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SECOND LOOK: Alternative Ways to Resolve Discovery Disputes

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THE MUNICIPAL LAWYER MAGAZINE



DEFENDING EXCESSIVE FORCE ACTIONS: A STEP BY STEP APPROACH

By Lisa Maki, City of Boston Law Department

Municipal attorneys require specialized responses in Section 1983 excessive force actions against police officers. The author delivers a tutorial on Fourth, Eighth and Fourteenth Amendment qualified immunity litigation strategies.

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PLEADINGS AND MOTIONS PRACTICE: PUTTING THE PLAINTIFFS ON TRIAL

By Tamara Baines and LaShawn Terry, City of Atlanta Law Department

Whether in a Section 1983 context or otherwise, the municipality is typically a defendant. Timely pre-trial, trial and post-trial motions are critical to counter plaintiffs who pursue conclusory or unsupported claims.

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THE PARADOX THAT IS CUBA

By Steven Meyers, Meyers Nave, Oakland, California

A mere 90 miles from American shores, a fascinating contrast in values and culture remains to be explored. A group of IMLA International Committee lawyers take a journey to experience Cuba's many dichotomies.

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EDITOR'S NOTE:

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THE MUNICIPAL LAWYER MAGAZINE

Dear IMLA Reader-

The May-June issue truly highlights what is superlative about IMLA and its many members who contribute to this publication. We begin by joining Steve Meyers and other IMLA International Commitee colleagues on their January 2016 trip to Cuba, reminding us again that there is an "I" in IMLA—and that we are privileged to enjoy significant freedoms as American and Canadian government lawyers.

Our main articles focus on Section 1983, to which IMLA devoted a separate three-day track at its just-completed conference in Washington D.C. Tamara Baines and LaShawn Terry of the Atlanta Law Department provide a refresher on the pleadings and motions available to rebut overzealous Section 1983 plaintiffs, while Boston Law Department's Lisa Maki delivers a comprehensive tutorial on defending police excessive force cases.

Continuing in a practical vein, in "Second Look" Pete Haskel provides advice on reducing waste and aggravation by minimizing discovery disputes. Gregg Hagopian, Milwaukee Assistant City Attorney, calls for more judicial supervision over zombie mortgages in "Op-Ed." And in "Practice Tips," we borrow from the New Hampshire Municipal Association to provide some useful sign ordinance parameters as the dust settles following last June's Supreme Court decision in *Reed v. Town of Gilbert.*

We also take the opportunity to identify and honor the many extraordinary appellate practitioners who contributed their time and skills in 2015 to advancing IMLA's amicus positions before the highest courts in the land.

Finally, we are pleased to resuscitate "ListServ" under the pen of Brad Cunningham, who promises to pick up where our longtime friend Kelly Addy left off.

We hope you will find this issue of *Municipal Lawyer* to be entertaining and informative—and we again invite you to submit articles worthy of sharing with our membership

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 policies, qualified immunity, technlogical developments, municipal 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.

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

Section 1983 — And Beyond

By Herb Thiele, IMLA President



Greetings! And welcome to the May-June edition of *Municipal Lawyer* magazine.

By the time you are reading this, IMLA will have just conducted its successful Mid-Year and Section 1983 Seminars at the Omni Shoreham Hotel in Washington, D.C. The attendees will have acquired significant new information on Section 1983 issues as well as myriad other general local government law matters that are at the forefront of each of our offices every day. Hopefully you will also have had the opportunity to meet with our vendors and supporters, and had social time to chat with your fellow local government lawyers from around the United States and Canada.

Speaking of Section 1983 liability issues, a major feature in this issue of *Municipal Lawyer* is devoted to Section 1983 excessive force issues. We hope that you find it to be helpful in your practice and a tool for further research as the cases are presented to you. As local government lawyers in the United States, we have seen Section 1983 litigation increase dramatically over the past decade or so. Not only are issues raised regarding employment law matters, as my client/local government has seen in the past few years, (including alleged improper training and supervision and First Amendment issues), but due in part to the ability to seek attorney's fees and costs, Section 1983 has been pled in new areas of the law such as zoning and land use (for procedural and substantive due process, and coupled with Fifth Amendment takings) and elections (alleged due process violations). So in combination with the IMLA Mid-Year Seminar, our comprehensive webinar series and *Municipal Lawyer*, IMLA aims to provide you with continuing information on this growing and ever more important topic.

In addition, the Program Planning Committee of IMLA is putting the finishing touches on our Annual Conference that will be taking place September 28, 2016 - October 2, 2016 in San Diego. It will be another fantastic opportunity to meet and converse with your government law colleagues on new areas of the law. If you have not been to southern California, the City of San Diego and their City Attorney's Office have been working hard to put together a superlative program that goes far beyond the Continuing Legal Education benefits. Our hotel location on the bay front is in the heart of all the activity that you will want to take in during your spare time. If you have not already done so, this would be the perfect opportunity to register and secure your hotel reservation as I am sure they will be going fast for this wonderful location.

In addition to IMLA's two main seminars and conferences, IMLA will have a presence at a number of other upcoming events. In June, the City of Atlanta will be the location for IMLA's "Top 50" program for those cities that qualify for this exciting one day program with a focus on the challenges and needs of the Top 50 local governments among our membership. And the "IMLA in Canada" program will take place in Toronto on June 2, 2016. This will be a perfect opportunity for all of our Canadian members to get together to exchange ideas and to hear presentations on topics directly relevant to Canadian local governments. Finally, while plans are still being finalized, IMLA, in cooperation with the National Association of Counties and the National Association of County Civil Attorneys, will have a presence at the upcoming National Association of Counties conference to be held in Los Angeles County in July. At that time, IMLA will be joining with these other organizations in making presentations specifically tailored for the elected officials who will be attending the NACo Annual Conference. Those topics will include courthouse relationships with your Manager and Attorney; how to run an effective meeting; and a significant track on ethics and honest services issues. IMLA is very pleased with this new affiliation and hope that we will continue to present in cooperation with NACo in the years ahead.

Lastly, let me once again thank our Executive Director and General Counsel Chuck Thompson and the IMLA staff for their continued hard work in making IMLA the premiere local government lawyer organization in North America, and thank all of the members of our various committees, our state chairs, our regional chairs, and all of the officers and members of the International Municipal Lawyers Association Board of Directors who also strive to make IMLA an organization that members can be proud of. If you ever have any issues or questions, please feel free to contact Chuck or myself so that we can continue to improve IMLA.

