reminds us of the foundational role that municipal attorneys play in the functioning of local governments across the United States and Canada.

In that vein, we look first at schools. *Educating Children with Dual Cognitive and Emotional Disabilities*, by Nikki Mitchell, an education specialist and Hope Tipton, a Baltimore family magistrate, discusses the challenges facing localities in complying with federal law as they deal with disabled students. We also examine the broader question of how and when governments should be accountable to their constituents: *The Public Duty Doctrine–Saga of a Common Law Renegade* by IMLA's own Erich Eiselt, examines the many faces of sovereign immunity's much-debated and often misunderstood second cousin.

A trio of practical advisory articles is included. Beth Anne Wilkening, City Attorney for Broken Arrow, Oklahoma, helps us avoid controversy (and worse) in *Competitive Bidding and Purchasing.* In *My Employee Said What on Facebook?* Drew Piersall, of Columbus, Ohio's Zashin & Rich, reminds us of best practices regarding social media in the workplace. And Lee Greenwood, an attorney for Best Friends Animal Society, rebalances misperceptions in *Ten Things You Should Know About Breed Discriminatory Laws.*

Our recurring writers contribute as well. "Second Look" author Pete Haskel identifies a pervasive Federal Rules principle in *Multiple Proportionality Syndrome and Pretrial Discovery.* "Amicus Corner" contributor Amanda Kellar recounts IMLA's 2015 activity in *The Year in Review.* And Lisa Soronen looks ahead in her "Supreme Court" column *2016 Looms Large for Municipalities.*

As always, Monica Ciriello flags cases of interest in "Inside Canada" and IMLA summarizes noteworthy US cases.

So let Super Tuesday, the eight-member High Court and March Madness play out. IMLA's members will be on the job, keeping things running.

Best regards—
Erich Eiselt

DO YOU HAVE AN ARTICLE FOR THE MUNICIPAL LAWYER?



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

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

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

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

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

We look forward to hearing from you!

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

PRESIDENT'S LETTER

Local Government Lawyers-The Foundation For Cities And Counties

By Herb Thiele, IMLA President

As a member of IMLA's Board of Directors for a number of years, and now as your President, I have had the opportunity not only to chat with lawyers who represent cities and counties across the United States and Canada, but frequently to see them in action, either in their offices or before their legislative bodies. While in years past there have been many contentious issues requiring the expertise and ingenuity of the City Attorney or County Attorney, events have unfolded more recently which make reliance upon local government lawyers in North America even more important, and an even greater asset for their cities and counties.

Specifically, while there has been increased emphasis on traditional aspects of local government law such as law enforcement techniques, personnel rules and zoning issues, new topics have also arisen in rapid succession where city and county elected officials now must look even further to their local government lawyers for assistance. It is the guidance of local government lawyers and their staffs, and organizations such as IMLA, which provides the foundation for cities and counties in the United States and Canada to maintain stability and, in most circumstances, to flourish.

For example, as part of the new wave of issues, many local governments are looking at ways to regulate firearms differently than they ever did before. Recently the United States Supreme Court announced that it would not entertain a challenge to the Highland Park, Illinois, ban on assault weapons and large capacity magazines. In June of 2013, the City of Highland Park passed an Ordinance prohibiting the possession, sale, or manufacture of certain military-style weapons and large capacity magazines. The City later amended the Ordinance to create exceptions for qualified retired law enforcement officers and owners of curios or relics that are safely stored. Later that year a lawsuit was filed claiming that the Ordinance, on its face, violated the Second Amendment. After granting the City's Motion for Summary Judgment, the Seventh Circuit affirmed the decision, and therefore the constitutionality of the ban, in April of 2015. A Petition for Writ of Certiorari followed and the United States Supreme Court announced on December 7, 2015 that it would not entertain the case. Our congratulations to the City's Corporation Counsel and their Appellate Counsel on their victory.

However, Highland Park is hardly the only instance where local governments–and their lawyers–are called upon to create a framework for analyzing new issues. Across the nation the demand for oil and gas reserves has resulted in a new extractive technique: "fracking". While there are arguments on both sides as to whether fracking techniques are an environmental problem, local governments have turned to their attorneys for assistance, either to attempt banning fracking altogether, or to regulate and permit fracking only under certain conditions. Municipalities in Colorado and more recently Washington have been faced with the growing, processing, and retail sale of marijuana since those States legalized recreational usage. A concept started in California many years ago called Property Assessed Clean Energy (PACE) was stymied for a number of years but has now re-emerged and is being pushed throughout the country as a way to assist in the renovation or redevelopment of low income housing, as well as commercial property, both to save energy and to save the owners of those structures the high costs of electricity to power air conditioners and other electrical equipment. Again, local governments have turned to their local government lawyers for assistance in creating PACE programs, defining the qualifications to participate in the programs, identifying funding sources (including new and novel bond issues), and the methodologies for collection of monies which have been expended by the PACE programs to upgrade facilities.

Other contentious issues such as immigration and even recent physical confrontations between elected officials themselves in Indiana and Alabama cities have posed new challenges for local government lawyers.

Paraphrasing what John Adams, our second President, once said, local governments are the governments of laws, not of persons. While elected officials have often brought up novel ideas or proposals, it falls to the City Attorney, County Attorney, Village Attorney or Corporation Counsel to find alternatives that protect the interests of the local government if those ideas are not possible, or to create novel legal frameworks within which to implement them. This has required local government lawyers to continuously hone their skills through Continuing Legal Education and to keep in touch with fellow local government lawyers around North America to determine if similar programs have already been started.

One of the finest benefits of being an attorney representing a local government is the openness and willingness of local government lawyers to share the products that they have created, without any reluctance or proprietary claims. Those ideas, legal positions, draft ordinances or draft contracts are readily shared among the brethren of local government lawyers both through personal contact and at one of the IMLA conferences where those lawyers who are on the cutting edge of legal issues are more than willing to share their background research on such hot new items. Your IMLA Officers and Directors welcome all members and prospective members to participate with us in providing programs where these ideas are shared. We likewise encourage all local government lawyers to attend IMLA conferences, listen to IMLA Webinars, and to read and share the IMLA publications which contain myriad information on all of these topics, old and new.

While many of the circumstances that have prompted local government lawyers to participate and stand firm in representing their clients have been tragic and sad, some of the issues have nonetheless resulted in a greater and stronger local government presence as the "go to" institution to resolve these issues and controversies. It is indeed another chance for municipal lawyers to demonstrate their skills and to solidify the foundations of local government.

We once again invite you to contact our General Counsel and Executive Director, Chuck Thompson, or any of our Officers and Directors, including myself, if you have any ideas that you wish to share about upcoming programs, proposals for IMLA participation, or anything we can do to continue helping to make your local government law office the success it has become. ML

Educating Children with Dual Cognitive and Emotional Disabilities

By Nikki Mitchell and Hope Tipton



Adam, age 15, was statistically destined to fail. His grandmother was raising him because his parents had substance abuse issues. Adam often went without enough food to eat or clean clothing to wear. Additionally, Adam had an intellectual disability. He had an IQ of 55 and functioned at the same capacity of an 8-year-old. At his public school, Adam received special education services through an Individualized Education Program (IEP) with a primary disability coding of Intellectually Limited. This means that Adam has low cognitive ability and adaptive behavior deficits that impact his learning.

Adam's life was a daily struggle and while walking the halls of his high school, he experienced an event that would alter his personality, school experience, and his entire life. Adam witnessed the murder of a fellow classmate inside his school building. Adam was traumatized from the event. While most adolescents would have difficulty coping with this experience, Adam's low adaptive skills made him especially incapable of processing his feelings. Because of this event, Adam developed Post Traumatic Stress Disorder (PTSD). PTSD is often diagnosed in children because the child exhibits aggressive behaviors or re-experiences the traumatic event when specific triggers are present.[1]

Adam became aggressive in class when his PTSD was triggered. He had extraordinary difficulty focusing on schoolwork and interacting appropriately with his peers. Eventually, the emotional toll of Adam's PTSD caused him to stop attending school. As a result of these behaviors, the IEP team changed Adam's primary disability on his IEP to that of Emotional Disability. Adam was already in a self-contained classroom, the most-restrictive environment possible at his public school, but when his teachers became concerned that they could no longer educate Adam due to his PTSD behaviors, they recommended he be placed in a new, alternative school for Emotionally Disabled students. These placements are known as "ED" programs.

ED programs are for a student diagnosed with disorders that make it difficult for the individual to control his or her emotions and behavior without significant intervention and thereby impacting his or her learning. Oftentimes, a student with an emotional disability exhibits aggressive, oppositional behavior. On Adam's first day of school in the ED program, his PTSD was triggered when he witnessed a fellow classmate choke another classmate in the hallway. Unfortunately, these kinds of incidents were a regular occurrence at his new school and reminded him all too vividly of the frightening event that caused his PTSD. Sadly, Adam stopped coming to school again to avoid re-experiencing these events and triggering his PTSD.

Worried, Adam's grandmother inquired about other possible placements and was told by the IEP team that there were none available. The IEP team was half-correct. There were no other **public** school placement options for Adam. However, there were non-public placement options that provided education services to children exactly like Adam, those with both cognitive and behavioral/emotional disabilities, or dual-diagnosed children. A student with a dual diagnosis has two separate disorders that interfere with some area of life.[2] Adam's grandmother was not aware that the law requires a public school to acknowledge when it is incapable of educating a student in a public school setting.[3] If a school cannot meet the educational needs of a student in a public school setting, then the school must pay for the student to attend a non-public school.[4] Non-public school placements are often more expensive for the public school system and thus are not common.[5]

One wishes Adam's story were the exception, but, unfortunately, there are many children like Adam in public school systems across the United States. However, few public school districts have programs designed to effectively educate these children while taking into account

their cognitive and emotional limitations and are hesitant to agree to a non-public placement for various reasons. Instead, these children often miss significant amounts of school because parents are unable to navigate the special education process and feel helpless, often resulting in truancy, suspension, and expulsion of the student.

The federal Individuals with Disabilities Education Act of 2004 (IDEA) governs the education of children with disabilities.[6] IDEA defines special education as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability [...]."[7] In order to receive special education services, a child must be diagnosed with a disability that adversely impacts his or her ability to learn. In general, children whose skills are commensurate with their cognitive abilities do not qualify for special education services. If the child is diagnosed with more than one disability, the IEP team must decide which is the primary disability affecting the child's ability to learn.

Children with intellectual disabilities must have significantly sub-average educational performance, combined with deficits in adaptive behavior that manifests during the developmental period.[8] Children with emotional disabilities display inappropriate types of behaviors or feelings, a general pervasive mood of unhappiness or depression, or have a tendency to develop physical symptoms or fears associated with their academic or social problems.[9] Examples of these disorders are Opposition Defiant Disorder (ODD), Major Depression, and PTSD. The determination of the primary disability code can have serious consequences for the child when the IEP team determines the best educational placement option. Children with an intellectual disability are 7.3 times more likely to be diagnosed with a psychiatric disorder than their non-disabled peers.[10] Specifically, children with an intellectual disability are 4.8 times more likely to develop PTSD than their non-disabled peers.[11] Placement in an ED classroom, where many children have conduct disorders, aggressive behaviors, and emotional melt-downs, is likely to trigger a child's PTSD symptoms.

The statute requires that educational services are rendered at no cost to the parents of the child and authorizes the funding of grants to the states conditioned upon the requirements of the legislation.[12] The formula for determining how much a state will receive is enumerated in the statute based on the population.[13] For example, in the 2013-2014 school year, Maryland received approximately $805,478,144, or 6.60 percent of its general education budget from federal dollars.[14] In the same school year, Maryland expended approximately $1,481,789,761, or 12.22 percent of its total budget on special education services.[15] In Maryland, of the 102,578 children receiving special education services in the 2013-2014 school year, 5,289 of them did so as a result of an intellectual disability.[16] In the same school year, 6,632 of them were doing so for an emotional disability.[17] (This number also does not include students with Attention Deficit Hyperactivity Disorder, which would be classified as "Other Health Impaired"). Because the severity of intellectual and emotional disabilities fall along a spectrum, not every child with one or both of these disabilities will appear the same or have the same educational requirements.

For several possible reasons, public school systems have not created separate programs for dual-diagnosed children. And, non-public placements, which may have programs specially designed for dual-diagnosed children, are terribly hard to attain by the parents. Though it is hard to measure why this is the case, one can speculate that it has much to do with funding. In addition to school systems having limited funds, parents are often in the same position. If parents cannot successfully petition their child's school for a non-public placement whereby the school becomes responsible for payment, then most parents cannot afford the cost of a non-public education for their child.

While much research has been done and education techniques implemented for other disabilities, such as Autism, little has been done to understand the effect new learning environments have on dual-diagnosed children.[18] It is perhaps this lack of understanding that results in a lack of motivation to explore new educational techniques for dual-diagnosed children. Critics of the current educational techniques for children with both a severe intellectual and emotional disability cite the lack of teacher training in new educational techniques as a primary issue.[19] Indeed, the PCESE found in 2002 that "our nation is less likely to serve children with disabilities well because of our failure to appropriately train [...] special education teachers" and that this failure would "undermine efforts to increase the achievement of students with disabilities."[20]

It is imperative that new training options include the **entire** IEP team. The IEP team, consisting of teachers, parents, school psychologists and counselors, principals, and school personnel, must be trained regarding the signs and symptoms of a student's disabilities before the IEP team can determine what educational services are necessary for the student. In other words, you cannot put the cart before the horse. Once educational professionals and parents understand the disability and how it impacts their particular student then the IEP team can draft an IEP and arrange for an educational placement that fully meets the student's needs. When IEP teams do not understand the student's disability and how it impacts the student and his or her learning, then what gets developed is a very generic IEP that barely meets the basic educational needs of the student. Instead, it is an educational plan that would be appropriate for any student that has learning deficits. In addition, furnishing training options that are inclusive of parents and/or caregivers assists parents in navigating the special education system by providing a knowledge foundation about their child. It allows parents to more fully participate as a member of the IEP team. Ensuring that **all** members of the IEP team are on the same page is critical to the student's educational success. After all, the school and parents have the same goal—to educate the student. Therefore, aligning training for parents and members of the IEP team ensures that the entire team is equipped with sufficient knowledge to create a meaningful IEP tailored to the needs of each individual child.

When considering educational placements, it is important for IEP teams to be trained to recognize and understand the difference between PTSD and other emotional disabilities. For example, in Adam's scenario, putting a student diagnosed with PTSD in a classroom with students who are ODD, aggressive, impulsive and otherwise hard to manage

Continued on page 8

Dual Disability Children Cont'd from page 7

is not a beneficial learning environment for Adam. This is especially important to consider when students with disabilities are two to three times more likely to be bullied than their non-disabled peers.[21] It is imperative for public school systems to recognize the need for more appropriate placement options and work toward removing this obstacle if dual-diagnosed children are to have academic success, and, in turn, long-term success. In other words, when it comes to educational placements for dual-diagnosed students, one size does not fit all. Instead, it is a holistic approach that is necessary when educating dual-diagnosed children.

The IDEA furthers this obstacle by forcing the IEP team to choose just one disability as the primary disability. Dual-Diagnosed children can be particularly challenging, because the strategies (accommodations and modifications to the child's classroom instruction and work) that usually work with one diagnosis might not work when another is thrown into the mix.[22] The natural ramifications of having either an Intellectual Disability or Emotional Disability as the child's primary disability coding are illuminated in placement settings where general educational techniques are most often employed. For example, for students with processing and reading deficits, it may be challenging for them to receive oral instruction as how to complete a worksheet and simply complete the task. Rather, students would benefit from the IEP reflecting the true nature of the combination of disabilities so that individually tailored instruction can be implemented. Again, the IEP needs to be tailored to the student's specific education needs, which must take into consideration each of the child's disabilities and how those disabilities impact the student's learning. It is naïve to require an IEP team to compartmentalize the disabilities and only address the one causing the most impact. This is futile at best when the student, who is living with the disabilities, cannot do so in order to learn in a classroom setting.

Changes to the IDEA could help alleviate many of the issues discussed. As the understanding of the effects of having an intellectual and emotional disability evolve, so too, should the legislation. The first way in which legislators can assist children with a dual-diagnosis is by making it a separate disability code for children with a dual-diagnosed combination of severe intellectual and emotional disabilities. In the very least, the legislators could expand the Multiple Disabilities code to include the combination of an intellectual and emotional disability. Currently, this disability code only includes 1) sensory and cognitive disabilities; 2) sensory and physical disabilities; or 3) cognitive and physical disabilities. Adding a new disability or expanding the Multiple Disability code will provide guidance to IEP teams for more appropriate IEP development. Moreover, this allows the IEP team to choose the most accurate primary disability code since it is the combination of the disabilities that is most adversely affecting the child's education. Creating a separate disability coding or expanding the current coding is not enough if appropriate public educational placements do not exist within a school district. For example, a public school system should be required to have at least one program within the system dedicated to educating children with a dual-diagnosis of intellectual and emotional disabilities.

Whether the solution is found in better teacher training, changes to federal law, more public educational placements or some combination thereof, the IDEA requires states to educate dual-diagnosed children appropriately.

If the school system is not able to submit plans for such a program, it should automatically be required by law that a child with a qualified dual-diagnosis, per the definition, is given a non-public placement at an appropriate non-public school. A program suited to the particular needs of dual-diagnosed children, in general, should be equipped to implement personalized instruction and psychosocial techniques according to the needs of the child. A more expedient transition to a non-public placement for these children is crucial to their success because, when the current public placement options are inadequate to address a child's needs, the child must remain in that placement until the conclusion of their due process hearings or a the public school system concedes that it cannot meet the child's educational needs. For each day this occurs, a dual-diagnosed child misses instructional opportunity, fails to master skills and materials, and falls further behind in his or her education. The student is also at a greater risk for truancy, suspension, and expulsion.

The advancement of resources and services available to dual-diagnosed students is crucial. More importantly, there is a need for a change in the atmosphere in the special education system and the approach for dual-diagnosed children. Whether the solution is found in better teacher training, changes to federal law, more public educational placements or some combination thereof, the IDEA requires states to educate dual-diagnosed children appropriately. Policies that are structured to address the needs of dual-diagnosed children will serve to provide the atmosphere and services that would truly benefit these students. Children who are living with such severe disabilities deserve no less.

Nikki Mitchell is principal and Chief Administrative Officer of BRN Consulting, LLC, a consulting firm providing customized education compliance solutions. She may be reached at nmitchell@brnconsultingllc.com. Hope Tipton is a Family Magistrate for the Circuit Court for Baltimore City. Prior to her appointment, she was the founding Director of Project HEAL and practiced special education law for 10 years.

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NOTES:

1. *National Center for PTSD, U.S. Dept. of Veterans Affairs, available at http://www.ptsd.va.gov/.*
2. V. Thompson, *What is Dual Diagnosis in Special Education?* Available at http://www.ehow.com/info_12266034_dual-diagnosis-special-education.html.
3. 20 U.S.C. §1412(a)(10)(B)(i) (2011).
4. *Id.*
5. Terry L. Jackson, et al., *Non-Public Placements: State Policies and Procedures,* National Association of State Directors of Special Education, Inc. (June 2004) http://nasde.org/Portals/0/Documents/Download%20Publications/DFR-0405.pdf.
6. 20 U.S.C. §§1401 et. seq. (2011).
7. 20 U.S.C. §1401(29) (2011).
8. 34 CFR 300.8(c)(9).
9. 34 CFR 300.8(c)(4).
10. E. Emerson, *Prevalence of Psychiatric Disorders in Children and Adolescents With and Without Intellectual Disability,* 47 Journal of Intellectual Disability Research 51 (2003).
11. *Id.*
12. 20 U.S.C. §1411(a)(1) (2011).
13. *Id.* at §1411(2)(A)-(B).
14. Maryland State Department of Education, The Fact Book 2013-2014.
15. *Id.*
16. *Id.*
17. *Id.*
18. Jane McCarthy, *Post Traumatic Stress Disorder in People With Learning Disability,* 7 Adv. Psychiatr. Treat. 163, 167 (2001).
19. President's Commission on Excellence in Special Education (PCESE), *Final Report to the President: Section 6 – Teacher and Administrator Preparation, Training and Retention,* available at http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/six.html#teach.
20. *Id.*
21. *National Bullying Prevention Center, http.www.pacer.org/bullying/resources/students-with-disabilities.*
22. V. Thompson, *What is Dual Diagnosis in Special Education?* at http://www.ehow.com/info_12266034_dual-diagnosis-special-education.html.

Expert Witness Services: Employment Litigation Cases (Selection & Promotion–Test, Development, Validation and Implementation)

Fred M. Rafilson, Ph.D.
(Industrial/Organizational Psychology)

As the former owner and CEO of I/O Solutions, Inc., the nation's largest public safety employment consulting firm, Dr. Rafilson led the development and implementation of assessment processes for federal, state and county/municipal agencies for20 years. Some of the federal agencies with whichDr. Rafilson has worked include the U.S. Department of Justice–Employment Litigation Division, U.S. Secret Service Uniform Division and the U.S. Capital Police. Dr. Rafilson has also worked with many state law enforcement agencies and organizations including the Massachusetts State Police Department, Illinois State Police Department, Pennsylvania State Police Department and the Florida Department of Law Enforcement.

In addition, Dr. Rafilson has led the implementation of assessment programs for numerous county and municipal public safety agencies, including the Chicago, IL Police and Fire Departments, the Washington D.C., Police and Fire Departments, Omaha, NE, Police and Fire, Indianapolis IN, Police and Fire and the San Diego, CA Police Departments.

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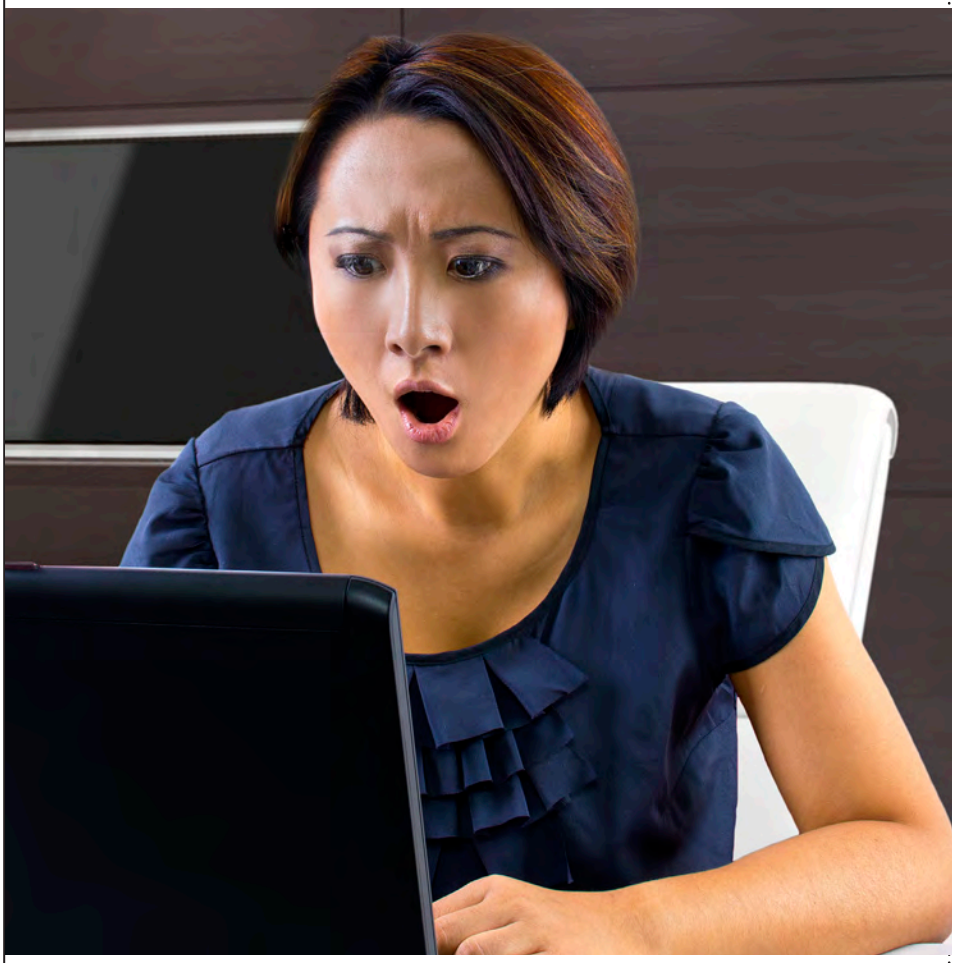
My Employee Said What on Facebook?

By Drew C. Piersall, Zashin & Rich Co., L.P.A.



"Ok we got Bin Laden . . . let's go get Kasich next . . . who's with me?" "[C]an't believe what a snake my boss is. . . . he needs to keep his [creepy] hands to himself . . . just an all around d-bag!!" "If you are on public assistance, you may not have additional children and must be on birth control (e.g. an IUD)."

These are statements that employees made on Facebook for which they received discipline, yet courts and an arbitrator reached different conclusions regarding the appropriateness of the discipline. This article addresses the issues employers face regarding social media in today's workplace, including: (1) employee conduct and discipline; (2) social media and the First Amendment; (3) government agency review of employer policies; (4) employer-issued social media and computer policies; (5) hosting social media sites; (6) public records; and (7) social media in the hiring process.

Can employers discipline employees for comments, posts, etc. that employees make while off-duty on non-employer social media sites? What standards apply to employee off-duty conduct? The arbitrator evaluating whether the Ohio Department of Rehabilitation and Correction had just cause to terminate the employee who made the Bin Laden comment above considered these issues. *State of Ohio, Ohio Dep't of Rehab. and Corr.*, (Pincus, Mar. 6, 2013). There, four employees who worked in the same correctional institution "liked" the corrections officer's Bin Laden Facebook comment, which he posted off-duty. The officer's Facebook profile included his job location and public employee status. Once the employer learned of the comments, it investigated and ultimately discharged the officer for violating the following rules: (1) threatening, intimidating, or coercive conduct; (2) compromising the employee's ability to effectively carry out his duty as a public employee; and (3) an act that brought discredit upon the employer. The arbitrator concluded that the officer's statements were nothing more than empty words. In addition, the arbitrator considered that the employer's "E-mail, Internet, and On-line Services Use" policy did not place the employee on notice that the policy covered his off-duty conduct. As such, the arbitrator concluded that while officer's alleged threat justified a 14-month suspension, the employer did not have just cause to terminate his employment.

The First Amendment protects a public employee's right "to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410 (2006). A public employee must show the following to establish the First Amendment protected their speech: (1) the employee spoke as a private citizen rather than pursuant to official duties; (2) the speech involved a matter of public concern; and (3) the employee's "interest as a citizen" in commenting on the matter outweighed the State's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees." *Westmoreland v. Sutherland*, 662 F.3d 714 (6th Cir. 2011).

Employees have raised the First Amendment as a defense to their social media posts in a number of contexts with varying results. For example, an Atlanta police officer claimed the Police Chief retaliated against her when he did not promote her after she criticized another law enforcement officer on Facebook. *Gresham v. City of Atlanta*, 542 Fed. App'x 817 (11th Cir. 2013). The court concluded the Police Department's legitimate interests in maintaining discipline and good working relationships outweighed the employee's interest in speaking about the matter.

In another case, the court affirmed the discharge of the Children's Services worker who made the above (and many other) comments about people who received public assistance. *Shepherd v. McGee*, 986 F.Supp. 2d 1211 (D. Or. 2013). The court reasoned that since her comments

were banter "rather than speech intended to help the public actually evaluate the performance of a public agency," they stood "on the periphery of First Amendment protection." The court also emphasized the heightened government interest that existed since the employee held a "public contact role." In addition, the employee's statements impaired her ability to do her job – testify at proceedings, since her statements raised credibility issues for prosecutors.

In an election year, a sheriff's office employee's statement ("liking" the Sheriff's opponent's campaign page) and interest in expressing his support for another candidate outweighed the incumbent sheriff's interest in providing efficient and effective services. *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013). The sheriff's election was a matter of public concern and, as a sheriff's office employee, the employee's opinion had particular value to the public. In addition, the court found the employee's statement was "the internet equivalent of displaying a political sign in one's front yard" and, as political speech, received the highest level of protection. As these examples demonstrate, the First Amendment analysis is highly fact specific and depends on the content and audience of the social media post.

In evaluating employee conduct, discipline, and social media use, it is helpful for employers to have social media and computer use policies. However, employers must be cautious about the content and prohibitions included in such policies. The National Labor Relations Board ("NLRB") has issued numerous decisions, opinions, and guidance on social media policies. Although the NLRB's jurisdiction does not extend to Ohio public employers, since the State Employment Relations Board has largely not addressed the issue, the NLRB's guidance provides useful consideration for drafting and implementing social media and computer use policies.

The NLRB analyzes whether employers violate Section 7 of the National Labor Relations Act ("NLRA"), which guarantees employees the right to join unions and engage in "concerted activity" for the purposes of "mutual aid or protection." 29 U.S.C. §157. In the social media context, the NLRB considers whether an employee could reasonably construe a rule or policy to chill the employee's exercise of their Section 7 rights. The NLRB's memoranda and opinions provide guidance to employers drafting social media and computer use policies. For example, the NLRB has stated social media rules must not be ambiguous as to their application and should contain language that limits their application to specific activity (e.g., disclosing confidential employer information). NLRB Memorandum OM 12-59, May 30, 2012. The NLRB found an employer social media policy that contained the following lawful: (1) a prohibition against "inappropriate posting that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct;" (2) a provision, entitled "Be Respectful," which counseled employees to avoid posts that "could be viewed as malicious, obscene, threatening or intimidating" and explained what constituted bullying or online harassment; and (3) a rule requiring employees to maintain the confidentiality of the employer's trade secrets and private and confidential information. The NLRB has found the following policies overbroad and unlawful: (1) a general prohibition against releasing confidential guest, team member, or company information (could be construed to prohibit discussion of terms and conditions of employment); (2) a requirement that personal posts about the employer be completely accurate and not misleading; (3) a prohibition on friending co-workers; and (4) a prohibition on criticizing the employer.

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A recent decision demonstrates the extent to which the NLRB will protect employee speech. In *Three D, LLC v. NLRB*, the NLRB ruled an employee's Facebook post that the employer was "[s]uch an asshole" was concerted, protected, activity. No. 14-3284, 2015 U.S. App. LEXIS 18493 (2d Cir. Oct. 21, 2015). The NLRB found the activity concerted because it involved multiple employees and protected because it involved workplace complaints about tax withholdings. Furthermore, the statements were within the NLRA's protection because the comment at issue did not mention, let alone disparage, the employer's products. Therefore, at least according to the NLRB, an employee may call their boss an asshole on social media without repercussion.

So what can an employer include in its social media and computer use policies? While the law is ever-shifting, policies should include:

- a prohibition against accessing social media websites, blogs, or other internet forums of communication during working hours;
- a requirement that employees receive permission before speaking on behalf of the employer;
- a prohibition against disclosing confidential employer information;
- a disclaimer that employees should have no expected right of privacy for any matter "passed through, viewed, downloaded, printed, created, stored, received, sent or otherwise transmitted" from employer-provided technology and equipment;
- misuse of employer property may subject the employee to discipline;
- employee use of discrimination and harassment policies and procedures for reporting alleged misconduct, on and off duty; and
- a requirement that employees only disclose records through public records policy.

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Employers also should have employees acknowledge their receipt and understanding of the social media and computer use policies.

Beyond controlling and responding to employee use of social media, additional challenges arise for employers who maintain and allow third parties to post on public websites. Those employers should: (1) clarify ownership of any "official" accounts; (2) clarify who, and under what circumstances, may create and use those "official" accounts; (3) publically inform those using the website that the employer monitors the site and posts may be deleted; (4) prohibit dissemination of non-public confidential information through the site; (5) prohibit threatening, harassing, or unlawful behavior; (6) maintain standards for deletion of off-topic, confidential, or inappropriate posts/materials; and (7) reference a records policy for deletion of records.

Public employers also must consider the interaction of public records laws with maintaining email systems, websites, and social media platforms. The Ohio Administrative Code ("OAC") defines records, for the purposes of the Public Records Act, to include "any document, device, or item, regardless of physical form or characteristic, including an electronic record . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." O.A.C. §149.011. Emails constitute public records under state law, are subject to public records requests, and must be maintained and deleted in accordance with the employer's public records policy. This includes public record content transmitted to or from private accounts or personal devices. Furthermore, records in the form of text and instant messages may fall under the purview of public records laws. Taking this into consideration, employers should: (1) clearly identify who is authorized to release public records; (2) amend retention policies to include the transient nature of social media sites; (3) archive websites; and (4) identify on websites that the employer may remove posts.