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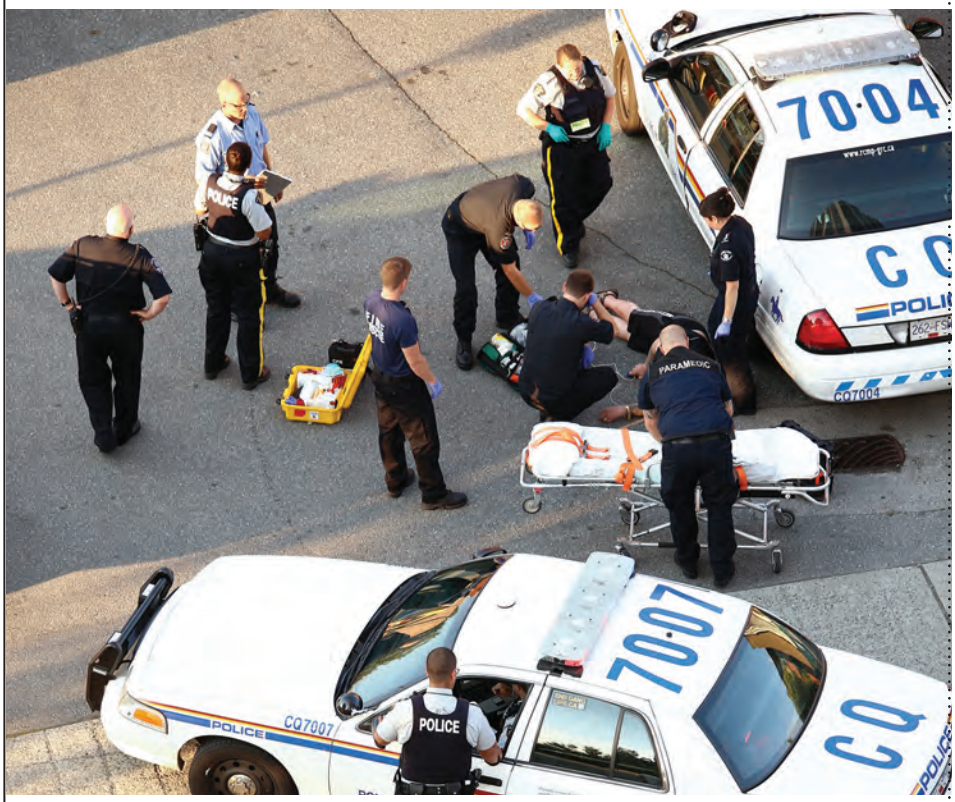
Defending Excessive Force Actions: A Step by Step Approach to Defending Law Enforcement Officers Accused of Using Excessive Force

By: Lisa Maki, Senior Assistant Corporation Counsel, Boston Law Department



Not since the 1992 Los Angeles riots over the acquittal of four Los Angeles police officers charged with beating Rodney King, has the issue of the use of force by police officers captured the national audience. The shooting death of Michael Brown, an unarmed black teenager in Ferguson Missouri, in August 2014, has changed the landscape in how municipalities and police departments must deal with the use of force by police officers. No longer will the public simply accept the officer's version of events as true. In fact, police officers will face heightened scrutiny when explaining the justification for their use of force.[1] It is in this new era of smartphone video recordings and the public's demand for government transparency that municipalities and police departments must confront excessive force actions. This paper will provide a roadmap in defending excessive force actions against police officers under the public microscope.

I. Assessing the Complaint: What Constitutional Right Did The Use Of Force Infringe?[2]

The first step upon receiving a complaint that brings allegations against an individual police officer[3] for excessive force is to determine what constitutional right was allegedly infringed. Oftentimes, this determination can be made by identifying the plaintiff's liberty status.[4] Depending on the plaintiff's liberty status, i.e., whether the plaintiff was a free citizen, a pretrial detainee (not yet convicted, but awaiting trail), or a prisoner (convicted), different constitutional standards apply to the level of force used by the officer.

An excessive force claim brought by a free citizen is judged by either the Fourth Amendment objective reasonableness standard or the Fourteenth Amendment substantive due process "shock the conscience" standard.[5] An excessive force claim brought by a pretrial detainee is subject to the Fourteenth Amendment objective[6] reasonableness standard. And finally, a convicted prisoner's excessive force claim is analyzed under the Eighth Amendment cruel and unusual punishment standard.

A. *The Plaintiff Was A Free Citizen, But Was He "Seized" Within The Meaning of The Fourth Amendment?*

In order for a plaintiff to have a claim for excessive force under the Fourth Amendment, he must show that (1) he was "seized" within the meaning of the Fourth Amendment; and (2) that the force was objectively unreasonable.[7] Thus, if the plaintiff was a free citizen at the time the force was used, it must then be determined whether the plaintiff was "seized" within the meaning of the Fourth Amendment.[8] In other words, just because a free citizen was subjected to force by a police officer does not *necessarily* mean that the Fourth Amendment objective reasonableness standard will apply. Thus, in order for the use of force to be analyzed under the Fourth Amendment reasonableness standard, a seizure must have occurred.[9]

The Supreme Court has defined a "seizure" under the Fourth Amendment the following ways: (1) a police officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen;" (2) "a reasonable person would have believed that he was not free to leave" and the person in fact submitted to the assertion of authority of the police officer; and (3) "there was a governmental termination of freedom of movement through means intentionally applied."[10]

Thus, if the plaintiff was not the intended target of a police officer's use of force, for example (1) was an innocent bystander shot by police; (2) was bystander injured as a result of a crash involving a high speed pursuit; or (3) was subjected to use of force outside the context of an arrest or a detention, the Fourth Amendment will not be implicated. But, if the means in which the officer used in his attempt to "seize" the individual results in a different detention than the officer had

originally intended, a seizure has still occurred.[11] For example, if an officer sets up a road block to stop a high speed pursuit intending to force the driver to voluntarily stop at the road block, but instead the driver crashes into the road block and dies, the driver was "seized" within the meaning of the Fourth Amendment because the road block was the means, or "instrumentality," that the officer intended to bring about the seizure.

II. The Substantive Due Process Clause: The "Shock the Conscience" Standard

If the plaintiff was not "seized" within the meaning of the Fourth Amendment, that, however, does not end the analysis. Claims for excessive force outside the context of an arrest are analyzed under the Fourteenth Amendment substantive due process standard.[12] Outside of the Fourth Amendment "search" or "seizure" context, the Supreme Court has recognized that an excessive-force claim may be based on substantive due process under the Fourteenth Amendment.[13] "The standard for showing excessive force in violation of the Fourteenth Amendment, therefore, is higher than that required to show excessive force in violation of the Fourth Amendment." [14]

III. The Fourth Amendment Reasonableness Standard: *Graham v. Connor*

In *Graham v. Connor*, 490 U.S. 386, (1989), the Supreme Court set forth the standard for analyzing excessive force claims under the Fourth Amendment. The *Graham* Court explained that determining whether the force used to effect a particular arrest was reasonable required a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing government interests at stake.[15]

The *Graham* Court formulated a test to determine "whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." [16] The *Graham* Court identified three factors to assist in determining whether under the "totality of the circumstances" the force used was objectively reasonable:

1. **the severity of the crime;**
2. **the immediate threat that the suspect posed to themselves, others, or the officers; and**
3. **whether the suspect was actively resisting or evading arrest.**[17]

The *Graham* Court also recognized that "[n]ot every push or shove, even it if may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment."[18]

> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.[19]

An officer's subjective intent is irrelevant. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[20] "The test of reasonableness is not capable of precise definition or mechanical application."[24] When a plaintiff asserts claims for both unlawful arrest and excessive force, the Court must "analyze the excessive force claim without regard to whether the arrest itself was justified."[22]

Each of the three *Graham* factors informs the ultimate question of objective reasonableness: whether a reasonable officer presented with the same circumstances, regardless of his or her subjective intent, would have taken the same course of action.[23]