Finally, the prevalence of social media bleeds into the hiring process. Social media provides employers with another forum to post jobs and conduct background checks. However, employers should engage in social media background checks with caution. First, employers should consider the accuracy of the information (e.g., potential for false profiles or accounts). In addition, by viewing a prospective employee's social media account, the employer may incidentally obtain information regarding the individual's race, gender, national origin, religion, age, disability, or genetic background. This knowledge could expose the employer to claims of discrimination. Therefore, any employer who chooses to review prospective employees' social media accounts should take the following precautionary steps: (1) ensure the person reviewing social media accounts is wholly uninvolved in making the hiring decision; (2) only review publically available social media; and (3) do not request social media account passwords during the hiring process.

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The growing prevalence of social media has created a host of potential issues for employers. Given social media's fast-paced growth and ever-changing nature, employers should constantly keep abreast of the current status of the law.



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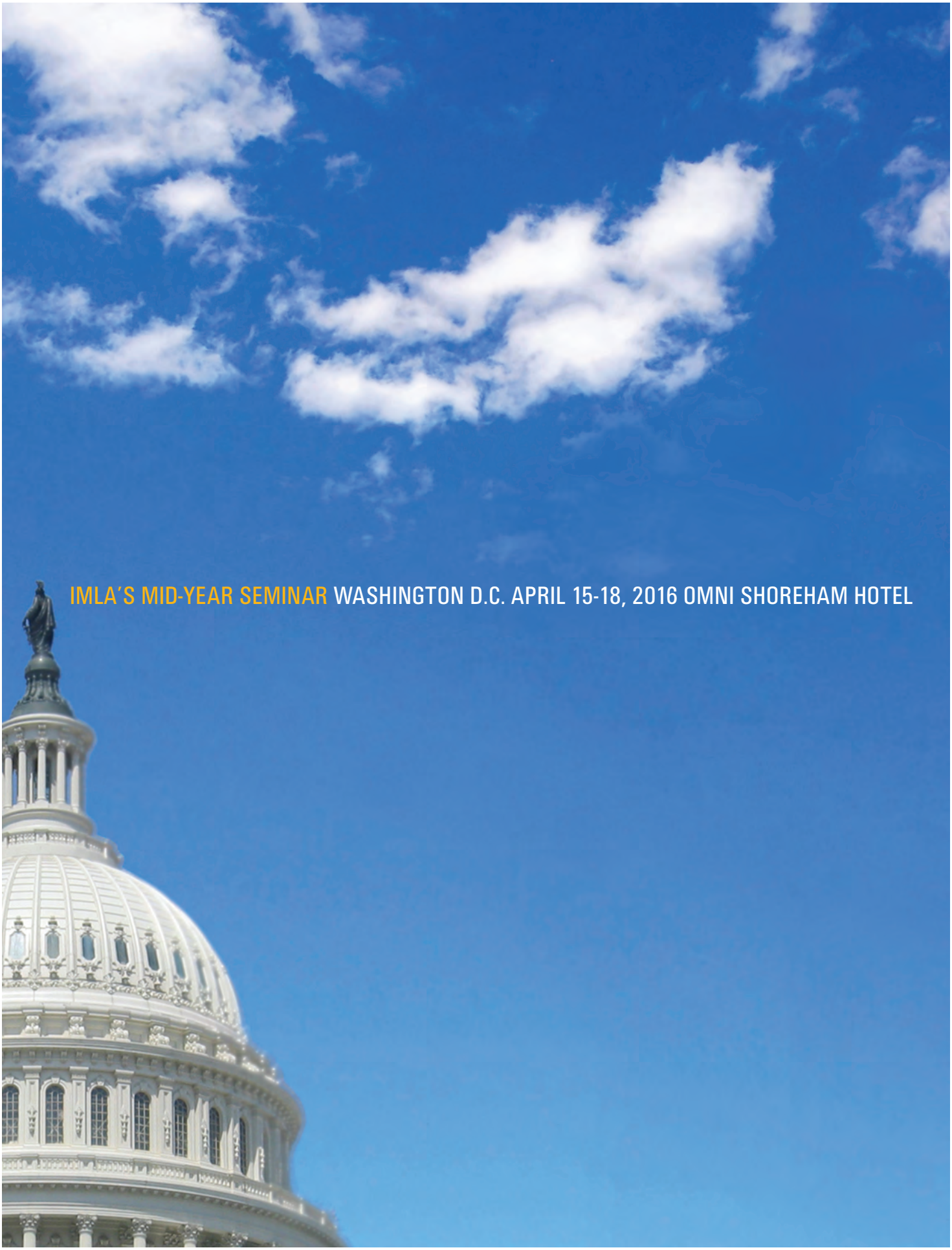

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The Public Duty Doctrine—Saga of a Common Law Renegade

By Erich Eiselt, IMLA Assistant General Counsel and Editor



The Venerable Tradition of Governmental Inviolability

In 1792, a South Carolinian named Alexander Chisholm sued the state of Georgia on behalf of a decedent who had not been paid for goods supplied to Georgia during the Revolutionary War. Georgia did not even bother to appear, asserting that as a state it was immune to litigation instituted by an out of state plaintiff. Much to Georgia's consternation, and that of legal scholars who believed that sovereign immunity precluded such a lawsuit, the Supreme Court permitted *Chisholm v. Georgia*[1] to proceed.

The states acted quickly to restore their supremacy. Within a year, Congress adopted the Eleventh Amendment, specifically granting immunity to the states from lawsuits in federal courts by citizens of other states, foreign countries, or their citizens:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.[2]

A century later, the Supreme Court would declare that states were also immune to suits brought against them in federal court by their own citizens. In *Hans v. Louisiana*[3] the Court refused to find jurisdiction over an action brought by a Louisiana bondholder who was concerned that changes to the state's constitution were impairing his contractual rights to receive payment.

Although state sovereign immunity was not absolute (for example, the Eleventh Amendment would not foreclose extensive litigation in federal courts against state or local officers alleged to have violated citizens' rights under the Civil Rights Act of 1871),[4] for much of the nation's history, suits against the states for negligence—and even for many species of intentional acts—were foreclosed.

Following World War II and the passage by Congress in 1946 of an expansive mechanism to facilitate legal actions against the national government under the Federal Tort Claims Act,[5] a more equitable view emerged at the state level. One by one, state legislatures questioned, and then curbed, sovereign immunity. By the 1960's blanket state immunity was largely a relic. In its stead, most legislatures adopted state tort claims acts, often borrowing from the federal model, which spelled out the conditions and circumstances under which citizens could sue their states for money damages.

(The waiver of state sovereign immunity was nuanced. Today, for example, at least 33 states impose statutory caps on damages that are recoverable from judgments against the state, and 29 states (mainly a subset of the "cap" states) prohibit judgments against the state for punitive or exemplary damages.)[6]

Some states also infused their tort claims acts with additional provisions intended to reduce the ambiguity inherent in lingering common law traditions. This category includes New Mexico, which asserted:

> The Tort Claims Act shall be read as abolishing all judicially-created categories such as "governmental" or "proprietary" functions and "discretionary" or "ministerial" acts previously used to determine immunity or liability. Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.[7]

But despite the statutory clarity imparted by many laws at the federal and state level, the boundaries of governmental liability remain complex, in part because of the persistent influence of common law precepts. For example, in contrast to New Mexico, many states continue to reject governmental immunity for "ministerial" responsibilities which are perfunctory and do not require analysis (such as

repairing potholes) while conferring immunity on "discretionary" actions which require the government to exercise judgment (such as designing a roadway and determining the optimal placement of traffic signs).[8]

A Common Law Renegade

Other common law traditions survive. One such outlier which has tenaciously endured, arousing more than its share of controversy along the way, is the public duty doctrine. The doctrine has been succinctly--and sometimes derisively--summarized as "a duty to all, but a duty to no one."[9]

Reviled by some and defended by others, the public duty doctrine originates in the common law of England. It was legitimized as the law of the United States by the Supreme Court in *South v. Maryland.*[10] In *South*, the plaintiff alleged that he had been kidnapped for four days and was released only after he produced the ransom monies demanded by his captors. He claimed that the local sheriff was well aware of the kidnapping but did nothing, and sued the sheriff for refusing to enforce the laws and for failing to protect him. The lower courts awarded plaintiff a substantial judgment. The Supreme Court reversed. It found that the sheriff's duty to keep the peace was "a public duty, for neglect of which he is amenable to the public, and punishable by indictment only."[11]

The Rationale for Public Duty

Defenders of public duty argue that, like governmental immunity, it is vital to allowing states and municipalities to provide an extraordinary breadth of services--police, fire, ambulance, courts, schools, infrastructure maintenance, licensing, zoning, and many more--for all constituents, without reservation. In contrast, private actors can provide services selectively, based on risk-reward matrices. (For example, the physician in private practice typically has no general responsibility to the public and can choose the number, nature and complexity of patients--and charge fees based on the difficulty of the diagnosis and treatment, even refusing service to those who cannot pay).

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Public duty is premised on the logic that our states, counties, cities and towns would not be able to discharge these critical responsibilities if, in so doing, they were constantly subject to litigation seeking compensation for errors or omissions in the performance of those services. If left completely unchecked, tort litigation (particularly when fueled by contingency fee arrangements), with its complex judicial elements of standard of care, foreseeability, proximate causation, contributory negligence and so on, would fatally over-consume the finite defense capabilities of government. Preservation of scarce public finances for the benefit of all, the argument goes, precludes recovery by the individual.

A broader rationale for the doctrine is provided by Professor McQuillin in *The Law of Municipal Corporations*:

> First, it is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law. Second, government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them. Third, exposure to liability for failure to adequately enforce laws designed to protect everyone will discourage municipalities from passing such laws in the first place. Fourth, exposure to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers. Fifth, the public duty rule, in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant.[12]

How Does the Public Duty Doctrine Differ From Sovereign Immunity?

Conceptually, public duty may seem to parallel immunity. Indeed, the outcome of the two principles may converge, eliminating governmental damage awards for negligence. But public duty is an even more powerful shield than immunity, if only in a highly esoteric sense. While immunity prevents plaintiffs from prosecuting a case where the government may otherwise be liable, the public duty doctrine avoids a finding of liability, *ab initio.* This is so, because with few exceptions, negligence law starts with the presumption of a duty to exercise care to avoid reasonably foreseeable harm to others.[13] Under public duty, the municipality is simply not accountable, because the primary ingredient necessary to a finding of negligence—duty—does not exist:

As the Connecticut Supreme Court noted, in upholding the public duty doctrine: "It is important to distinguish between the *existence* of a duty and the *violation* of that duty."[14] Stated otherwise:

> Unlike governmental immunity, which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first place. A defendant who pleads immunity conditionally admits the plaintiff's case, but asserts immunity as a bar to liability. In contrast, the public duty rule is a defense that denies an element of the plaintiff's cause of action--the existence of a duty of care to the individual plaintiff.[15]

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The Pivotal Role of Duty

Removal of duty from the consideration of governmental liability will necessarily absolve even foreseeable governmental negligence: "Immunity revolves around the necessity or desirability of freeing policy decisions from jury speculation; *a duty of care, on the other hand, concerns foreseeability.*"[16]

The public duty doctrine's extraordinary sleight of hand, which can eliminate the governmental duty of care to the individual in certain instances, presents an insurmountable obstacle to many plaintiffs--and an inequity in the eyes of some jurists. In a recent case testing the bounds of Washington, D.C's expansive public duty doctrine, a judge had this to say regarding the rendering of an incorrect diagnosis by EMT personnel:

> Surely no one would contend that Ms. Woods would be barred from bringing suit against a private physician who examined her at her friend's home and then provided the same negligent diagnosis and advice to refrain from seeking further treatment. Such a claim would be governed by garden-variety principles of tort law, and it is not at all clear to me why Ms. Woods' claim against the District should not be resolved in the same manner.[17]

Public duty adherents will argue that applying "garden variety" tort principles would greatly increase the cost and duration of the litigation process, whether or not the plaintiff succeeds. When "duty" remains part of the legal calculus, an extensive inquiry follows:

> When the court has considered whether a duty should be imposed based on a particular relationship, it has balanced numerous factors to aid in that determination: (1) the foreseeability of harm to the plaintiff, (2) the closeness of the connection between the defendant's conduct and the injury suffered, (3) the degree of certainty that the plaintiff suffered injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden upon the defendant, (7) the consequences to the community and the court system, and (8) the availability, cost and prevalence of insurance for the risk involved.[18]

The public duty doctrine avoids any such protracted analysis, preserving governmental assets.

The Implications of "Duty-Free" Government

The consequences of a "duty to all is a duty to no one" legal principle can seem harsh:

-A Maryland 911 operator receives an anonymous call on a cold November evening reporting the general location of a girl lying motionless in a wooded area behind a row of townhouses. The operator communicates a different, incorrect, location to officers, who search extensively but ultimately find nothing and conclude that the call is a hoax. The teenager is left outside through the night and dies of hypothermia. Based on the public duty doctrine, neither the operator nor the county owes a duty to the girl and neither is liable in damages for the girl's death.[19]

-A county in Washington issues a building permit, ostensibly an official confirmation that construction complies with all applicable codes, to owners of an unfinished house shortly before they sell the residence. The home is purchased and the new owners soon confront significant violations of the county code which render the house defective. They sue the sellers, the realtor, and the county. The sellers and realtor then seek indemnity from the county. Neither plaintiff obtains relief, because under the public duty doctrine, the county owes them no duty on an individual level.[20]

-A West Virginia police officer stops a heavily intoxicated woman in a nightclub parking lot and prohibits her from driving. The officer allows the woman's male companion to drive her home, despite having reason to suspect that he is also intoxicated. The man is subsequently driving in the wrong lane towards oncoming traffic, headlights off, when he hits a car head-on. A woman occupant in the other vehicle is badly injured and her husband is killed (as is the intoxicated driver). The survivor sues the city and the officer for negligence but her case is dismissed under the public duty doctrine.[21]

-A Washington DC woman is visiting a friend when she becomes extremely ill and 911 is called. An ambulance arrives and the emergency response staff examines the woman, concluding that she is merely suffering from the effects of having recently quit smoking. They do not transport her or prescribe any remedy. Throughout the day her condition worsens. When she finally checks herself into the emergency room, it is determined that she has suffered a stroke. In a decision which prompted the dissenting opinion referenced near the beginning of this article, the court finds that the plaintiff cannot sue the ambulance crew. Under the public duty doctrine, their rendering a diagnosis is a duty owed to the public generally and not to her as an individual.[22]

-Detroit police officers respond to a 911 call reporting that a husband is attacking his wife in an apartment and that she is screaming for help. Neighbors confirm to the officers that they have seen and heard the attack and provide the officers with the specific apartment number. The officers take down witnesses' names, circle the building once and then leave, without knocking on the apartment door or inquiring of its occupants. Three hours later, the husband calls 911 to report that he has just stabbed his wife to death. The estate's representative sues the city, the Police Department, the officers and others. All defendants are protected by the public duty doctrine.[23]

These examples are merely a small

subset of the body of case law resulting from application of the public duty doctrine. While objectionable to some, they reflect a policy decision by the jurisdictions involved that law enforcement and other governmental functions must evade individual duty analyses in order that those services to remain available for all.

The Supreme Court's Limits on Governmental Duty

The Supreme Court has not specifically spoken on the public duty doctrine, but one if its more celebrated decisions is frequently referenced in public duty cases. *DeShaney v. Winnebago County*[24] is the tragic story of a father who obtained custody of an infant boy in 1980. In 1983, police filed a report of child abuse after the infant required a trip to the hospital. The Winnebago County, Wisconsin Department of Social Services rapidly obtained a court order to hold the child in the hospital's care. But three days later, on the advice of a 'child protection team' including a pediatrician, a police detective, the County attorney, various caseworkers and others, the court returned the boy to the custody of his father.

Five subsequent visits by social workers to the DeShaney home revealed continuing abuse, but no action was taken. Even after caseworkers were not allowed to see the boy because he was, according to his father, too ill for a visit, the County took no further steps to protect him.

In March 1984, four-year old Joshua DeShaney was beaten so savagely by his father that he required lifesaving brain surgery. The operation revealed multiple traumatic injuries inflicted over several years. His brain damage was so horrific that he would be severely retarded and require special care for the rest of his life.

The boy's mother sued the County and the social services department under 42 U.S.C. §1983, claiming that by failing to protect him from abuse about which they knew or should have known, they violated Joshua's Fourteenth Amendment due process rights.

She was unsuccessful. Affirming the Seventh Circuit and the Eastern District of Wisconsin, the Supreme Court held that due process protects against state action; here it was the father, not the County and its agencies, who inflicted the abuse. The County could not be found liable, as a matter of constitutional law, for failure to protect the child from a private actor.