IV. Deadly Force

The use of deadly force is also governed by the Fourth Amendment reasonableness standard. Whether the use of deadly force is reasonable "turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation."[24] Deadly force is reasonable when:

1. **the suspect poses an immediate threat of serious physical harm to the officers or others;**
2. **the suspect committed a crime involving the infliction of threatened infliction of serious harm, such that his being at large represents an inherent risk to the general public;**[25] **and**
3. **The officers either issued a warning or could not have done so before using deadly force.**[26]

The reasonableness of the use of deadly force must be determined "from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight."[27]

V. Beyond Excessive Force

A. Duty to Intervene

Even if the defendant officer did not actually participate in the use of force, he may still be held liable for failing

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Lisa Skehill Maki is a Senior Assistant Corporation Counsel for the City of Boston Law Department where she represents public officials and police officers at all stages of litigation in state and federal courts. She concentrates on civil rights litigation involving police misconduct and employment discrimination. She was recognized as an Up and Coming Lawyer by *Massachusetts Lawyers Weekly* in 2013. Attorney Maki graduated from Suffolk University Law School where she was a staff member and editor of the Suffolk University Law Review.

Defending Excessive Force Cont'd from page 7

to intervene to prevent the use of excessive force. A police officer has a duty to intervene to prevent the use of excessive force if he is informed of facts that establish a constitutional violation and is able to prevent that violation.[28] Therefore, a police officer may be sued for both his own use of excessive force on the plaintiff or his failure to take reasonable steps to attempt to stop the use of force by fellow officers.[29]

"An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (1) that excessive force is being used; (2) that a citizen has been unjustifiably arrested; or (3) that any constitutional violation has been committed by a law enforcement official."[30] "Failure to intercede results in liability where an officer observes excessive force is being used or has reason to know that it will be."[31] "'In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring.'"[32]

B. Failure To Provide Medical Treatment

Oftentimes, a Fourth Amendment excessive force claim is accompanied by a Fourteenth Amendment due process claim for failure to provide medical treatment. The Supreme Court has held that Officers are required to "provide medical care to persons . . . who have been injured while being apprehended by the police."[33]

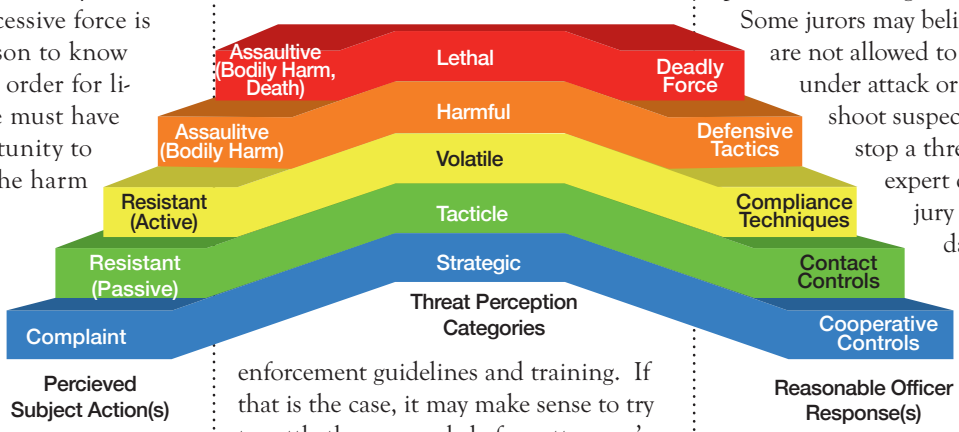
VI. You Have Determined the Legal Landscape: Now What?

A. Motions to Dismiss

A defense attorney must decide at the outset whether the Complaint is subject to a motion to dismiss. Excessive force claims are some of the most factual and circumstantial-dependent claims to defend, which require significant discovery in order to establish whether conduct was reasonable. Filing a motion to dismiss that has an unlikelihood of success may serve only to drive up the plaintiff's attorneys' fees which may increase the cost of settlement later on.

B. Understanding Use of Force

It is important to develop a theme for your case early on. In order to do this, it is important to have a firm understanding of use of force principles. One of the best ways to do this is to consult with a use of force expert. A use of force expert can be an instructor from the state or municipality's police academy or a private law enforcement expert on the use of force—oftentimes retired police officers. Although case law *may* shed light on whether the use of force was reasonable, no two use of force cases are identical. So, consult with a use of force expert prior to discovery. A use of force expert may determine that the force was excessive based on law enforcement guidelines and training. If that is the case, it may make sense to try to settle the case early before attorneys' fees start to pile up.



If, on the other hand, the use of force expert finds that the use of force was reasonable it is important to understand how to present the reasonableness of the use of force to the Court at summary judgment and/or to a jury. Many law enforcement agencies[34] rely on a use of force "model" or a use of force "continuum."[35] Therefore, it is important to understand the principles guiding officers in their decisions to use force.

In addition to consulting with an expert, it is important to gather information on the defendant officer's training at the academy and the policies and procedures of the police department. Although police department procedures and guidelines do not establish the constitutional standard, courts have found that such guidelines and procedures are relevant to the Fourth Amendment "reasonableness" standard.[36]

C. Experts

A use of force expert can be extremely helpful at trial in excessive force cases. Although the defendant officer can and should testify as to his training, departmental rules and procedures, and his understanding of the appropriate levels of force, the jury may be skeptical of his testimony given that he is the one accused of using excessive force. Jurors will likely expect the defendant officer to say that which best serves his defense. Expert witnesses lessen this problem.[37]

Policing is a profession and officers undergo significant training and retraining in the use of force. Jurors may come to service with impressions of use of force by police officers from the media, movies, and novels without consideration of the specialized training officers undergo. Some jurors may believe that officers are not allowed to use force unless under attack or that they should shoot suspects in the leg to stop a threat. A use of force expert can inform the jury that national standards in policing do not require shots to the leg or for an officer to wait to be attacked before using force and why these preconceived notions would significantly increase the risk to the safety of both the public and police officers. Experts can also be helpful in resolving disputes of facts in deadly force cases by ballistic reconstruction.

Use of force experts can teach the jury that use of force is strategic and tactical rather than an emotional response to a resisting suspect. Educating the jury on the spectrum of perceived resistance/threat from a suspect, i.e., compliant, passive resistance, active resistance, and assaultive resistance along with the appropriate corresponding response to each level of resistance, i.e. verbal commands, pepper spray, taser, distraction techniques, pain compliance techniques, and deadly force is essential in a post-Ferguson world.

Finally, experts may be allowed to opine as to whether the use of force was appropriate based on law enforcement standards. Although reasonable conduct under law enforcement standards does not compel a finding of Fourth Amendment reasonableness, such testimony is highly relevant and persuasive.

If an expert is cost prohibitive, departmental policies on the use of force and training manuals can be very effective in educating the jury as to the guidelines governing force. Many department guidelines are comprehensive and define the levels of resistance along with the correlating levels of force that officers are allowed to use to overcome that resistance. Demonstrating at trial that an officer followed departmental rules when using the force in question can be a significant step towards showing that the force was "reasonable."