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The Court did not accept the mother's argument that the actions of the social services department in taking the boy under their care had created a special relationship which obligated them to a continuing duty. While conceding that there are instances where the state and its agencies are obligated to provide protection against private actors, the Court found such a duty only arises where the victim has been taken into the state's custody:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf... it is the State's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.[25]

Exceptions to the Public Duty Rule

DeShaney was decided on substantive due process grounds and not under a public duty analysis. But its consideration of a special relationship which triggers a duty by the state is a useful segue, because "special relationship" is one of the primary exceptions to public duty's shield against governmental liability.

A plaintiff can circumvent the government's public duty argument by alleging and proving a "special relationship" consisting of: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agent that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.[26]

Consider the case of a Montana police officer who stopped a vehicle being driven erratically in icy conditions; although not issuing a DUI citation, he advised both occupants that they would not be permitted to continue driving the car and should find alternate transportation. The intoxicated driver, dressed almost completely in black, wandered off, apparently to seek a ride and was fatally struck while walking on a nearby highway. Her estate successfully argued that the officer had created a special relationship with the decedent, by denying her the opportunity to drive her vehicle even though he did not formally ticket her.[27]

Other exceptions also make the public duty barrier permeable. These include the "legislative intent" exception, the "failure to enforce" exception,[28] the "rescue" exception, the "danger creation" exception, and others.

To prevail under the "danger creation exception," a complainant must show that the government's action or inaction "affirmatively placed the plaintiff in a position of danger, that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced."[29] Thus, where a woman passenger was removed from a vehicle by a police officer during a DUI arrest of the driver, left alone on a roadside in a high-crime area, and subsequently

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raped, the officer was deemed to have put her in harm's way and may have "deprived her of a liberty interest protected by the Constitution."[30]

A Gradual Death Spiral?

Exceptions to the public duty doctrine are just that--exceptions. Often the facts do not align (or are not construed) to provide a plaintiff with a mechanism to pierce the doctrine. Given the unpopular outcomes occasioned by public duty and the confusing application of its principles, some jurisdictions have moved to discard it. Courts in at least eight states have jettisoned (or declined to recognize) public duty over the past four decades, including Alaska, Arizona, Colorado, Louisiana, New Mexico, Oregon, Vermont and Wyoming.[31] Other jurisdictions have significantly narrowed its scope, deciding, as Georgia has, that public duty only applies in the context of law enforcement activity[32] or, as Ohio has, that the doctrine cannot apply to supersede a statute protecting the welfare of children.[33]

The most recent revolt against public duty occurred in Illinois. That state's judiciary decommissioned the public duty doctrine on January 22, 2016 when a divided Illinois Supreme Court decided *Coleman v. East Joliet Fire Protection District.*[34] *Coleman* involved a depressingly familiar-sounding fact pattern, with a woman calling 911 from her home and complaining that she couldn't breathe; an operator failing to connect the call to a dispatcher; an ambulance being first directed to an incorrect address; ambulance workers knocking at the correct residence but leaving; and ultimately their locating the woman, expired due to cardiac arrest, some 41 minutes after her initial call.

The trial court granted the defendants summary judgment, not only on the gross negligence counts brought by the decedent's estate, but also on the counts alleging wanton and willful misconduct—based on the absence of an individualized duty to the decedent under the public duty doctrine. The appellate court affirmed.

The Illinois Supreme Court reversed, refusing to recognize a common law shield for willful acts. It rejected public duty—but not because it conflicts with the abandonment of sovereign immunity, as many other states have opined:

> The primary rationale employed by the courts that abolished the public duty rule is that the doctrine is nothing more than a continuation of sovereign immunity and should not exist when sovereign immunity has been abolished. The Illinois Supreme Court has already rejected this argument. The public duty rule is not a form of sovereign immunity. Rather, the existence of a duty and the existence of an immunity are separate issues. The Court has consistently held that the public duty rule survived the abolition of sovereign immunity and passage of the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 et seq. (2014). Nevertheless, after much reflection, the Illinois Supreme Court has determined that the time has come to abandon the public duty rule and its special duty exception.[35]

The Illinois majority went on to define why its actions were appropriate, despite *stare decisis* to the contrary over more than 50 years:

> (1) the jurisprudence has been muddled and inconsistent in the recognition and application of the public duty rule and its special duty exception; (2) application of the public duty rule is incompatible with the legislature's grant of limited immunity in cases of willful and wanton misconduct; and (3) determination of public policy is primarily a legislative function and the legislature's enactment of statutory immunities has rendered the public duty rule obsolete.[36]

-Or a Stubborn Survivor?

As suggested by the Illinois court and many others, public duty is a juridical conundrum. A survey of the case law illustrates that it leads to diametrically opposite results among the states, even on very similar fact patterns. But despite a rising chorus of public duty detractors, rumors of its demise are, to paraphrase Mark Twain, greatly exaggerated.

Just as some state tort claims acts have expressly incorporated the common law governmental-proprietary and/or ministerial-discretionary tests for immunity, some state judiciaries have affirmatively recognized the continuing vitality of the public duty doctrine alongside tort claims acts. A case in point is Iowa, sometimes erroneously characterized by foes of public duty as having abolished the doctrine:

> Our cases decided after the adoption of the State Tort Claims Act continue to recognize the public-duty doctrine . . . [The cases cited by plaintiffs] were not aimed at the protection of the public in general (as required by the public-duty doctrine), but to narrow groups of persons, thereby establishing special relationships and making the public-duty doctrine inapplicable. *Kolbe*, 625 N.W.2d at 729. . . . In *Kolbe* we recognized that the public-duty doctrine is still viable despite enactment of the State Tort Claims Act.[37]

The same is true in West Virginia, as evidenced in a decision rendered late in 2015:

> Moreover, the [tort claims] statute and the common law doctrine are, without question, harmonious. W.Va. Code [§] 29-12A-5(a)(5)[1986], which provides, in relevant part, that a political subdivision is immune from tort liability for "the failure to provide, or the method of providing, police, law enforcement or fire protection [,]" is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole.[38]

And the history of Florida's judiciary reveals that even after public duty has ostensibly been banished from a state, it may re-emerge. True, the Florida

Supreme Court announced in 1979 that the doctrine was "a function of municipal sovereign immunity" which had been waived by Florida's legislature:

> [I]t is clear that the *Modlin* doctrine is a function of municipal sovereign immunity and not a traditional negligence concept which has meaning apart from the governmental setting. Accordingly, its efficacy is dependent on the continuing vitality of the doctrine of sovereign immunity. If this be so, does the *Modlin* doctrine survive notwithstanding the enactment of section 768.28 [waiving governmental immunity in tort]? We think not.[39]

But after a hiatus, the Florida judiciary is again employing public duty analysis:

> The public duty doctrine exception to the statutory waiver of sovereign immunity recognizes that "there can be no governmental liability unless a common law or statutory duty of care exist[s] that would have been applicable to an individual under similar circumstances."
> A plaintiff suing a governmental entity in tort must, therefore, allege and prove that the governmental entity owed [5] a duty of care to the plaintiff individually rather than to the public in general.[40]

The reality is that public duty is still very much alive. To return to Professor McQuillin's authoritative compendium of municipal law, the public duty doctrine "is in effect in most jurisdictions."[41] In fact, the doctrine is clearly alive in at least 30 states and the District of Columbia, perhaps more.[42] Recent decisions continue to affirm the validity of public duty as a legitimate touchstone for evaluating governmental liability. Some of these opinions expressly challenge the thinking of other jurisdictions that have abolished the doctrine:

> The Supreme Court of Utah disagrees with the reasoning of the courts that have abandoned the public duty doctrine. The public duty doctrine is not a subsidiary branch of sovereign immunity, as asserted by some courts. Rather, the doctrine informs a court's determination of whether a government actor owes a common law duty of care to a plaintiff. Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.[43]

Who Decides the Future of Public Duty?

As illustrated above, a survey of the relevant case law reveals that many courts have not hesitated to assert the authority to reshape or reject the public duty doctrine. But it is clearly arguable that the more appropriate forum for making such decisions lies in the legislature.

As the Supreme Court held in *DeShaney*, admittedly in a different context, the degree to which state and local governments should be shielded from liability is a matter for lawmakers, not judges:

> The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.[44]

Some state courts have respected this separation of powers when assessing common law allocation of governmental liability. For example, the Vermont Supreme Court stated that legislative approval of municipal immunity doctrines precluded action by that court:

> Plaintiff points out that municipal immunity and the governmental/proprietary distinction are common-law doctrines that a variety of courts have abrogated without legislative action. Yet this Court's ability to act does not turn on whether the doctrines in question are judicially created, but on whether the Legislature has expressed approval of these doctrines since their formulation. Such approval precludes judicial action.[45]

Connecticut's highest court came to the same conclusion, declining to abrogate the public duty doctrine, noting that "whether the principals of governmental immunity from suit and liability can best serve this and succeeding generations has become, by force of the long and firm establishment of these principles as precedent, a matter for legislative, not judicial, determination."[46]

Deference to the legislative role is also expressed in decisions *not* to apply public duty. As the Ohio Supreme Court pronounced, in a case often cited by public duty doctrine foes: "If the public-duty rule is to become a rule of substantive law applicable to suits in the Court of Claims, it is the General Assembly--the ultimate arbiter of public policy--that should make it so by way of legislation."[47]

Conclusion

The public duty doctrine is now more than 160 years old. Despite the enactment of tort claims acts across the nation, public duty continues to play a significant role in American jurisprudence, coexisting with other tenets of sovereign immunity. Its continued survival seems assured for so long as state and local governments require a safe harbor from which to serve their constituents.

Note

1. 2 U.S. 419, 1 L. Ed. 440 (1793).
2. U.S. Const. 11th Amend. (1793).
3. 134 U.S. 1, 10 S. Ct. 504 (1890).
4. (42 U.S.C.A. § 1983).
5. (28 U.S.C.S. §§ 1346, 2671-2678, 2680).
6. http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx (last accessed Feb. 2, 2016).
7. N.M. Stat. Ann. §41-4-2. *See also* Wyo. Stat. §1-39-101(b): "In the case of the state, this act abolishes all judicially created categories such as 'governmental' or 'proprietary' functions and 'discretionary' or 'ministerial' acts previously used by the courts to determine immunity or liability."
8. *See, for example* Mich. Comp. Laws Ann. §691.1407(2) regarding ministerial duties.
9. Karen Kruger, "Duty to All–Duty to No One: Examining the Public-Duty Doctrine and Its Exceptions," The Police Chief, vol. 74, no. 5, May 2007. http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1172&issue_id=52007 (last accessed

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Public Duty Doctrine Cont'd from page 19

Feb. 4, 2016).
10. 59 U.S. (18 How.) 396, 15 L. Ed. 433 (1855).
11. *Id.*
12. Eugene McQuillin, *The Law of Municipal Corporations* § 53.04.25, at p. 199 (3rd ed. 2003) (footnotes omitted).
13. Restat 2d Of Torts, §283 (2d ed. 1979).
14. Shore v. Stonington, 187 Conn. 147, 444 A.2d 1379 (Conn. 1982) (*emphasis added*).
15. Wininger v. Hong, 2010 Conn. Super. LEXIS 2298 (Conn. Super. Ct. 2010).
16. Chandler v. District of Columbia, 404 A.2d 964, 967 (D.C. 1979) (*emphasis added*).
17. Woods v. District of Columbia, No. 11-CV-1011 (D.C. Cir. 2013) (Associate Justice Oberly, concurrence page 23).
18. Natrona County v. Blake, 81 P.3d 948 (Wyo. 2003).
19. Muthukumarana v. Montgomery County, 370 Md. 447, 805 A.2d 372 (Md. 2002).
20. Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (Wash. 1988).
21. Ezell v. Cockrell, 902 S.W.2d 394 (Tenn. 1995).
22. Woods v. District of Columbia, 63 A.3d 551 (D.C. 2013).
23. White v. Beasley, 453 Mich. 308, 313, 552 N.W.2d 1, 2 (Mich. 1996).
24. 489 U.S. 189 (1989).
25. 489 U.S. 189, at 201.
26. White v. Beasley, *supra*.
27. Nelson v. Driscoll, 1999 MT 193, 295 Mont. 363, 983 P.2d 972 (Mont. 1999).
28. The "failure to enforce" exception establishes a duty where governmental agents responsible for enforcing statutory requirements [1] possess actual knowledge of a statutory violation, [2] fail to take corrective action despite a statutory mandate to do so, and [3] the plaintiff is within the class the statute is intended to protect. [39]
Jamison v. Storm, 426 F. Supp. 2d 1144, 1159 (W.D. Wash. 2006).
29. Johnson v. City of Seattle, 474 F.3d 634, 639 (9th Cir. 2006).
30. Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) *cert. denied*, 498 U.S. 938 (1990).
31. Jurisdictions which have unambiguously abandoned (or refused to adopt) public duty include: Alaska (Adams v. State, 555 P.2d 235 (Alaska 1976)); Arizona (Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (Ariz. 1982)); Colorado (Leake v. Cain, 720 P.2d 152 (Colo. 1986)); Louisiana (Stewart v. Schmieder, 386 So. 2d 1351 (La. 1980)), New Mexico (Schear v. Bd. of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (N.M. 1984)), Oregon (Brennan v. Eugene, 285 Ore. 401, 519 P.2d 719 (Ore. 1979)); Vermont (Hudson v. Town of E. Montpelier, 161 Vt. 168, 638 A.2d 561 (Vt. 1993)); and Wyoming (Natrona County v. Blake, 2003 WY 170, 81 P.3d 948 (Wyo. 2003)). North Dakota's Supreme Court abrogated the doctrine in that state (Ficek v. Morken, 2004 ND 158, 685 N.W.2d 98 (N.D. 2004), but the North Dakota legislature rapidly filled the void with a statutory solution essentially replicating public duty, including a special duty exception. N.D. Cent. Code §32-12.1-03 (2015).
32. Hamilton v. Cannon, 267 Ga. 655, 482 S.E.2d 370 (Ga. 1997).
33. Brodie v. Summit County Children Services Board, 51 Ohio St. 3d 112, 554 N.E.2d 1301 (Ohio 1990).
34. 2016 IL 117952 (Ill. Jan. 22, 2016).
35. *Id.*
36. *Id.*
37. Raas v. State, 729 N.W.2d 444, 448-449 (Iowa 2007).
38. Danner v. City of Charles Town, 2015 W.Va. LEXIS 1130, *9 (Nov. 20, 2015).
39. Commercial Carrier v. Indian River County, 371 So. 2d 1010, 1016 (Fla. 1979).
40. Miami Dade County v. Fente, 949 So. 2d 1101 (Fla. Dist. Ct. App. 3d Dist. 2007).
41. McQuillin, *supra note 12*, at 207.
42. These include: California (Adams v. City of Fremont, 68 Cal. App. 4th 243, 80 Cal. Rptr. 2d 196, (Cal. App. 1st Dist. 1998); Connecticut (Coley v. City of Hartford, 140 Conn. App. 315, 59 A.3d 811 (Conn. App. Ct. 2013); Delaware (Millman v. Town of Milton, 755 A.2d 389 (Del. 2000)); District of Columbia (Varner v. District of Columbia, 891 A.2d 260 (D.C. 2006)); Florida (Pollock v. Fla. Dep't of Highway Patrol, 882 So. 2d 928, 932 (Fla. 2004)); Georgia (Ratliff v. McDonald, 326 Ga. App. 306, 756 S.E.2d 569 (Ga. Ct. App. 2014)); Hawaii (Ruf v. Honolulu Police Dept., 89 Haw. 315, 972 P.2d 1081 (Haw. 1999)); Idaho (Ransom v. Garden City, 113 Idaho 202, 743 P.2d 70 (Idaho 1987)); Iowa (Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)); Kansas (Fudge v. Kansas City, 239 Kan. 369, 720 P.2d 1093 (Kan. 1986); Kentucky (Gibson v. Hicks, 2012 Ky. App. LEXIS 125 (Ky. Ct. App. 2012); Maryland (Muthukumarana v. Montgomery County, 370 Md. 447, 805 A.2d 372 (Md. 2002)), Minnesota (Hage v. Stade, 304 N.W.2d 283 (Minn. 1981)); Missouri (Jungerman v. Raytown, 925 S.W.2d 202 (Mo. 1996)); Montana (Nelson v. State, 346 Mont. 206, 195 P.3d 293 (Mont. 2008)); Nevada (Coty v. Washoe County, 108 Nev. 757, 839 P.2d 97 (Nev. 1992)); New Hampshire (Wolfeboro Neck Prop. Owners Ass'n v. Town of Wolfeboro, 146 N.H. 449, 773 A.2d 633 (N.H. 2001); New York (Cuffy v. New York City, 69 N.Y.2d 255, 505 N.E.2d 937 (N.Y. 1987)); North Carolina (Stone v. North Carolina Dept. of Labor, 347 N.C. 473, 495 S.E.2d 711 (N.C. 1998)); Pennsylvania (Melendez v. Philadelphia, 320 Pa.Super. 59, 466 A.2d 1060 (Pa. 1983)); Rhode Island (Torres v. Damicis, 853 A.2d 1233 (R.I. 2004)); Barratt v. Burlingham, 492 A.2d 1219 (R.I. 1985)); South Carolina (Steinke v. South Carolina Dept. of Labor, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999)); South Dakota (Tipton v. Tabor, 567 N.W.2d 351 (S.D. 1997)); Tennessee (Luna v. White County., 2015 Tenn. App. LEXIS 525 (Tenn. Ct. App. June 29, 2015)); Texas (Vaquera v. Salas, 810 S.W.2d 456 (Tex. App. 1991)); Utah (Rollins v. Petersen, 813 P.2d 1156 (Utah 1991)); Virginia (Mpras v. Community Living Alternatives, 35 Va. Cir. 264, 1994 Va. Cir. LEXIS 156 (Va. Cir. Ct. 1994)); Washington (Oberg v. Dept. of Natural Resources, 114 Wash.2d 278, 787 P.2d 918 (Wash. 1990)); West Virginia (Allen v. Greenbrier County Sheriff's Dep't, 2013 W.Va. LEXIS 819 (W.Va. 2013)).
43. Cope v. Utah Valley State College, 342 P.3d 243, 246 (Utah 2014).
44. *DeShaney, supra note 24*, at 203.
45. Hillerby v. Town of Colchester, 167 Vt. 270, 273, 706 A.2d 446, 447 (Vt. 1997).
46. Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 169, 544 A.2d 1185 (Conn. 1988).
47. Wallace v. Ohio Department of Corrections, 96 Ohio St. 3d 266, 278, 773 N.E.2d 1018, 1029 (Ohio 2002).