In addition to an expert on the use of force, forensics experts can also be helpful. For example, in a situation where an officer has used deadly force, a forensics/ballistics expert may be able to recreate the scene to demonstrate how the scenario unfolded at the time of the shooting from the officer's perspective. Medical experts are also useful in excessive force cases. Medical experts can opine as to whether certain alleged injuries were pre-existing, the possible causes of injuries,[38] and, in shooting scenarios, perhaps the position of the suspect when he was shot.

VII. Qualified Immunity—Staging the Defense

Prior to embarking on discovery, a defense attorney must know what the clearly established law is with respect to the level of force in question. It is also important to determine to what extent the Court views the "totality of circumstances" when determining the reasonableness of the use of force. Some Circuit Courts only look to the use of deadly force at the moment the force was used.[39] Other Circuit Courts consider the events leading up to the need to use deadly force to determine reasonableness.[40]

For example, if it is a case involving a taser, it is critical to know (1) what authorities[41] the Circuit Court considers for purposes of qualified immunity; (2) the level of factual similarity[42] the Circuit Court considers; (3) all cases in which it was held that the use of a taser was objectively unreasonable; and (4) the time frame in which the court looks to in determining reasonableness.

In order for the Court to grant the officer qualified immunity for particular use of a taser, the facts and circumstances must be substantially different from cases where the use of the taser was found to be objectively unreasonable—otherwise the officer would have known that his conduct was unlawful. With those cases in mind, you will need to seek out facts to differentiate your case from those in which the use of the taser was found to be unreasonable.

Defense attorneys should also shape their discovery plan with these *Graham* reasonableness factors in mind: (1) the severity of the crime; (2) whether the plaintiff posed an immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting or attempting to evade arrest by flight. For deadly force cases, it is important to establish facts to show that the officer had probable cause to believe that a suspect posed a threat of serious physical harm to the officer or others.

Perhaps the defense is that the officer mistook a fact, i.e., mistakenly believed that the plaintiff was going to resume his attack and/or flight when he was really submitting, or that the plaintiff was armed when he was in fact unarmed. It is crucial to establish every incremental move made by the plaintiff up to and including the time the force was used. Even if the officer was mistaken in the amount of force he used, he will be entitled to qualified immunity if the mistake was reasonable.[43]

A. Discovery

Discovery requires that the defense attorney depose the plaintiff and interview/depose any and all witnesses. If the plaintiff is deposed before anyone else, he will be locked into a story early on. Deposing the plaintiff after the officers and/or other witnesses gives the Plaintiff an opportunity to favorably shape his testimony. Be sure to have conducted enough of an investigation before the plaintiff's deposition to know which questions must be asked. Consider videotaping the plaintiff's deposition and ask the plaintiff to demonstrate the exchange. Oftentimes, plaintiffs fall victim to exaggerating their story in the deposition in the hopes of getting a large settlement. Exaggerated claims undercut the credibility of the Plaintiff at trial, especially if it has been acted out on camera.

In addition to depositions, video footage (dash cams, body cams, surveillance video, etc.) can be very revealing. Allegations of excessive force oftentimes arise many years after the incident—meaning crucial video evidence has since been deleted. Plaintiff's medical records are crucial in excessive force cases because the records will contain the plaintiff's first report of the use of force which may contradict the allegations later. Furthermore, a record of minor or *de minimis* injuries may contradict the plaintiff's exaggerated allegations of brutal force. Dispatch recordings which may have captured the officer's description of the events in real-time may also prove valuable. Photos of the scene, police reports, the booking photos of the plaintiff, use of force forms, and visible injury reports are also critical in defending an excessive force case.

In addition, obtain a copy of the plaintiff's criminal record. Had the officer ever arrested the plaintiff before? Was the officer familiar with the plaintiff's criminal background at the time the force was used? These facts may prove significant at trial. On the other hand, plaintiffs' attorneys routinely request the internal affairs and personnel files of the officers. Because public records laws vary state to state, it is important to know what information is confidential and what is public with respect to police officer personnel and internal affairs files. For example, in Massachusetts, closed internal affairs investigations are considered public record, while records of discipline against the officer are confidential.[44]

B. Summary Judgment

Summary judgment is typically the first opportunity the defense attorney has to raise the issue of qualified immunity because excessive force cases are so factually and circumstantially depen-

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dent. Summary judgment in an excessive force case should be submitted where the undisputed facts taken in the light most favorable to the plaintiff[45] show that the officers did not violate a constitutional right, or that the law was not clearly established, or that an objectively reasonable officer could have concluded (even mistakenly) that his conduct did not violate the plaintiff's constitutional rights.[46] Video evidence such as body cams or dash cams may prove critical at the summary judgment stage. If the video depicts the incident from the perspective of the officer, the court does not have to take the plaintiff's version of events as true if it is contradicted by the video.[47]

Arguing qualified immunity at the summary judgment stage requires careful attention to the disputed and undisputed facts. In cases of deadly force, where there are no witnesses to contradict the officers' version of events, courts can look to circumstantial evidence such as physical evidence or inconsistencies among the officers' testimony, to determine whether there is a credibility determination to be resolved by a jury.[48] At the summary judgment stage, the district court determines which facts a jury could reasonably find from the evidence presented by the litigants.[49]

An officer has a right to interlocutory appeal if he is denied qualified immunity.[50] The Appeals Court however, may not review factual determinations by the district court but rather only issues of law.[51]

VIII. Officer Credibility

Post-Ferguson, officer credibility has declined based on the numerous videos showing officers engaged in the use of excessive force.[52] Video evidence of police misconduct has demonstrated to the public at large that police misconduct actually *does* happen.[53] Therefore, juries may be skeptical of officer testimony in civil rights trials involving the use of force.[54] After all, in order for the officer to justify his use of force, the jury must believe the officer's testimony that the plaintiff had committed a serious crime or was resisting arrest or engaged in threatening conduct.

The defense attorney wants to be sure to keep out any and all prior allegations of misconduct and/or discipline for prior misconduct because it would be unduly prejudicial propensity evidence. If the excessive force case involves a *Monell* claim against the municipality, be sure to bifurcate the two portions of the case for trial so that any allegations of prior misconduct against the officer (that may be relevant to the *Monell* claim for failure to supervise and/or discipline) be kept out during the "constitutional phase" of the trial. Otherwise, allowing the jury to hear that the officer has prior allegations of misconduct against him would prevent the officer from receiving a fair trial. Of course, any finding that the officer had been disciplined for "untruthfulness" would be allowed into evidence for impeachment purposes.

Finally, some officers testify better than others. A nervous police officer could be mistaken for an untruthful witness. Therefore, it is imperative that a defense attorney seek out corroborating evidence by third party witnesses, recordings, or videos during the discovery phase. Although other officers may have also witnessed the incident, their testimony may also be viewed skeptically, i.e., the "blue wall" of silence. If corroborating evidence does not exist, substantial effort must go into preparing the officer for testimony and cross-examination. In a "he said, he said" case, credibility is everything.

IX. Using the Facts Affirmatively At Trial

In order to defend the use of force, a defense attorney must use the facts to show that the force used was reasonable. That is because the use of force in any given police case is almost always a reaction to the plaintiff's conduct. So at trial, a defense attorney needs to shape the trial around the *Graham* factors in order to show that it was the *plaintiff's actions* or inactions that caused the Officer to use that particular level of force. Discuss the *Graham* factors in the opening and closing. The officer will need to be able to articulate at trial with particularity the conduct of the plaintiff at the time the force was used.