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Code Enforcement

Ten Things You Should Know About Breed Discriminatory Laws (BDL)

By Lee Greenwood, Legislative Attorney, Best Friends Animal Society, Boston, Massachusetts

Let's start with the basics. Breed-discriminatory laws are any law, ordinance, policy, regulation or governmental categorization that regulates or restricts dog owners from keeping their pets. They're sometimes called breed-specific laws, but in reality there's nothing specific about them. They discriminate against entire classes of dogs based solely on breed or appearance, which makes BDL the rare type of law that punishes responsible and law-abiding individuals (and their innocent pets).

But besides all the legal problems with BDL (which we'll get to), there's the very real-world impact that these laws have on communities, such as innocent pets being torn away from their homes and owners. It's bad enough for people who have the means to move or find alternate care for their dogs, but for many the only option is to surrender their pets to the animal shelter, where there's a good chance the dog will end up being killed.

Without further ado, I provide the following, which I bet you didn't know about breed discriminatory legislation:

1. BDL violates our fundamental property rights. Our pets mean the world to us. In fact, studies have consistently found that nearly 90 percent[1] of us think that they are members of the family. But in the eyes of the law, pets are property.

And this is America, where all Americans who follow the right safety rules as responsible dog owners should be allowed to own whatever breed of dog they choose. It's that simple.

2. BDL is totally ineffective. Peer-reviewed studies[2] that assess bite statistics in jurisdictions that have adopted BDL have consistently come to the same conclusion: BDL is an utterly ineffective tool for protecting the public.

To keep our communities safe, our laws should focus on the individual behaviors of all dogs, regardless of breed or appearance, as well as reckless and irresponsible dog owners who cause so many of the problems. If there's a dog or person endangering the community, they should be dealt with accordingly — no exceptions, no excuses.

3. BDL is a huge waste of tax dollars. There are all sorts of obvious financial costs built into BDL, including enforcement, kenneling and euthanasia. What's less obvious are the hidden costs, such as the inevitable litigation you're going to encounter.

Our tax dollars are better spent when we invest in things like schools, roads and more animal control officers than wasting them on BDL. Find out how much it will cost your municipality to enact BDL with the fiscal impact calculator[3] developed by economist John Dunham.

4. BDL in your municipality is probably unconstitutional. An increasing number of courts, both federal[4] and state[5], have found that it violates responsible and innocent dog owners' constitutional rights.

Gone are the days of courts rubber stamping a municipality's BDL. Over the past decade-plus, the research and study on dogs and dog-related bites and fatalities has evolved to the point where there is a consensus among experts (including every peer-reviewed study and paper on the topic) that a dog's breed or appearance is not a credible predictive tool of behavior. Simply put, the science has concluded that every dog truly is an individual.

As a result, when you are sued over this issue (and lawsuits are becoming more and more inevitable), courts will take a long, hard look at the municipality's rationale for enacting and maintaining its BDL. And as we've seen, there's a good likelihood that upon close examination that rationale isn't going to withstand judicial review.

5. BDL is impossible to enforce, due to the inherent flaws with visual breed identification. An eye-opening study recently found that the breed of dogs adopted from shelters was misidentified approximately 87.5 percent of the time. Keep in mind that the inaccurate breed identification was assigned by the experts in the field — shelter veterinarians.

If these experts aren't able to identify dog breeds with any degree of accuracy, how can we ever expect our under-trained and overworked police or animal control officers to do it? Not to mention that some courts have found that animal control officers are actually unqualified to visually identify a dog's breed.

6. BDL could violate the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA). Even if your municipality has a breed-discriminatory ordinance in place, these federal statutes

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Lee Greenwood, Esq. Legislative Attorney, Best Friends Animal Society Lee Greenwood is a Legislative Attorney for Best Friends Animal Society, the leading national animal welfare organization dedicated to ending the unnecessary killing of companion animals in our nation's shelter systems. He has been involved in the legislative process for his entire career, starting in the Senate Judiciary and Senate Budget Committees. He then worked for the American Association for Marriage and Family Therapy in Alexandria, VA, helping to enact their priorities on the state and federal levels. Most recently he worked as a lawyer for a state representative at the State House in Boston, MA. At Best Friends, Lee specializes in dog-related laws, working as an advocate and lobbyist on local, state, and federal legislation.



SECOND LOOK

Multiple Proportionality Syndrome and Pretrial Discovery

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

On December 1, 2015, "proportionality" returned as an explicit component of the Federal Rules of Civil Procedure's definition of the permissible scope of pretrial discovery.returned[1] as an explicit component of the Federal Rules of Civil Procedure's definition of the permissible scope of pretrial discovery.
Amended Fed. R. Civ. P. 26(b)(1) now reads:

> Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery* outweighs *its likely benefit*. Information within this scope of discovery need not be admissible in evidence to be discoverable.[2]

The precise meaning and practical application of the "new" proportionality standard will be developed by the courts.[3] We will need to follow those developments for reference when drafting discovery requests, objecting to discovery based on disproportionality,[4] and explaining that our own discovery requests are within the scope of proportionality when drafting and arguing motions to compel discovery filed against our clients.

However, Rule 26(b)(1) is not the only place that considerations of "proportionality," in all but name, appear in the federal civil discovery rules as currently amended. There are seven other instances, as I detail below. These proportionality "alter egos" sometimes apply only in limited situations (such as for electronic discovery as distinguished from paper discovery).[5] Sometimes the rules are written in an apparent attempt to differentiate an "alter ego" proportionality factor outside of Rule 26(b)(1) from the explicit proportionality factors in Rule 26(b)(1)[6] – implying that different standards should be applied under the "alter ego" rule. But I question whether any purportedly variant standards will be (or indeed can be) as a practical matter substantively different than the standards that courts will use to enforce the explicit proportionality standard under Rule 26(b)(1). This doubt is reinforced by the consideration that Rule 26(b)(1)'s listed factors allow trial courts to exercise very broad discretion in identifying and weighing relevant proportionality considerations – making it impossible to prevent a court from considering the broadest range of factors in deciding proportionality questions.[7] In other words, I suggest that these "alter egos" are merely additional manifestations of "proportionality" that must be considered along with Rule 26(b)(1), and the same proportionality factors will apply to all of these similar rule standards.

Alter Egos of Proportionality

I contend that these "alter egos" of Rule 26(b)(1) "proportionality" are present whenever the rules require a court or an attorney to weigh the propriety of a discovery request against the needs of a case or against a party's resources. Of course these express instances are in addition to the court's overriding authority to alter discovery rules, limits, and standards to do justice[8] and the trial court's broad discretion to manage discovery.[9] These "alter egos" also are in addition to instances where another pretrial discovery rule expressly incorporates Rule 26(b)(1) by reference.[10]

What and where are these other aspects of proportionality in the rules in addition to the discovery scope definition in Rule 26(b)(1)?[11]

1. Rule 26(b)(2)(B) ("Specific Limitations on Electronically Stored Information" ("ESI")):
   This provision excuses a party from producing ESI that is "not reasonably accessible because of undue burden or cost." The question of when "burden or cost" becomes "undue" must be decided based on principles of proportionality, if only because no other standards would make sense.[12]
2. Rule 26(b)(2)(C)(i) (Court may limit or bar discovery that "is unreasonably cumulative or duplicative"):
   When would cumulative discovery become "unreasonably cumulative"? The only meaningful standards that occur to me are the Rule 26(b)(1) proportionality factors. Indeed, discovery that is "unreasonably cumulative" within the meaning of Rule 26(b)(2)(C)(i) is almost always unduly burdensome under Rule 26(b)(1).[13]
3. Rule 26(b)(2)(C)(ii) (Court may limit or bar discovery after "party seeking discovery has had ample opportunity to obtain the information by discovery in the action"):
   When will a court decide that a party's prior discovery opportunities were "ample"? How else but by deciding that allowing any further opportunities would be disproportionate using the standards of Rule 26(b)(1)?

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Practice Tips

Competitive Bidding and Purchasing—Ten Tips Designed to Keep You Out of the Papers

By Beth Anne Wilkening, City Attorney, City of Broken Arrow, Oklahoma

A few years ago, I was invited by representatives of the Oklahoma Municipal League to make several presentations on the subject of competitive bidding and purchasing. Initially, I was unenthusiastic about this topic and would have placed it squarely in the category of watching paint dry. After all, as City Attorney for the City of Broken Arrow, I had dealt with far more interesting issues such as casinos, kangaroos, *qui tam* lawsuits, officer involved shootings, miniature horses, and various displays of public nudity (not my own, just to be clear).

But as I reflected over my ten year career as the Chief Legal Officer, memories of threatened vendor lawsuits, actual lawsuits, criminal prosecutions (from other Oklahoma cities, just to be clear), beaver removal contracts, purchases of a preserved snake, poison oak, and microbes (glad I missed the Purchase Order on that), and the desire of Staff to be brand-specific came pouring back. The topic of competitive bidding and purchasing, as unsexy as it sounds, is intrinsically one of the more important functions of government. I modified my way of thinking to embrace this opportunity to review the statutes, read applicable case law and Attorney General's Opinions, and ensure that our code of ordinances, Purchasing Manual, and current practices are lawful, transparent, and designed to be most advantageous to both the City and the taxpayers. I also used it as an opportunity to articulate ten rules that I have found to be key in accomplishing the goals set forth above.

My rules for staying out of the papers (both print media and legal) are as follows:

1. Be thorough. My fellow Department Directors constantly express frustration over my "belt and suspenders" approach to even the most routine purchases. When I am reviewing fact sheets for Council Meetings, I tend to always go overboard on background information. Although they certainly tire of my endless questions, I constantly remind them that if I do not understand what they are saying, then the general public certainly will not. Also, the tried and true rule in my practice remains that a little bit of work on the front end saves a tremendous amount of work on the back end. Comprehensive background information has been invaluable not only in warding off potential lawsuits, but also in answering questions posed by "Inquiring Minds." This is especially true for Inquiring Minds that peruse the claims list for entertainment.

2. Angry people file lawsuits. This rule is tried and true. It is my belief that angry people file lawsuits on the basis of principle alone. I constantly encourage City Staff to treat all bidders, vendors, and citizens with courtesy and respect. I also encourage them to maintain good working relationships with contractors. There are times when things may become contentious, but more often than not, these matters can be handled professionally, even if they become adversarial. Also, being responsive to citizens (especially those who peruse the claims list) and providing them with an abundance of information can be very helpful in warding off litigation and negative media attention.

3. Don't fall victim to "Emergencies." If I had a dollar for every time I had a City Staff Member tell me that something was "an Emergency," I would no longer need to draw a paycheck from the City of Broken Arrow. When a particular situation arises that has everyone running around with their hair on fire, I spend a considerable amount of time inquiring about the problem, the solution, and the true need for advancement of the purchase. There are certainly times when a situation warrants immediate action and declaration of an Emergency by the Governing Body. However, these situations need to be true emergencies (like no water, no power, falling walls, and things that are a danger to persons and property). If not, you compromise the process and put your client at risk.

4. Read the law. I keep a notebook with state statutes, the Broken Arrow Code, important cases (especially those where people go to jail), the Purchasing Manual, drafts of previous form documents such as Emergency Resolutions, and previous Council Actions. When asked a question, I do my best not to depend upon memory alone and actually review the statute. This is especially important when it is something that you have not seen before. (Like all good municipal attorneys, I have given up saying "I have seen it all.")

5. Be transparent. Put all relevant information in the fact sheet. Include benefits, challenges, recommendations, and the rationales behind them. When you neglect to do this, the conspiracy theorists really get the upper hand. For example, if your emergency medical services personnel like a certain type of defibrillator, but that is not the low bid, talk about redundancy and the need for all units to function in

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Current Cases of Interest

By Monica Ciriello, Ontario, 2015

City of Calgary Is Granted Injunction Against Uber Drivers.

Calgary (City) v. Trevor Arthur John Gold et al., 2015 (AB QB) E-File No.: CVQ15GOLDTREV

The City of Calgary ("City") sought an interim injunction prohibiting drivers ("Respondents") from providing rides under the Uber "app" as it is a breach of the City's *Livery Transport Bylaw ("Bylaw").*

HELD: Injunction against the Respondents is granted.

DISCUSSION: The City brought forward an interim injunction under section 554 of the *Municipal Government Act ("Act").* The Court indicated that it is often better to wait for a full trial before granting an injunction, as "injunctions before trial are often said to be extraordinary remedies to be granted only when equitable principles have been satisfied." The Court examined whether the Respondents had breached the *Bylaw.* The City presented satisfactory evidence to the Court that documented the Respondents charged a fee to carry passengers and therefore breached the *Bylaw.* Based on evidence presented by the City, the Court was able to infer that there was a continuous contravention of the *Bylaw* by the Respondents and the Respondents "were likely aware, or should have been aware, of the City's position." The Court did not require the City to show that each Respondent continuously breached the *Bylaw*, as that would "present a practically insurmountable hurdle for any application in this type of situation under section 554 of the *Municipal Government Act*."

The Respondents argued that because Calgary City Council had requested Administration to propose a *Bylaw* change to accommodate rides under an "app", the Court should deny the interim injunction. The Court dismissed this argument, stating that "there is a legally binding bylaw that precludes what the respondents, on the evidence, have been doing. It is being contravened deliberately and continuously. The respondents do not get to choose which bylaws are out of date and can be ignored." The Court concluded that, "absent an injunction, the usual sanctions available to the City by way of retrospective penalties will not avail in curtailing the activity of which it complains." The Court granted an interim injunction against the Respondents, which extended to all other persons who operate as an Uber driver in the City.

Update - provided in consultation with the City of Calgary Prosecutor, Colleen Sinclair:

Following the interim injunction, Uber voluntarily shut down their app in the City, thereby eliminating the need to pursue a permanent injunction. The injunction is still in place today without challenge. It is impossible for any of the drivers to breach the injunction as the app remains shut down. Prior to the successful interim injunction, City Council had instructed Administration to propose options to amend the *Bylaw* to allow a Transportation Network Company ("TNC") like Uber to operate. The *Bylaw* amendments will be proposed to City Council on February 22, 2016.

Employer Must Accommodate To The Point Of Undue Hardship.

Chatham-Kent (Municipality) v. CUPE, 2016 CanLII 76 (ON LA) http://canlii.ca/t/gms6r

Rob Bossence ("Grievor") filed a grievance claiming the Municipality of Chatham-Kent ("Employer") failed to accommodate his disability. The Grievor had a seizure and as a result his driving licence was medically suspended. When the Grievor returned to work, he performed all duties except driving. A month after returning to work his hourly rate was reduced to the Labourer rate.

HELD: Grievance is allowed.

DISCUSSION: The Employer relied on Minutes of Settlement from 2008 which indicated that:

Any member of the bargaining unit employed in a classification which requires a driving license and whose license is suspended for any reason shall be placed in the position of labourer subject to availability of work in the position and subject to the individual's ability to otherwise meet the skills and qualifications of the labourer position. The parties agree that, where applicable, such placement meets the requirements of the *Human Rights Code* to accommodate to the point of undue hardship.

The Union argued that the Minutes of Settlement were "either inapplicable to the present situation or unlawful for being in violation of the *Human Rights Code*". The Union stated that the course of action taken by the Employer lacked an individualized approach that the Grievor was entitled to by law: the Ontario Human Rights Commission *Policy and Guidelines on Disability and the Duty to Accommodate* provide that "each person's needs are unique and must be considered afresh when an accommodation request is made."

The Arbitrator found that the Minutes of Settlement are not in compliance with the *Human Rights Code.* The Grievor was entitled to an accommodation, to the point of undue hardship on the Employer, not a blanket application of the Minutes of Settlement.

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Cases



By IMLA Editorial Board

DUE PROCESS: Detention in Solitary Confinement Pending Appeal by State Did Not Violate Fourteenth Amendment

***Ballinger v. Cedar County,* No. 14-3576 (8th Cir. Jan. 14, 2016).**

Summary: Where a Missouri prisoner's felony convictions were overturned and the state appealed, holding the prisoner in solitary confinement did not violate due process, according to the Eighth Circuit. The circuit did not agree that vacating the convictions restored him to "pretrial detainee" status; because he remained a prisoner, he could not demonstrate "atypical and significant hardship" needed to benefit from Fourteenth Amendment protections.

Facts: In 2010 Brent Ballinger's three felony convictions were set aside due to ineffective assistance of counsel. Granting the motion, the state court ordered that he be "remanded to the custody of the Cedar County, Missouri Sheriff's Department for further proceedings in his underlying case." The State then appealed the court's order to vacate his sentence.

The Sheriff's Department put Ballinger in "administrative segregation," also known as solitary confinement. Ballinger, who remained there for a year, filed §§ 1983 and 1988 claims against the County. He maintained that the County policy was deliberately indifferent to his Fourteenth Amendment rights. The County answered that he was not a pretrial detainee at that point – rather, he was a prisoner – and therefore did not suffer an "atypical hardship" as required under the Fourteenth Amendment. The district court granted the County's motion.

Held: The Eighth Circuit affirmed, holding that Ballinger was a prisoner and not a pretrial detainee.

Discussion: The Court began noting that while pretrial detainees are presumed innocent and cannot be punished under the Fourteenth Amendment, prisoners have already been deemed culpable and must show an "atypical and significant hardship" to establish a claim. Ballinger argued that, because his successful action to vacate was analogous to a successful habeas petition, he was essentially a pretrial detainee. The district court had relied on the Missouri Supreme Court Rule under which Ballinger's sentence was vacated, which states that if the State appeals, then the defendant shall remain in custody.

The Circuit Court acknowledged Ballinger's argument but was not persuaded given the Missouri Supreme Court Rules exception. That rule authorizes an appeal by the state if a sentence is vacated and, if so, *requires the order be stayed*, while habeas petitions do not allow appeals and do not include the stay. As a result, Ballinger remained a prisoner while the state's appeal was pending and never regained the status of a pretrial detainee.
http://media.ca8.uscourts.gov/opndir/16/01/143576P.pdf

EMPLOYMENT: White Police Officer Wins Discrimination Claim; Denial of Transfer Can Be Adverse Job Action

***Bonenberger v. St. Louis Metropolitan Police Department,* No. 14-3696 (8th Cir. Jan. 19, 2016).**

Summary: The Eighth Circuit has upheld a damage award to a white St. Louis police officer who was not hired for a Police Academy position due to his race. It found discriminatory intent and rebuffed the Police Department's argument that no adverse employment decision occurred because the position sought was not a promotion. Denial of a transfer could constitute an adverse employment decision if the new position offered materially different working conditions.

Facts: Sergeant David Bonenberger had worked for the St. Louis Metropolitan Police Department for many years when a position as Assistant Director of the Police Academy opened up. He showed interest, despite not having enough years of supervisory experience, but was advised by a lieutenant said he should not bother applying because "the job was going to a black female." The lieutenant repeated this opinion to the outgoing assistant director, noting "there no way [sic] they were going to put a white male in that position."

Bonenberger applied for the job despite these warnings, thinking the hand-picked person could fall through. That person – Sergeant Taylor – also did not have the minimum experience listed in the job description and had less supervisory experience, less teaching experience, and scored lower than Bonenberger on her performance evaluations. Neither candidate was interviewed. Taylor got the job.

Bonenberger sued under §§1983 and 1981, alleging he was not hired because of his race. The case went to trial and the jury found in favor of Bonenberger, awarding both actual and punitive damages. The Police Department moved for judgment as a matter of law and, upon losing that motion before the trial judge, appealed to the Eighth Circuit.

Held: The Eighth Circuit affirmed, holding judgment as a matter of law was properly denied in the case.

Discussion: Bonenberger could make out a prima facie case of discrimination under Title VII of the Civil Rights Act

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by showing he suffered an adverse employment action brought on by his employer's discriminatory motive.

The crux of the defendant's appeal was that Sergeant Bonenberger did not suffer an adverse employment action because the job was not a promotion since it carried no increase in pay, benefits, or rank. The Eighth Circuit noted this might be true, but added that denial of a transfer can be an adverse employment action if it would have resulted in a change in material working conditions. The court noted it had not yet opined on this specific issue, but had evaluated when a compulsory, undesired transfer constituted an adverse employment action since it came with a significant change in working conditions.

Looking at those precedents the Circuit found that changes in supervisory duties, prestige, and promotion potential can produce materially different working conditions. This was the case for Sergeant Bonenberger: the Assistant Academy Director job came with more supervisory duties, a regular working schedule and hours, greater prestige, and significantly increased promotion potential once performed. It affirmed.

http://media.ca8.uscourts.gov/opndir/16/01/143696P.pdf

SPEECH: Police Officer Was Not Private Citizen Speaking on Matter of Public Concern When Complaining About Threats by Fellow Officer

***Kubiak v. City of Chicago,* No, 14-3074 (7th Cir. Jan. 11, 2016).**

Summary: A Chicago police officer who complained about a fellow officer's threatening actions towards her and was subsequently re-assigned was rebuffed in characterizing the action as retaliation in violation of her First Amendment rights. The Seventh Circuit agreed with the lower court that reporting about other officers' misdeeds is a normal incident of Police Department work, not an example of private citizens' speech.

Facts: Laura Kubiak, a patrol officer with the Chicago Police Department, was detailed to the Office of News Affairs in 2000, where she worked as a liaison to the news media. The position was considered to be a prestigious "desk job" with high visbility. After a disagreement over a report for work in November 2012, Kubiak was verbally assaulted by another officer in the News Affairs Office. The other officer – Veeja Zala – cursed, yelled, and raised his hand as if he was going to hit her. Kubiak reported the incident immediately to her supervisor. During the call to the supervisor Zala stood at her desk and berated her. Others witnessed the event and described fearing Zala might shoot Kubiak, noting that Zala had a history of violence on the job both as a patrol officer and in the News Affairs Office.

Kubiak sought to discuss the incident further with her supervisors and each time was denied the opportunity. Ultimately she filed a memo that triggered an internal affairs investigation. The complaint against Zala was ultimately sustained, but Kubiak was reassigned. She lost her position in the Office of News Affairs, was put back on patrol, and given the night shift.

Kubiak filed a complaint against the City and the supervisors who made the decision to reassign her, alleging she was retaliated against, in violation of the First Amendment. The district court dismissed, agreeing with the defendants that she was not speaking as a private citizen on a matter of public concern.

Held: The Seventh Circuit affirmed, agreeing that Kubiak's speech was made as a public official and not a private citizen.

Discussion: Kubiak argued she was speaking as a private citizen because her job duties as a media liaison did not consist of reporting misconduct of her co-workers. The Circuit Court found this too cramped an interpretation of "job duties," finding that all employees, as a general rule, would be expected to report inappropriate behavior by colleagues, despite that not being listed in a job description. It found further support in its position since Kubiak's speech was so closely intertwined with her job – the complaint was about a colleague's inappropriate behavior based on a work-related report and her speech was directed to her supervisors.

Additionally, Kubiak had to show that her speech related to a matter of public concern. She argued that her complaint was motivated not only out of fear for herself, but for the public at large. The Circuit Court evaluated this element along three parameters–the content, form, and context of the speech. Despite Kubiak's entreaties that Officer Zala's behavior was a matter of public concern because he was a police officer, the content of her complaint related solely to a work-related incident and was all about her – her fear of Zala, the incident in November, and his previous outbursts towards her. Her objective was overwhelmingly to alleviate a personal grievance. The Circuit found that she was speaking about a private matter, and could not claim the protections of the First Amendment.
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D01-11/C:14-3074:J:Flaum:aut:T:fnOp:N:1685011:S:0

GUNS: Illinois Requirement that 18 to 21 Year Olds Must Obtain Parental Consent on Gun Permit Application Does Not Violate Second Amendment

***Horsley v. Trame,* No. 14-2846 (7th Cir. Dec. 14, 2015).**

Summary: The Seventh Circuit has upheld an Illinois statute requiring 18 to 21 year olds to obtain parental consent on firearm permit applications as a legitimate exercise of the State's substantial interest maintaining safety, noting that the registration process allows for appeals where parental consent isn't obtained.

Facts: Tempest Horsley was 18 years old when she sought her Firearm Owner's Identification Card (FOID) from the State of Illinois. Her application was returned to her with a notation that it was incomplete because it lacked a parent or guardian's signature – a necessary element for 18-to-21 year old FOID applicants in Illinois. Horsley sued Jessica Trame in her official capacity as the Chief of the Illinois State Police Firearms Services Bureau. She contended that she wanted a double-barrel shotgun for self-defense in her home, that her parents refused to sign the application and that the State's rejection of her application

violated her Second Amendment rights. The district court granted Trame's motion for summary judgment.

Held: The Seventh Circuit affirmed, finding that the parental signature requirement does not violate the Second Amendment.

Discussion: The Illinois law provides that applicants under age 21 must submit evidence that s/he "has the written consent of his or her parent or legal guardian to possess and acquire firearms . . . provided, however, that such parent or guardian is not an individual prohibited from having a Firearm Owner's Identification Card . . . ."

Any person whose application for a gun permit is denied may appeal to the Director of State Police and have a hearing on the matter. In the case of a person under 21, the Director may grant the application as long as the applicant shows that s/he "has not been convicted of a forcible felony within a certain number of years, . . . will not be likely to act in a manner dangerous to public safety, and granting relief would not be contrary to the public interest or to federal law."

Trame and the State first argued the case was not ripe for review, since Horsley had not exhausted her administrative remedies. The Circuit Court disagreed, noting there is no general duty to exhaust administrative remedies before seeking § 1983 relief, with two exceptions--takings claims and prisoner suits--neither of which applied here.

The Circuit Court also evaluated whether a scheme under which 18 to 21 year-olds must undergo a different procedure for gun ownership than the process for full-fledged adults violates the Second Amendment. It found no such violation.

Trame's primary argument was that the Second Amendment, as interpreted by the Supreme Court, codifies a pre-existing right—but that right had not traditionally extended to those under 21. Trame highlighted Thomas Cooley's 1883 Treatise on Constitutional Limitations for this proposition and a more recent Fifth Circuit case. Horsley, for her part, started with more recent history, noting that until recently the age of majority was considered 18, not 21, and then pointed out that the First Militia Act of the 1792 Congress included 18-year-old men as part of its ranks. The Circuit, though it highlighted these interesting historical footnotes, found it need not determine the issue; even if 18 to 21 year-olds are protected by the Second Amendment, the regulation passes means-ends scrutiny.

Means-ends scrutiny evaluates "the regulatory means the government has chosen and the public-benefits end it seeks to achieve." The Circuit Court focused on the fact that, though Horsley treated the regulation as an all-out ban on those under 21 from possessing a firearm, there was an appeal process is in place for those that lack a parental or guardian signature. This process distinguished the case from *Heller.*

It also found the law did not impose a severe burden, but only a modest one. As for the public-benefits end, the Circuit found Illinois has a compelling interest in citizen safety and that it supported the link to this interest with studies showing that those under 21 commit violent gun crimes more frequently than those over 21. Furthermore, it cited information about brain development through early adulthood that it found persuasive. The Seventh Circuit ultimately found a sufficient means-end relationship between the law and the government interest and upheld the scheme.
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D12-14/C:14-2846:J:Williams:aut:T:fnOp:N:1671930:S:0

SPEECH: Florida Law Restricting Physicians From Keeping Records About Patients' Firearm Ownership Does Not Violate First Amendment

***Wollschlaeger v. Governor of Florida*, No. 12-14009 (11th Cir. Dec. 14, 2015).**

Summary: The Eleventh Circuit, reversing a lower court, has found that a Florida law limiting physicians and medical facilities from inquiring about and maintaining records about patients' ownership or use of firearms unless "relevant" to their medical treatment or the safety of others, was not void for vagueness or overbroad, was not an impermissible content-based limitation on their speech rights and advanced the State's compelling interests in protecting Second Amendment rights and patient privacy.

Facts: In 2011 Florida Governor Rick Scott signed into law the Florida Firearm Owners Privacy Act (Act), responding to complaints from constituents that medical personnel were asking unwelcome questions about firearm ownership, and that constituents faced harassment or discrimination if they refused to answer such questions--or simply because they were gun owners.

The Act provides that licensed healthcare practitioners and facilities "may not intentionally enter" data about a patient's ownership of firearms into the patient's medical record that the practitioner knows is "not relevant to the patient's medical care or safety, or the safety of others." Practitioners and facilities must respect the patient's right to privacy, and should not ask about gun ownership absent a good faith belief that the information is "relevant to the patient's medical care or safety, or the safety of others." They may not discriminate against or harass patients based on firearm ownership. Violations of the Act will result in

In 2012, the District Court permanently enjoined enforcement of the Act's provisions regarding inquiry, record-keeping, discrimination and harassment, holding that they facially violated the First Amendment by imposing a content-based restriction of speech, and that the inquiry, record-keeping, and harassment provisions of the Act were void for vagueness. The District Court found that the State had failed to provide any evidence that the confidentiality of information regarding patients' firearm ownership was at risk, noting that a patient may simply decline to provide such information, and that state and federal laws pertaining to the confidentiality of medical records provide adequate protection to patients. It also found that the Act was not the least restrictive means of achieving the State's interests. Florida appealed.

Held: Reversed. The Act does not violate the free speech rights or due process rights of medical practitioners or facilities.

Discussion: The Circuit Court first examined the issue of vagueness and its due process implications. Plaintiffs had argued that the prohibition against record-keeping unless "relevant" was fatally vague. The Eleventh Circuit disagreed:

[W]e think the record-keeping provision stands for the simple proposition that

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2016 Looms Large for Municipalities

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

Editor's Note: This article was submitted before the untimely death of Justice Antonin Scalia on February 13, 2016. it is unclear what cases, if any, the Supreme Court may choose to defer deciding until a full complement of Justices is again seated.

It is unusual for the Supreme Court to accept many cases at once, except at the end and the beginning of the Term. But on the Friday before and the Tuesday after Martin Luther King, Jr. Day (January 15 and 19, 2016) the Court granted *certiorari* for a total of nine cases, including a challenge to the President's executive order allowing undocumented parents of children who are citizens to remain in the United States.

Here is a brief summary of the cases already accepted by the Court which are relevant to state and local government:

United States v. Texas

Various states have challenged the Deferred Action for Parents of Americans (DAPA) program that allows certain undocumented immigrants who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents to lawfully stay and work temporarily in the United States. The United States argues that the states lack "standing" to challenge the DAPA program. The Fifth Circuit concluded that the cost of issuing drivers licenses to DAPA program participants is a particular harm states will face, which provides the basis for standing.

States also challenged the DAPA program as violating the Administrative Procedures Act (APA) notice-and-comment requirement and claim it is arbitrary and capricious in violation of the APA. The lower court concluded the states were likely to succeed on both claims because the DAPA is a substantive rule and it is "foreclosed by Congress's careful plan" in the Immigration Naturalization Act. The states also argue the DAPA violates the Constitution's Take Care Clause because it is contrary to federal law; the President is failing to "take care" that federal law is followed.

Manuel v. City of Joliet

May federal malicious prosecution claims be brought under the *Fourth* Amendment? In 1994 in *Albright v. Oliver* the Supreme Court held that they may not be brought under the *Fourteenth* Amendment. While numerous federal circuits have held that federal malicious prosecution claims are viable under the Fourth Amendment, the Seventh Circuit disagrees. In this case a lab report cleared Elijah Manuel of possessing ecstasy but charges against him were not dismissed for over a month.