A. Graham Factors Applied:

In *Kinne v. Pierre, et al.* USDC No. 2012 cv 11466-RWZ, the Plaintiff, Sarah Kinne, a young female painter and art teacher, parked illegally in a pharmacy parking lot while running errands. A short time after she left the parking lot, a tow truck operator began towing her car by lifting the rear of her vehicle in the air. While the car was still raised in the air, but before the tow truck driver had begun driving away, the Plaintiff returned and, upon observing that her car was about to be towed, jumped into the driver's seat demanding that it be released to her. The tow truck operator called 911 and two police officers responded. When the officers arrived they asked the Plaintiff to get out of the vehicle. She responded by screaming for help to passersby, yelling that the police and tow truck driver were stealing her car, and that her civil rights were being violated. The officers then threatened to arrest her if she did not get out of the car. She responded by rolling up her window and placing her keys in the ignition. At that point, one officer opened the car door, reached in and handcuffed one of her hands. He was unable to secure the second handcuff because she was flailing her arms and kicking her legs. While the officers were trying to pull her out, one officer held on to the chain of the handcuffs. The officers were eventually able to pull her out of the car by her arms and leg, bring her to the ground and place her under arrest.

The Plaintiff sued the officers alleging that they had used excessive force by pulling on the chain of the handcuff that had been attached to her wrist, causing permanent ligament damage to her right wrist. The Plaintiff, an artist/painter, claimed that she was no longer able to paint due to the chronic pain in her right wrist.

Severity of the Crime:[55]

> Misdemeanor—disorderly conduct. Because disorderly conduct is not considered a serious crime, this factor weighed in favor of the Plaintiff. The focus of the defense was therefore, shifted to the second and third *Graham* factors: threats to safety and resistance to arrest.

Threat to Public and Officer Safety:

The Plaintiff's screams for help that her car was being stolen had caused dozens of onlookers to congregate in a busy downtown parking lot creating a risk that onlookers could be struck by an unknowing vehicle entering and/or exiting the parking lot.

Although the Plaintiff, a young woman of approximately 120 lbs was not a physical threat to two male officers, both of whom weighed over 200 lbs, the Plaintiff's screams for help that her car was being stolen put the officers at risk of being attacked by an angry mob that may incorrectly perceive that she is being carjacked and/or being attacked by police.

The other threat posed to the officers was that they were trying to pull a noncompliant person out of a car that had been lifted by a tow truck. If the struggle between the plaintiffs and the officers caused the car to fall, they could all have been seriously injured. Finally, had the Plaintiff been able to turn the ignition and hit the gas, both the officers and the Plaintiff would have been seriously injured.

Actively Resisting or Evading By Flight:

The Plaintiff was passively resisting by refusing to get out of the car. The Plaintiff was actively resisting by flailing her arms and legs once the officers placed a handcuff on her. The Plaintiff was also attempting to evade the arrest by flight when she attempted to start the car.

Here, the jury was also presented with evidence on the Boston Police Department's rules and procedures for handcuffing. The rules stated that officers are never to let go of a handcuff that is only attached to one hand of a suspect because handcuffs can be used as weapons. The reason the officer held on to the handcuff? Not to inflict pain or cause injury. But rather, to prevent an actively resistant suspect from using a loose handcuff as a weapon.

The case resulted in a defense verdict.

In *Fedorishin v. Leahy, et al.* SUCV No. 2011-04623, the Plaintiff sued an officer for excessive force when he arrested him for disorderly conduct outside a night club by grabbing him out of a crowd of people, throwing him against the hood of a police cruiser, and kneeing him in the thigh. The entire incident was caught on video. The case went to trial in June 2015.

Severity of the Crime:

Misdemeanor—disorderly conduct. This *Graham* factor was in Plaintiff's favor.

Threat to Safety:

None. Prior to the arrest, the Plaintiff had been arguing with the police over the lawfulness of his friend's arrest and had his back turned and was walking away when he was arrested, had not been informed that he was under arrest until he was grabbed, and was unarmed.

Resisting/Evading Arrest:

The video showed very little resistance other than what appeared to be verbal resistance by the Plaintiff after he had been thrown against the cruiser.

Viewing the video at first glance, the force appears to be excessive. The Plaintiff is not a safety threat, he does not appear to be resisting. He is unaware that he is under arrest until he is grabbed from behind and swung onto the hood of the cruiser and the video does not depict any physical resistance.

At trial, the defense introduced the Boston Police Department rules and procedures on use of force to show that (1) officers are trained to use the hood of a police cruiser in order to gain control of a suspect; and (2) that a knee strike is a technique used when a suspect is resisting handcuffing.

The testimony regarding the officer's use of the knee strike was that the Plaintiff had been resisting the handcuffing by stiffening his arms and refusing to allow his hands to be placed together so that handcuffs could be applied.

The department rules demonstrated that this type of resistance is called "active resistance" and officers are trained to use "distraction techniques," such as knee strikes, in response to situations where the arrestee is offering "active resistance" in order to gain compliance. The officer testified that he was trained not to force a suspect's hands together against the suspect's will because it could cause serious injury to the suspect's shoulder, i.e., dislocation and torn ligaments, and that knee strikes were more effective in gaining compliance without any injury to the suspect.

The case resulted in a defense verdict.

Qualified Immunity At Trial

The Defendant is entitled to raise the defense of qualified immunity throughout the trial, at the close of plaintiff's case and the close of all the evidence. The Defendant can also raise qualified immunity after a plaintiff's verdict. However, at that juncture, the facts are construed in the light most favorable to the verdict. Therefore, in many cases, special juror interrogatories can assist in determining what facts the jury actually found. For example, the special interrogatories could ask the jurors whether they found that the plaintiff was actively resisting, or whether the officer applied force before or after handcuffing. Specific factual determinations by the jury at trial *may* assist in obtaining qualified immunity after trial if a verdict comes back in the Plaintiff's favor if the facts found by the jury do not demonstrate a clearly established constitutional violation.

Excessive Force Cases—Some Examples:

Unintentional Excessive Force: In *Stamps v. Town of Framingham*. 2016 WL 457153 (1st Cir. 2016), the First Circuit denied qualified immunity to an officer who accidentally shot and killed the plaintiff on the grounds that his conduct leading up to the accidental shooting—pointing a gun at the head of a compliant, unarmed, non-threatening individual who was not suspected of any criminal activity with the safety off and his finger on the trigger. There, several police officers were executing an early morning search war-

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rant when one of the officers accidentally shot and killed the plaintiff—a 68 year old man who had been laying prone on the ground with his hands in the air and was not suspected of any criminal wrongdoing. In denying the officer qualified immunity, the First Circuit held that the officer's conduct leading up to the accidental shooting—"pointing his loaded assault rifle at the head of a prone, non-resistant, innocent person who presents no danger, with the safety off and a finger on the trigger"—constituted excessive force in violation of the plaintiff's Fourth Amendment rights.