Murr v. Wisconsin

This case involves a possible taking. The Murrs owned contiguous lots which together were just shy of an acre. An ordinance prohibited the individual development or sale of adjacent lots under common ownership that total less than an acre. The Murrs wanted to use or sell the lots separately. They claim the ordinance resulted in an unconstitutional uncompensated taking. To determine whether a taking occurred they argue each plot should be looked at separately.

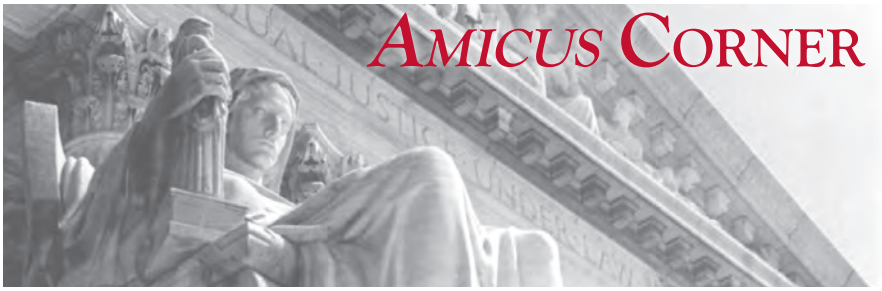
McDonnell v. United States

A jury found former Virginia Governor Bob McDonnell guilty of violating federal fraud statutes. He was accused of having accepted money and lavish gifts in exchange for helping a company secure university testing for a dietary supplement. McDonnell claims he didn't violate the statutes because he didn't engage in "official acts" to help the company. He merely extended to it "routine political courtesies: arranging meetings, asking questions, and attending events." If "official acts" includes such "routine political courtesies," McDonnell argues the federal statutes are unconstitutional.

Trinity Lutheran Church of Columbia v. Pauley

The issue in this case is whether Missouri's "super-Establishment Clause" trumps the federal Free Exercise of Religion Clause. Missouri refused to give Trinity Church preschool a grant to purchase recycled tires to resurface its playground because Missouri's constitution prohibits aid directly or indirectly to churches. In its 2004 opinion in *Locke v. Davey* the Supreme Court held that Washington State's "super-Establishment Clause" prohibiting post-secondary students from using public scholarships to receive a degree in theology did not violate the federal Free Exercise Clause. This case gives the Court an opportunity to expand or limit *Locke v. Davey* outside of the context of state aid for training clergy.

United States v. Texas will be heard on March 2, 2016 and decided by the end of June. Oral argument will be held next Term in some of the other cases accepted mid-January. ML



The Year In Review

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

IMLA's advocacy activity over the past year continued in full stride. In 2015, we filed nearly thirty amicus briefs on behalf of our members, including eight Supreme Court merits briefs and seven Supreme Court petition stage briefs.

While we are still awaiting the results of a number of the petitions for certiorari that we filed, our petition in *Franchise Tax Board v. Hyatt* was granted and the Supreme Court heard oral argument in December 2015. We were also active at the federal and state appellate court level, filing briefs in the First Circuit, Third Circuit, Ninth Circuit, Tenth Circuit, California Supreme Court, Illinois Supreme Court, Ohio Supreme Court, Oregon Supreme Court, Tennessee Supreme Court, Texas Supreme Court and the California Court of Appeal. The issues in these cases were as varied as the courts we filed in, ranging from the use of statistics in a disparate impact claim to issues under the First Amendment pertaining to buffer zones and sign ordinances. We are still awaiting the outcome in most of these cases.

December 2015 and January 2016 were particularly active. In these two months alone, we filed amicus briefs in three petition stage Supreme Court cases and one Supreme Court merits case, and have a number of other briefs in the works before the nation's highest court as well as in state and federal appellate courts. The cases are all of importance to municipal governments and cover a wide range of issues, including everything from privity to appellate jurisdiction over qualified immunity cases and many more.

Below is a small sampling of the more recent cases in which we have recently filed amicus briefs on behalf of IMLA members:

Wasatch County v. Ute Indian Tribe, a Supreme Court petition-stage case, involved a long tortured litigation history between the state of Utah, some of the counties in Utah, and a Native American tribe--the Ute Indians. The underlying dispute revolved around defining the boundaries of Ute Indian reservation. The facts of this case were complicated and largely irrelevant for IMLA's purposes.

What was relevant for IMLA and its members, is that the Tenth Circuit enjoined Wasatch County from prosecuting a member of the Ute Indian Tribe based on an exception to the Anti-Injunction Act that permits enjoining a state court proceeding to enforce a prior federal court judgment. Notably, however, the County was not a party to the prior case (which did not even produce an enforceable judgment as the parties settled). The Tenth Circuit nonetheless held that *every* county was in privity with the State of Utah, which had been a party to the prior suit even though there was no evidence that the State had litigated the prior litigation with Wasatch County's interests in mind. To the contrary, the State settled with the Tribe and the County received nothing for that settlement. On this privity point, the Tenth Circuit noted "[i]t's not just parties who are bound by prior decisions: those in privity with them often are too, and counties are usually thought to be in privity with their states for preclusion purposes when the state has lost an earlier suit." (emphasis added).

IMLA submitted an amicus brief which focused solely on this narrow privity issue. In its brief, IMLA highlighted the circuit split created by the Tenth Circuit's ruling on the question of whether a municipality should generally be held to be in privity with a state for preclusion purposes. IMLA argued that the Tenth Circuit got the rule backward, and that it is the rare case (and not the general rule) that a municipality is in privity with a state and bound by judgments to which the municipality was not a party. Any such showing requires a fact-intensive inquiry to support the unusual finding, which the Tenth Circuit had not done.

IMLA's amicus brief also noted the tremendous waste of taxpayer's resources which would result from the Tenth Circuit's ruling, because it will require municipalities to monitor all litigation involving the state and intervene where necessary. Such an endeavor would be at best an extremely costly endeavor for municipalities and would likely be impossible for most.

On January 22, 2016, IMLA filed another petition-stage Supreme Court brief in *Blanchard v. Brown*. The issue in *Blanchard* is whether a circuit court must accept a district court's conclusion that there are genuine disputes of material facts. IMLA's brief in this case did not argue for overruling *Johnson v. Jones*,

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Application v. Action: Choosing the Appropriate Route.

Halifax Regional Municipality v. Zurich Insurance Company Ltd., 2015 NSSC 373 (CanLII) http://canlii.ca/t/gmpxl

Halifax Regional Municipality ("Applicant") sought a declaration of indemnity from the Court pursuant to an insurance policy with the Zurich Insurance Company Ltd. ("Respondent"). The Respondents argued that what took place was not "sudden and accidental" and therefore does not fall within the scope of the insurance policy. The Respondent subsequently made this motion to convert the proceeding into an action.
HELD: The Respondent's motion is dismissed.
DISCUSSION: The Court first examined the analysis that must be applied on a motion to convert as discussed in *Jeffrie v. Hendriksen*, 2011 NSSC 292 (CanLII):

> 13. Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:
> a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);
> b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);
> c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

The Respondent argued that "justice can only be done if they have the right to examination and cross-examination and to have witnesses appear to have their conduct and testimony assessed by a judge." The Applicant argued that an application is a speedier and more cost effective option for determining the definition of a contractual term: sudden and accidental. The Court agreed with the applicant that this was a case of interpreting the contractual term. The Court held that "at this juncture, the application route is most appropriate and the presumptive one in accordance with Civil Procedure Rules."

Applicant Did Not Present Any Exceptional Circumstances of Sensitivity Necessitating Anonymity.

Budwal v. Brampton (City), 2016 HRTO 46 (CanLII) http://canlii.ca/t/gmw41

Budwal, the applicant ("Applicant") in a Human Rights Tribunal ("Tribunal") process sought an interim decision seeking anonymity.
HELD: The Applicant's request for anonymity was denied.
DISCUSSION: To obtain an anonymity request, the Applicant had to establish that an exceptional circumstance existed that warranted anonymity. The Tribunal assessed the Applicant's argument in light of *Visic v. Elia Associates Professional Corporation*, 2011 HRTO 1230 (CanLII). In *Visic* the Tribunal held: Although a publication ban is a discretionary remedy, it is an extraordinary measure that is used to ensure fairness of the hearing process and/or protect significant privacy interests. The importance of an open human rights process is expressed in the Tribunal's Rules of Procedure, which state that the Tribunal is committed to "a fair, open and accessible process". This is also reflected in Rule 3, which provides that the "Tribunal's hearings are open to the public", except when appropriate to protect the confidentiality of personal or sensitive information.
The Applicant argued that his application contained private information regarding the nature of his disability that may affect his future employment. The Tribunal agreed with the City of Brampton's position that the Applicant did not meet the threshold of exceptional circumstance, therefore anonymity was not warranted. Relying on *Visic* the Tribunal ultimately held that most Tribunal applications contain "personal information about an applicant's disability, or the basis for the perceived disability."

City Employee Was Constructively Dismissed When Her Employment Was Substantially Changed.

Maasland v. City of Toronto, 2015 ONSC 7598 (CanLII) http://canlii.ca/t/gmnv3

The plaintiff, Maasland ("Plaintiff") was an employee at the City of Toronto ("City") since 1989. The City reorganized the structure and responsibilities of various traffic units where the Plaintiff worked. The Plaintiff was moved to a new unit, at the same wage and in the same location. However, the essential terms of her employment were changed. The Plaintiff stopped attending work; using up her vacation and leave time. The City advised that the Plaintiff must return to work or her employment would be terminated for cause. The Plaintiff was ultimately terminated and brought forward a claim for constructive dismissal.
HELD: The Plaintiff was constructively dismissed and is entitled to salary in lieu of notice.
DISCUSSION: The Court examined the test for constructive dismissal; "at the time the alleged breach of the employment contract occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of her employment were being substantially changed" *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 (CanLII), [2015] 1 S.C.R. 500. When examining the plaintiff's role change, the Court found that the plaintiff's situation was analogous to *Corker v. University of British Columbia*, 1990, Carswell B.C. 726 BCSC, where the Court held that constructive dismissal occurred:
Where an employee who had been hired to provide counselling services at a university was unilaterally transferred into a position where she was to be responsible for cataloguing reference materials (her counselling clients were transferred to others). Despite the fact that her title and salary remained the same, the court concluded that she had been constructively dismissed. The employer was not entitled to alter her duties unilaterally in the manner in which it had done because she was hired to provide counselling services and not clerical services.
The City argued that an organization may internally reorganize its structure and it may require an employee to transfer or be re-assigned. The Court found that "the City is not to be faulted for seeking greater efficiencies in the way that it delivers services to the people of Toronto, a reasonable person observing the changes in the plaintiff's terms of employment would, in my opinion, conclude that her role would change substantially."
In summary, the Court concluded that the plaintiff was constructively dismissed the day the reorganization took effect. ML

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a physician may not record a patient's firearm-ownership status unless the physician believes that—because of some particularized information about the individual patient, for example, that the patient is suicidal or has violent tendencies—the patient's firearm-ownership status pertains to the patient's medical care or safety, or the safety of others. The record-keeping provision is sufficiently clear that a person of common intelligence need not guess as to what it prohibits.

Assessing the First Amendment issue, the Circuit Court found that the challenged provisions were not merely laws regulating professional conduct, with incidental restrictions on speech—but directly restricted a "significant amount" of speech. Citing *Reed,* it noted that "The First Amendment does not suffer content-based restrictions of speech lightly. They are presumptively invalid and generally subject to strict scrutiny." However, it noted, certain types of content-based speech restrictions have traditionally received less-demanding judicial scrutiny. Limits on commercial speech receive lesser scrutiny because "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980).

Here, the conversation between the medical professional and patient was within, and relating to, the doctor-patient relationship—professional speech.

The status of professional speech is murkier. The Supreme Court has never precisely addressed the proper level of scrutiny for professional speech. Plaintiffs here contend that even if the First Amendment's waters were previously murky, the Supreme Court's recent decision in *Reed v. Town of Gilbert* makes clear that all content-based restrictions on speech are subject to strict scrutiny. As explained below, there was ample evidence before *Reed* that professional speech also received, at most, intermediate scrutiny and it is hardly clear that anything has changed.

The court noted that the State's regulation of professional speech is a means of safeguarding the public, ancillary to the State's police powers to license and regulate practitioners to protect the public health and well-being generally, which would imply a lesser standard of scrutiny. But it declined to analyze which level of scrutiny applied here, because the Act survived even strict scrutiny analysis: the State clearly had a compelling interest in protecting the fundamental Second Amendment rights of its citizens to keep and bear arms. This included maintaining the secrecy of who owns guns:

> [W]e hold that protecting the privacy of patients' status as firearm owners by prohibiting physicians from inquiring about and recording medically irrelevant information about firearm ownership is also a compelling state interest.

This conclusion required the State to demonstrate that the restriction against record-keeping about firearms was "narrowly tailored." The court noted that the law does not prohibit inquiry into other sensitive areas of discussion, evidencing the Act's narrow focus on protecting the identified compelling interest: the right to privacy in the exercise of one's Second Amendment rights. There were other factors evidencing a narrow approach:

> The Act actually prohibits record-keeping about firearm ownership only when the physician knows such information to be irrelevant..., inquiry about firearm ownership only when the physician lacks a good-faith belief that the information is relevant...., and harassment about firearm ownership only when the physician does not believe it necessary."

In sum, the Act was a narrowly-tailored means of advancing Florida's compelling interest in protecting Second Amendment rights:

Though the Act applies in only a small number of circumstances, when it does apply it plays an extremely important role in protecting patients. The Act is not a legislative revolution, but it does not need to be. It narrowly protects patients in a focused manner in order to advance the State's compelling interest in protecting the Second Amendment's guarantee to keep and bear arms and patients' privacy rights in their medical records, exactly the sort of tailoring strict scrutiny requires. Those are rights that must always be protected in ways big and small. http://media.ca11.uscourts.gov/opinions/pub/files/201214009.reh2.pdf **M.**



Code Enforcement Cont'd from page 21

require that "reasonable accommodations" be made for service animals. And the Department of Justice has explicitly said that places "that prohibit specific breeds of dogs must make an exception for a service animal of a prohibited breed."

This issue was recently litigated[6] in Aurelia, Iowa, and the federal court found that between a municipality's BDL and federal law, the law of the land trumps the local ordinance.

7. BDL is based on long-disproven stereotypes, myths and junk data. The fact is, many of these ordinances were passed decades ago before any accurate data was available. Couple that with panic policymaking and you end up with ineffective and discriminatory laws that do nothing to actually keep communities safe.

A 2013 peer-reviewed study[7] in the Journal of the American Veterinary Medical Association examined every dog bite-related fatality over a 10-year period (2000-2009) and found that breed could only be accurately determined 17 percent of the time. And of that 17 percent, 20 breeds and two known mixes were identified. The study concluded that most dog bite-related fatalities were characterized by "coincident, preventable factors; breed was not one of these."

8. BDL is not publicly supported. Recent polling found that 84 percent of respondents think that responsible dog owners should be allowed to own whatever kind of dog they want, without the government arbitrarily restricting that right.

Not to mention, organizations like the American Bar Association, the Centers for Disease Control and Prevention, the American Veterinary Medical Association, the National Animal Care and Control Association and the American Kennel Club have all publicly rejected BDL.

Taken together, it's no wonder that 19 states have passed laws prohibiting breed discrimination on the local level, and hundreds of municipalities have rejected or repealed BDL.

9. BDL runs counter to the central tenets of community policing. There are tens of millions of pet dogs in our communities, making it vital for our police to be well-trained and well-equipped to safely and humanely deal with the countless dog encounters they're going to have. At the same time, the community should always feel safe in calling on the police when help is needed.

The fact is that BDL interferes with this relationship and makes it difficult to accomplish successful community policing. These arbitrary dog laws force responsible dog lovers underground and erodes their trust in government and the police.

To help improve community policing, the Department of Justice's Office of Community Oriented Policing Services (COPS), in partnership with Best Friends Animal Society and others, released "The Problem of Dog-Related Incidents and Encounters"[8] to help strengthen public and officer safety, and to consider the needs and demands of the community.

10. BDL violates the principles that make America great.

Our laws should focus on keeping us safe and protecting the community. We don't want or need the government telling responsible pet owners what kinds of dogs they can own.

Notes

1. http://www.nbcnews.com/id/31505216/ns/health-pet_health/t/poll-americans-consider-pets-part-family/#.VrEdyi0o6Cp (last accessed Feb. 2, 2016).
2. National Canine Research Council. (2013). *Denver's Breed-Specific Legislation: Brutal, Costly, and Ineffective.* Retrieved from:http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Denver%20BSL%20Brutal,%20Costly,%20and%20Ineffective%20_%20Aug%202013.pdf (last accessed Feb. 2, 2016)
3. http://bestfriends.guerrillaeconomics.net/ (last accessed Feb. 2, 2016).
4. *Nelson v. Town of New Llano*, No. 2:14-cv-803 (W.D. La. Jul. 1, 2014) (enjoining anti-pit bull ordinance).
5. http://www.al.com/news/birmingham/index.ssf/2014/09/city_of_clays_vicious_dog_ordi.html (last accessed Feb. 2, 2016) (Birmingham, Alabama breed specific law held to be unconstitutional).
6. *Sak v. City of Aurelia*, 832 F.Supp.2d 1026 (N.D. Ia. 2011) (enjoining anti-pit bull ordinance as applied against a disabled veteran and his pit bull service dog, where the 5-year old dog had never manifested any aggressive behavior).
7. http://avmajournals.avma.org/doi/abs/10.2460/javma.243.12.1726 (last accessed Feb. 2, 2016).
8. http://ric-zai-inc.com/ric.php?page=detail&id=COPS-P206 (last accessed Feb. 2, 2016).

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a 1995 Supreme Court case which held that an appellate court does not have jurisdiction to review purely factual disputes on an interlocutory appeal of a denial of qualified immunity. Instead, IMLA argued that *Johnson* has created confusion in the lower courts along with a circuit split, with some appellate courts interpreting it so broadly that they will not even review inferences a district court makes based on other disputed facts. Due to the confusion and circuit split, as well as the frequency with which these issues arise, IMLA urged the Court to grant certiorari.

IMLA also noted that the Supreme Court's own cases have recently implied that *Johnson* should be read narrowly. For example, its opinion in *Scott v. Harris* noted that the video evidence "blatantly contradicted" the plaintiff's version of the facts and that the Court therefore should not adopt that contradicted version of the facts.

The facts of *Blanchard* illustrate the problem that broad interpretations of *Johnson* create. In *Blanchard,* John Brown was suicidal and his mother called 911 after finding that he had cut himself in his bedroom with a knife and would not relinquish the weapon. When officers Blanchard and Such arrived on the scene, his mother conveyed the relevant information to them, including that her son had a knife in his possession and had locked himself in his room in the mobile home. After she spoke to the officers, she went into the living room, where she could no longer see what transpired; however, she could still hear the officers and her son.

One officer went outside to look through the bedroom window to assess the situation and saw Mr. Brown drinking a beer and smoking a cigarette. That officer radioed that information and returned to join Officer Blanchard, who then kicked in the locked bedroom door. Both officers observed Mr. Brown holding a knife; blood was dripping down his arm. Brown closed the door as

Continued on next page

the officers moved towards him. Officer Blanchard kicked in the door again and, according to the officers, ordered Mr. Brown to drop the knife, telling him they would have to shoot him if he did not comply. Instead of dropping the knife, Brown raised it over his head and advanced. When he came within five to six feet of the officers, Officer Blanchard shot, killing Brown.

Brown's mother disputes that the officers told her son to drop the knife. She claims she heard her son say something to the effect of; "Fine, come in and shoot me between the eyes and kill me." It is beyond dispute, however, that she could not *see* the events that transpired and that she therefore did not know whether her son had threatened the officers with the knife by raising it and advancing towards them.

Nonetheless, the district court held that the mother's testimony that the officers did not tell her son to drop the knife discredited their allegations that Mr. Brown had raised the knife and advanced on them as they testified. The court therefore found a dispute of material fact as to whether the officers had been threatened by Brown (despite the uncontradicted testimony on this point as the officers were the only ones able to see the events) and concluded that qualified immunity was inappropriate.

The Seventh Circuit concluded that its review of the denial of qualified immunity on an interlocutory appeal is limited and that it cannot "determine whether the district court erred in finding that a genuine issue of material fact exists." The Circuit Court therefore determined that it must accept the district court's conclusion that there was a genuine dispute of material fact as to whether Brown had raised the knife and advanced on the officers at the time he was shot--even though this was an inference the district court drew based on the dispute of fact regarding whether the officers ordered Mr. Brown to drop the knife. After so concluding, the Seventh Circuit held that the denial of qualified immunity was appropriate because it was clearly established that the use of deadly force against a non-resisting or passively resisting suspect was unjustified.

To learn more about IMLA's amicus activity, including a complete list of all cases in which we filed amicus briefs in 2015 please visit our website at www.imla.org/legal-advocacy or contact Amanda Kellar at akellar@imla.org. ML

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the same way to avoid mistakes in care and treatment of the public. Challenge Staff to explain in detail the rationales for the recommendation. Also, if a mistake is made, remedy it, but be transparent in the process.

6. Get competent advice. I have learned over the years to recognize my limitations. If I am concerned about a particular issue in bidding and purchasing, I always contact the best attorneys that I can find. I outline the situation without inserting my opinion and actively listen to what they say about the issue. I also heavily rely on the opinions of my fellow City Attorneys. If I have not seen a particular issue, chances are that one of them has dealt with it.

7. Provide an opportunity for unsuccessful bidders to be heard. Occasionally, elected officials will want to limit the amount of time that an unsuccessful vendor will have to present their position in open meetings. I always encourage the Mayor to allow vendor representatives as much time as they want (within reason) and to provide as much information as they see fit. Also, in advance of the meeting, I will typically encourage the vendor to provide information they deem necessary and will include it as part of the agenda packet. Limiting the opportunity to be heard only serves to substantiate their claims of a lack of due process and will also likely lead them to the conclusion that the process is "rigged." A well written fact sheet that provides all information regarding successful and unsuccessful bidders encourages Staff to be thorough in their evaluation and also the opportunity for all positions, even those that are unsuccessful, to be set forth.

8. Fully explain and justify recommendations to select the second low bidder. If a governing body deviates from the lowest bid, be prepared to explain the rationale in a professional, non-emotional way. It is critically important in these situations to have all information included in the fact sheet and explain the basis for Staff's recommendation to deviate from the low bidder. Prior performance issues (such as failure to meet demand and delivery deadlines, negative repair histories, and other objective criteria) are extremely helpful in supporting these decisions.

9. Don't fear use of the table. If things are not going well and time is not critically important, I believe that there is always value in tabling an item until additional information can be obtained. Sometimes, the heat of the moment can lead to decisions that are not well thought-out and result in litigation. Giving a vendor or contractor the opportunity to provide additional information to Staff can be incredibly helpful in amicable resolution of an issue, particularly in the area of purchasing. As in most instances, time brings clarity.

10. Justify sole source purchases. Various Departments and Divisions of the City of Broken Arrow love to sole source equipment. They use words like "redundancy," "integration," and "structural integrity" in an attempt to confuse me into agreeing with their proposed purchases. Not to be fooled, I subject them to hours of inquiry and required explanation on the sought-after equipment and the need to narrow the field to one particular provider. Purchases from State contracts and purchasing consortiums are increasingly popular in my jurisdiction. Although not technically sole source purchases, it is important to ensure that procurement from these entities are allowed by both your local ordinances and state statutes.

I recently was vindicated from my role as "Ms. No" by an open records request wherein a citizen demanded an explanation as to the need for several proposed purchases. Fortunately, I had effectively utilized the "belt and suspenders" approach to the point of bringing my Information Systems representative to the precipice of insanity. Information provided to the Inquiring Mind proved to be satisfactory due to the foundation laid in the fact sheet and as supplemented by Staff.

Hopefully, you will find some of this information helpful (or, at a minimum, mildly entertaining). Happy purchasing to all and best of luck staying out of the papers!

Second Look Cont'd from page 22

4. Rule 26(b)(3)(A)(ii) (Exception to privilege not to produce trial preparation materials where information not obtainable without "undue hardship"):
   This provision terminates the work-product privilege at the point when the party seeking discovery "shows that it has substantial need for the materials to prepare its case and cannot, without *undue* hardship, obtain their substantial equivalent by other means." (Emphasis added). So the court must decide when the hardship becomes "undue." Once again, the court must use standards indistinguishable from those listed for proportionality in Rule 26(b)(1) in making that decision, because there are no other standards that make sense.
5. Rule 26(g)(1)(B)(iii) (Certification on signing discovery requests, responses & objections):
   This provision provides that in signing discovery requests, responses and objections, an attorney certifies that the instrument is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Is this identical to the Rule 26(b)(1) proportionality factors? No. But it is very similar, and I do not think the distinctions will ever prove to be substantive. I suggest that parties likely will cite to proportionality decisions in litigating false certification allegations as the case law on Rule 26(b)(1) proportionality evolves and becomes available for citation, because the considerations are so closely analogous.
6. Rule 30(b)(6) (Representative witness must testify to facts "reasonably available to the organization"):
   Once more, I think that the reasonableness of the effort required for a 30(b)(6) witness to learn about facts known to the organization will be decided on proportionality principles, whether or not the lawyers and the court explicitly acknowledge consulting those principles.
7. Rule 37(e) (discovery sanctions for loss of "electronically stored information . . . because a party failed to take reasonable steps to preserve it"):
   The "reasonableness" of preservation steps must be measured in terms of proportionality. However, in this instance the factors should be viewed in light of facts that were known or reasonably should have been know when the information was lost. At the pre-litigation stage, before claims or damages could have been fully known, perhaps less care or less expense to preserve information on some topics might have been reasonable even if greater efforts preservation would have been required at a later stage had the information still existed.[14]

Practical Implications

Because these other instances of de facto proportionality use terms other than "proportionality" the courts may apply, or purport to apply, distinct rules to these other instances. But the similarities in relevant considerations between Rule 26(b)(1) "proportionality" and the "alter ego" instances that I have identified are so close that we should consider them all when addressing proportionality issues under any name, at least in the following contexts:

1. Consider all the instances as a check list – should we cite more than one rule provision in an objection or motion?
2. Consult citations to the alter egos when litigating an issue under one of them to search for persuasive authority.

There is one potentially substantive distinction between Rule 26(b)(1) proportionality and the alter egos: Rule 26(b)(1) purports to establish a non-discretionary limit on the scope of discovery, whereas the alter egos each set out discretionary standards for conduct that is presumptively within the permissible scope of discovery. However, given the trial courts' discretion to determine proportionality, Rule 26(b)(1) seems as elastic as any discretionary rule. One might think that appellate courts should be less deferential to a trial judge's proportionality conclusion, than to the trial court's exercise of discretion on one of the alter ego issues, because Rule 26(b)(1) supposedly imposes a non-discretionary standard. But I doubt that will happen. Trial courts have so much discretion in adjudicating the individual standards listed in Rule 26(b)(1) that appellate courts will give the trial courts' ultimate proportionality conclusions great deference.

Notes

1. "The present amendment restores the proportionality factors to their original place in defining the scope of discovery." Fed. R. Civ. P. Rule 26, Committee Notes on Rules—2015 Amendment, online at (among many other sites) https://www.law.cornell.edu/rules/frcp/rule_26 (last visited Jan. 22, 2016) (hereinafter "Note R. 26 - 2015 Amend."). This note also provides a good history of proportionality's meandering and evolving place in the federal discovery rules.
2. Online at https://www.law.cornell.edu/rules/frcp/rule_26 (last visited Jan. 22, 2016)(Emphasis added).
3. The drafters insist that the amendment merely clarifies and highlights, but does not substantively change, the existing proportionality standard for discovery: "This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections. Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." Note R. 26 - 2015 Amend. (Paragraph break omitted). We shall see.
4. The drafters caution, "Nor is the change intended to permit the opposing party to refuse discovery simply by making a *boilerplate* objection that it is not proportional. The parties and the

court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." *Id.* (Emphasis added). This remark would permit disproportionality objections, but require them to conform to the specific facts of a discovery dispute as they exist in a specific case – forbidding only those disproportionality objections that are not tailored to the facts.

5. *See* Fed. R. Civ. P. 26(b)(2)(B) ("*Specific Limitations on Electronically Stored Information*").

6. *Compare* Fed. R. Civ. P. 26(b)(2)(C)(i) and (ii) *with* Fed. R. Civ. P. 26(b)(2)(C)(iii).

7. *See* the factors italicized in R. 26(b)(1) as reproduced above. I do not suggest that judicial discretion should be limited, only that the absence of meaningful limits to this discretion makes difficult or impossible any practical distinction between the standards used to decide nominal proportionality questions under Rule 26(b)(1), and the standards used to decide proportionality "alter ego" issues arising under other rules. I think that the result will be that similar or identical factors will be considered in resolving the similar issues.

8. Rule 26(b)(1) gives the trial judge explicit authority to limit the scope of discovery, but omits the authority to expand it, by court order, suggesting that the court cannot or at least should not expand the scope of discovery to permit disproportionate discovery. However, since the proportionality factors so subjective and usually evade quantification, I do not view this "limit" as providing an effective check on court discretion except in extreme situations. Note too that other rule provisions give the court discretion to alter some discovery limits. *See, e.g.*, Fed. R. Civ. P. 26(b)(2)(A) ("By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions"). This further vitiates any meaningful restraint on judicial discretion when making proportionality decisions.

9. *See, e.g.*, *United States v. Clarke*, 134 S. Ct. 2361, 2368 (2014)(tax case).

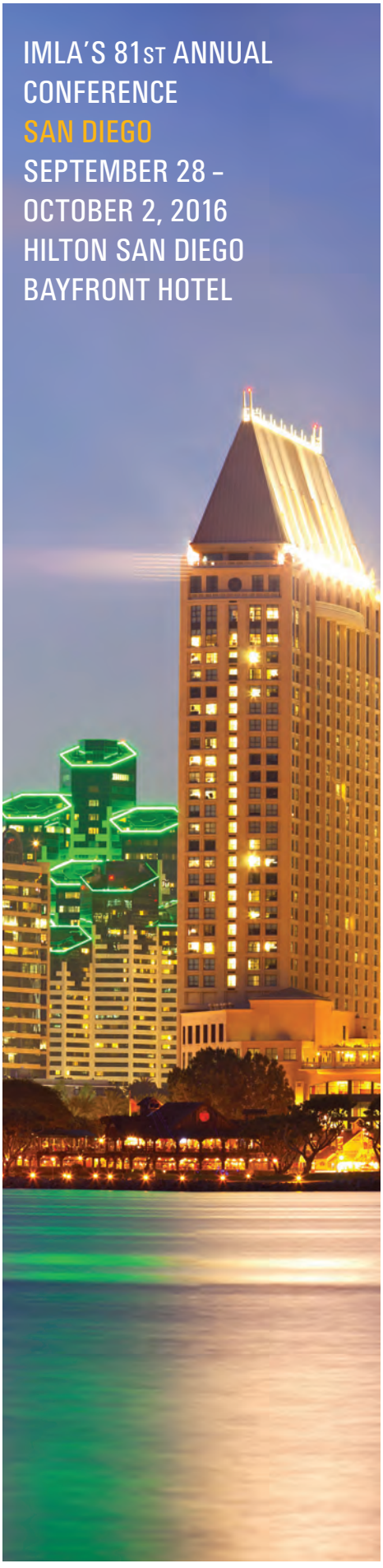
10. *See, e.g.*, Fed. R. Civ. P. 30(d)(1) (for deposition on oral questions, "court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent"), 31(a)(2) (court must grant leave to take additional deposition on written questions "to the extent consistent with Rule 26(b)(1) and (2)"), 33(a)(1) ("leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2)"). Rule 26(b)(2) sets out the general default limits on the "frequency and extent" of discovery. One effect of these provisions that incorporate Rule 26(b)(1)'s proportionality standards by reference is to further insulate trial judges' proportionality determinations from appellate review.

11. Please do email me at peter.haskel@dallascityhall.com if you find that I have missed any.

12. Perhaps this is a slight exaggeration as applied to one or more of these "alter egos." Lawyers can always devise additional factors on any issue. But I question whether any such additional factors would be materially different from those in Rule 26(b)(1), or, more important, whether they would lead to different results.

13. Rule 26(b)(1) includes as one proportionality factor "whether the burden or expense of the proposed discovery outweighs its likely benefit." I suppose that the reverse is not necessarily always so: Discovery might be "unreasonably cumulative," Rule 26(b)(2)(C)(i), without being unduly burdensome to produce, Rule 26(b)(1), if the cumulative information were easy to produce (*e.g.*, ESI that was already saved, reviewed, indexed, and tagged so that it could be spit out by a computer). But such instances will be few and usually unworthy of judicial protection.

14. "This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998). ML



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