Use Of Force On Compliant/Non Resisting Suspects Excessive: Courts have generally held that the use of force above and beyond regular handcuffing, i.e., tackling, throwing to ground, slamming against car, is a clearly established violation of the Fourth Amendment where the suspect is compliant, subdued, and non-threatening.[56]

Handcuffing: Courts have held that handcuffing can constitute excessive force if the plaintiff complained that the handcuffs were too tight and the overly tight handcuffing resulted in an injury[57]

Handcuffing Pre-Existing Injuries: In *Hunt v. Massi*, 773 F.3d 361 (1st Cir. 2014), the First Circuit granted qualified immunity to the defendant officers who refused to handcuff the plaintiff in front after he told them that he had just undergone abdominal surgery and showed them his scar because the arrestee did not have clearly established right to be handcuffed with his hands in front of him when it would not have been obvious to reasonable officer that his abdominal scar would prevent him from putting his hands behind his back.

Detainment In Extreme Temperature: Some courts have held that detaining a person in extreme temperatures can violate the Fourth Amendment.[58]

Tasers: In *Lash v. Lemke*, the D.C. Circuit outlined the clearly established law amongst the Circuit Courts with respect to Tasers:

Unreasonable Use of a Taser: The use of a Taser against a person who is not resisting arrest or merely passively resisting may violate that person's rights.[59] The use of a Taser may also violate an individual's rights even in the face of resistance if the officer uses the Taser to excess, such as firing multiple times after the officers have gained control of the scene. [60]

Reasonable Use of a Taser: "There is no clearly established right for a suspect who actively resists and refuses to be handcuffed to be free from a Taser application."[61] "Courts generally hold that the use of a taser against an actively resisting suspect either does not violate clearly established law or is constitutionally reasonable."[62]

Deadly Force on a Knife Wielding Suspect: In *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015), relying on a similar Tenth Circuit case, the Tenth Circuit denied qualified immunity to an officer who shot and tasered a knife wielding plaintiff on the grounds that although the plaintiff had refused to drop the knife, he had not charged the officer, had not moved aggressively at the officers, and was not within striking distance. Therefore, the officer did not have probable cause to believe that the plaintiff posed a threat to the officer's life.

Deadly Force—Highspeed Pursuit: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[61] Therefore, as it stands, officers do not violate the Fourth Amendment if they shoot at a fleeing vehicle as long as the continued flight posed a risk to officer or the public's safety. In the line of cases granting qualified immunity to officers who have used deadly or potentially deadly force in cases of high speed chases, the plaintiff has driven recklessly, almost always at speeds in excess of 100 mph, and have not demonstrated any intent on ending the chase.

Notes

1. Ty Burr, *The Most Important Movies of 2015 Were Not In Any Theater,* The Boston Globe, December 28, 2015 (commenting on national impact of recent videos depicting excessive force).
2. "In addressing an excessive force claim brought under Section 1983, analysis begins by identifying the specific constitutional right infringed by the challenged application of force. . . The validity of the claim must then be judged by reference to the specific right, rather than to some generalized 'excessive force' standard." Graham v. Connor, 490 U.S. 386, 394 (1989).
3. Non law enforcement government employees can also be sued pursuant to Section 1983 for the use of excessive force. *See* Wallace by Wallace v. Batavia Sch. Dist. *101*, 68 F.3d 1010 (7th Cir. 1995) (student discipline cases may be brought against teachers under the Fourth or Fourteenth Amendments).
4. Although claims brought by free citizens who have been subjected to force by the police will generally be analyzed under the Fourth Amendment, the Fourth Amendment does not apply to such claims where the police officer uses excessive force against an unintended free citizen. Brower v. County of Inyo, 489 U.S. 593, 596-597 (1989).
5. *Graham*, 490 U.S. at 386; County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998).
6. In *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2472 (2015), the Supreme Court announced that the standard to be applied to excessive force cases for pretrial detainees is whether "the force purposely or knowingly used against him was objectively unreasonable." "This determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time and must account for the 'legitimate interests [stemming from the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 2471-73 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)); Bell v. Wolfish, 441 U.S. 520, 540 (1979).
7. *Graham*, 490 U.S. at 394-96 (1989).
8. *See* Michigan v. Summers, 452 U.S. 692, 696 (1981). A Fourth Amendment seizure occurs only when there is a governmentally caused termination of freedom of movement through means intentionally applied. Brower v. County of Inyo, 489 U.S. 593, 596-597 (1989).

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons... Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 20 (1968). "When the actions of the police do not show an unambiguous intent to restrain . . . a seizure occurs if, 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" Brendlin v. California, 551 U.S. 249, 255 (2007).

9. Circuit courts have held that the use of force outside an arrest does not implicate the Fourth Amendment. *See* Cummings v. McIntire, 271 F.3d 341, 344 (1st Cir. 2001); *see also* Rodriguez v. Phillips, 66 F.3d 470, 476 (2d Cir. 1995) (where plaintiff was neither arrested nor an inmate, neither her Fourth or Eighth Amendment rights were implicated). McCoy v. Harrison, 341 F.3d 600, 605-06 (7th Cir. 2003) (rejecting argument that "seizure occurs with 'the slightest application of physical force'" and finding that no seizure occurred where plaintiff "immediately" walked away after physical altercation). *But see* Acevedo v. Canterbury, 457 F.3d 721, 725 (7th Cir. 2006) (finding seizure because blow to the head temporarily rendered the plaintiff unconscious). *See also* Smith v. Dept. of Gen. Servs. 2005 WL 1563505, at *2, 9 (M.D.Pa. 2005), *aff'd,* 181 Fed. Appx. 327 (3d. Cir. 2006) (district court rejected argument that plaintiff was seized when police sergeant grabbed his elbow and berated him, resulting in a sprained shoulder and months of medical treatment because plaintiff was able to break free and leave sergeant's presence. The Third Circuit affirmed, holding that "the solitary act of momentarily grabbing [plaintiff's] elbow was not a seizure," notwithstanding the brief physical restraint and the resulting injury). *See* 181 Fed.appx. at 329-330; *see also* Gottlieb v. Laurel Highlands Sch. Dist. 272 F.3d 168, 172 (3d Cir. 2001) (holding push by school administrator of student that propelled her backwards into a door was not the "type of detention or physical restraint that we require to effectuate a seizure" under the Fourth Amendment).

10. California v. Hodari *D.* 499 U.S. 621 (1991).

11. Brower v. County of Inyo, 489 U.S. 593, 595-600 (1989); Stamps v. Town of Framingham, 2016 WL 457153 (1st Cir. 2016),

12. County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998).

13. *Lewis,* at 843-45. This protection, however, shields individuals from only arbitrary and oppressive uses of force. Carr v. Tatangelo, 338 F.3d 1259, 1271 (11th Cir. 2003). Put simply, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Lewis,* 523 U.S. at 846, (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)). The standard governing Fourteenth Amendment excessive-force claims is "shocks the conscience." *Id.,*

14. Fennell v. Gilstrap, 559 F.3d 1212, 1217 (11th Cir. 2009). The Supreme Court has indicated that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis,* 523 U.S. at 849.

15. *Graham*, 490 U.S. at 396. (internal citations omitted).

16. *Id.* at 397.

17. *Id.*

18. *Id.* (quoting Johnson v. Glick, 481 F. 2d 1028, 1033 (2d Cir. 1973)).

19. *Id Graham,* 490 U.S. at 396.

20. *Id* at 396-97.

21. Freeman v Gore, 483 F.3d 404, 417 (5th Cir. 2007)

22. *Graham*, 490 U.S. at 397.

23. *Id.*

24. Although the "prevent escape" language from *Graham* remains good law, most police departments significantly restrict the use of deadly force to prevent escape. *High Risk Critical Tasks In Law Enforcement, Legal and Liability Issues,* Legal and Liability Risk Management Institute, Ryan, Jack (2010)

25. Penley v. Eslinger, 605 F.3d 843, 850 (11th Cir. 2010) (citing Tennessee v. Garner, 471 U.S. 1, 11-13 (1985)

26. Plumhoff v. Rickard, 134 S.Ct. 2012, 2020 (2014).

27. Montano v. City of Chicago, 535 F.3d 558, 569 (7th Cir. 2008).

28. Phillis v. Community Ins. Corp., 678 F.3d 513, 519-20 (7th Cir. 2012); Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008).

29. Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994)

30. Jean-Laurent v. Wilkerson, 461 Fed. Appx. 18, 24 (2d Cir. 2012)

31. *Id.*

32. City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983).

33. The attached chart is the Use of Force Model used by the Boston Police Department.

34. *Id.*

35. Stamps v. Town of Framingham, 2016 WL 457153 at * 11 n.4 (1st Cir. 2016); (citing Jennings v. Jones, 499 F.3d 2, 11-16, 19-20 (1st Cir. 2007)) (noting that evidence regarding officer training "is relevant both to the. . . question of whether there was a violation at all and to the . . . question . . . of whether a reasonable officer in [the defendant's] circumstances would have believed that his conduct violated the Constitution."). *See also* Young v. County of Los Angeles, 655 F.3d 1156, 1162 (9th Cir. 2011); Torres v. City of Madera, 524 F.3d 1053, 1057 (9th Cir. 2008) (agreeing that the following "factors [had been] relevant to the reasonableness determination" in a case where an officer unintentionally fired his pistol when he meant to fire his Taser: "(1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training") (citing Henry v. Purnell, 501 F.3d 374, 383 (4th Cir. 2007)); Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003) ("Although . . . training materials are not dispositive, we may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable."). *But see, e.g.,* Moreno v. Taos Cty. Board of Commissioners, 587 Fed.Appx. 442, 446 (10th Cir. 2014); Thompson v. City of Chicago, 472 F.3d 444, 453-55 (7th Cir. 2006). Just as a violation of departmental procedures does not deem the conduct constitutionally unreasonable, compliance with police department procedures does not render the conduct constitutionally reason-

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able. *See* Smith v. Kansas City Missouri Police Department, 586 F.3d 576-581-82 (8th Cir. 2009). Cf. City and County of San Francisco, v. Sheehan, 135 S.Ct. 1765 (2015) ("even if an officer acts contrary to her training, however. . . that does not itself negate qualified immunity where it would otherwise be warranted.")

36. Fed. R. Civ. P. 26(a) requires a party to disclose the identity of any expert witness and to provide a written, signed report of that expert at least 90 days prior to trial.

37. Miranda-Rivera v. Toledo-Davila, – 2016 WL 563070 (1st Cir. 2016) (opposing expert witnesses opining as to cause of plaintiff-decedent's injuries).

38. Carr v. Tatangelo, 338 F.3d 1259 (11th Cir. 2003) (declining to analyze the circumstances preceding the use of force); Salim v. Proulx, 93 F.3d 86 (2d Cir. 1996) ("The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force.").

39. St. Hilaire v. City of Laconia, 71 F.3d 20 (1995) (holding that If the actions of the officers leading up to the need to use deadly force were unreasonable, then the ultimate use of force may be found unreasonable as well); Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999) (considerations of objective reasonableness should not automatically exclude "all context and causes prior to the moment" force is used); Allen v. Muskogee, 119 F.3d 837, 840-41 (10th Cir. 1997) (if the officer's pre-force conduct was "immediately connected" to the suspect's threat to use force, it is considered for purposes of determining objective reasonableness).

40. Courts of Appeal differ in what authorities they will look to in order to determine whether the right at issue was clearly established. For example, the First Circuit looks to all available case law, *see* Hatch v. Dep't. for Children, Youth & Their Families, 274 F.3d 12, 23 (1st Cir. 2001), while the Eleventh Circuit looks only to case law from the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the state's highest court. Jenkins v. Talladega City Bd. of Education, 115 F.3d 821, 826 n.4 (11th Cir. 1997). Although some Courts consider decisions by the district courts, the Supreme court has cautioned that "district court decisions — unlike those from the courts of appeals — do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity," and therefore "[m] any Courts of Appeals . . . decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity." Camreta v. Greene, 131 S.Ct. 2020, 2033 n. 7 (2011).

41. The Supreme Court has cautioned courts "not to define clearly established law at a high level of generality," and reiterated that "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" Mullenix v. Luna, 136 S.Ct. 305, 308 (2015) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001). The "correct inquiry" in the Fourth Amendment context is "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted.'" *Id.* at 309 (quoting Brosseau v. Haugen, 543 U.S. 194, 200 (2004).

42. Loch v. City of Litchfield, 689 F.3d 961, 966 (8th Cir. 2012) (An act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment.)

43. Worcester Telegram and Gazette Corp., v. Chief of Police of Worcester, 58 Mass.App.Ct. 1 (2003).

44. Graham, 490 U.S. at 397.

45. "Qualified immunity shields government officials from civil damages liability unless he official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." Taylor v. Barkes, 135 S.Ct. 2042, 2044 (2015). Under this standard, "[a]n officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it, meaning that existing precedent ... placed the statutory or constitutional question beyond debate." City and County of San Francisco, LCV. Sheehan, 135 S.Ct. 1765, 1774 (2015). The right in question must be defined with a sufficient degree of particularity. *Id.* At the summary judgment stage, an officer is entitled to qualified immunity "[i]f even on plaintiffs' best case, there is no violation of their rights, or the law was not clearly established, or an objectively reasonable oFfficer could have concluded (even mistakenly) that his or her conduct did not violate their rights." Stamps v. Town of Framingham, 2016 WL 457153 (1st Cir. 2015) (quoting Mlodzinski v. Lewis, 648 F.3d 24, 27 (1st Cir. 2011).

46. Scott v. Harris, 550 U.S. 372, (2007);

47. In *Pauly v. White*, 2016 WL 502830 at * 16 (10th Cir. 2016), the Tenth Circuit denied summary judgment to defendant officers on the grounds that a genuine dispute of fact existed even though there was no witness testimony to contradict the officers' version of events—that the decedent pointed a gun and fired it at them. The Court held that circumstantial evidence, such as physical evidence inconsistencies in the officer's testimony, would require credibility determinations that should not be made on summary judgment. The Court noted that "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.'" *Id.* (quoting Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)).

48. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995).

49. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

50. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995).

51. Jeffrey Jones, *In U.S., Confidence in Police Lowest in 22 Years*, http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx (last visited March 2, 2016).

52. Gallup survey data from 2011-2014 measuring Americans' confidence in the police shows that 59% of white Americans have a great deal or quite a lot of confidence in the police, compared with 37% of black Americans. The police are among the three high-

est-rated institutions out of 17 tested in terms of whites' confidence, behind only the military and small business. Among blacks, police drop to seventh on the list, behind not only the military and small business, but also the presidency, the church or organized religion, the medical system, and television news. http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx (last visited March 2, 2016); Burr, *The Most Important Movies of 2015 Were Not In Any Theater*, The Boston Globe, December 28, 2015.

53. Recent videos of police misconduct have changed things significantly in terms of the prior public perception that police officers were "correct in what they were doing." Now jurors may be more skeptical of police use of force. Zusha Elinson and Dan Frosch, *Cost of Police Misconduct Cases Soars in Big US Cities*, Wall Street Journal, July 15, 2015 http://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834 (last visited March 3, 2016).

54. "[M]ore force is appropriate for a more serious offense and less force is appropriate for a less serious one." Lee v. Ferraro, 284 F.3d 1188, 1198 (11th Cir. 2002).

55. Malor v. Whiting, 489 Fed. Appx. 78, 85-86 (6th Cir. 2012) (the use of violence against a subdued and non-resisting individual has been clearly established as excessive, regardless of whether the individual had been placed in handcuffs); Alexis v. McDonald's Restaurants of Massachusetts, Inc., 67 F.3d 341 (1st Cir. 1995) (excessive force where officer arrested woman for trespassing in a fast food restaurant by "suddenly and violently grabbed woman from booth and across table, bruising her legs in the process."); Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003) (IRS agent confronted woman inside her home and when she demanded to see warrant "grabbed her by her arms, forcibly threw to the ground and, twisting her arms, placed handcuffs on her wrists").

56. *See e.g.*, Morrison v. Board of Trustees of Green Twp., 583 F.3d 394, 399 (6th Cir. 2009) (the test to determine when a plaintiff has established an excessive force claim based on handcuffing is: (1) the plaintiff complained that the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced "some physical injury" resulting from the handcuffing); Wall v. County of Orange, 364 F.3d 1107, 1112 (9th Cir. 2004) ("overly tight handcuffing can constitute excessive force."); Freeman v. Gore, 483 F.3d 404, 417 (5th Cir. 2007) ("minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force."); Kopec v. Tate, 361 F.3d 772, 778 (3d Cir. 2004) (denying qualified immunity in overly-tight handcuffing excessive force claim) (collecting cases).

57. Burchett v. Kiefer, 310 F.3d 937, 945 (6th Cir. 2002).

59. *See, e.g.*, Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009).

60. *See, e.g.*, Meyers v. Baltimore County, 713 F.3d 723, 735 (4th Cir. 2013).

58. Goodwin v. City of Painesville, 781 F.3d 314, 325 (6th Cir. 2015).

61. Abbott v. Sangamon County, Ill., 705 F.3d 706, 727 (7th Cir. 2013). *See also* Hagans v. Franklin County Sheriff's Office, 695 F.3d 505, 509-510 (6th Cir. 2012) (observing that courts generally find that "[i]f a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a [T]aser to subdue him"). *See also* Aldaba v. Pickens, 777 F.3d 1148, 1158 (10th Cir. 2015) (finding that "where the subject actively resisted a seizure, whether by physically struggling with an officer or by disobeying direct orders, courts have held either that no constitutional violation occurred or that the right not to be tased in these circumstances was not clearly established"). Furthermore, officers were granted qualified immunity in excessive force claims where they had tased individuals who were actively resisting arrest. *See, e.g.*, De Boise v. Taser Int'l, Inc., 760 F.3d 892, 897 (8th Cir. 2014); Buchanan v. Gulfport Police Department, 530 Fed. Appx. 307, 314 (5th Cir. 2013). Hoyt v. Cooks, 672 F.3d 972, 797-980 (11th Cir. 2012).

62. Mullenix v. Luna, 136 S.Ct. 305 (2015); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) Scott v. Harris, 550 U.S.372 (2007).

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Pleadings and Motions Practice: Putting the Plaintiffs on Trial

By: Tamara N. Baines, Sr. Assistant City Attorney and LaShawn W. Terry, Sr. Assistant City Attorney, City of Atlanta Law Department



Introduction

For some, the litigation process can be a very daunting and even intimidating process. Suddenly, your municipal and police officer clients are accused of myriad constitutional and state law violations. You immediately have to decipher between the obviously frivolous claims (i.e., those alleging "false arrest" when the plaintiffs were never even detained, much less arrested) and those requiring more in-depth legal analysis. You panic as you anticipate a never-ending period of discovery, motions, trials and appeals. You are faced with critical decisions regarding how best to proceed and, worse yet, how to prevail without exhausting your already-limited government resources.

While your instinct may be to sit back and force the plaintiffs to prove their case (or, worse yet, settle under the weight of the mounting pressure), such an approach would only empower already-litigious plaintiffs. It would also encourage them to seek an advantage by attempting to try their case in the media (a.k.a. the court of public opinion), where the rules of evidence and civility do not control. However, a more aggressive approach at the onset of litigation can not only make it more difficult for plaintiffs to shape the case, but it can put them on the defensive.

Pre-Trial Motions

The first major decision you have after receiving the complaint is how best to respond. In reviewing the complaint, you immediately notice that it is wrought with a series of self-serving conclusory claims unsupported by the law. Do you file an Answer, allow discovery to commence and wait until the Motion for Summary Judgment stage to resolve these issues *or* do you file a Motion to Dismiss? While filing an Answer is certainly not as time-consuming as filing a long detailed motion, you will save time in the long run and immediately force the plaintiffs to defend the viability of their case. Filing a Motion to Dismiss is the first act of attacking the complaint and disposing of any frivolous claims.

Federal Rule of Civil Procedure ("FRCP") 12(b) authorizes a party to answer a complaint by answer *or* by motion. The grounds for filing a Motion to Dismiss include:

- Lack of subject-matter jurisdiction
- Lack of personal jurisdiction
- Improper venue
- Insufficient process
- Insufficient service of process
- Failure to state a claim upon which relief can be granted
- Failure to join a party under Rule 19

Filing a Motion to Dismiss will not automatically stay discovery; however, most judges will likely grant a stay during the pendency of the motion so that the defendant does not unnecessarily incur expenses to defend meritless claims. Thus, out of an abundance of caution, you should file a Motion to Stay Discovery during the pendency of the motion. A Motion to Dismiss, even if not granted in its entirety, will also be instrumental in limiting the number of claims and/or parties in the lawsuit as most plaintiffs tend to "throw in the kitchen sink" when filing suit.

Filing a Motion to Dismiss Under FRCP 12(b)(6) After *Iqbal* and *Wombley*: When Vague Just Isn't Good Enough

Most plaintiffs filing suit believe it is sufficient to include a series of self-serving conclusory allegations that your police officer client has violated their constitutional rights or that your municipal client has instituted a custom, policy or practice that was the moving force behind the alleged constitutional violation. Indeed, FRCP 9(b) only requires specificity when alleging fraud or mistake. However, while specificity is not generally required when asserting allegations in other cases, plaintiffs cannot merely allege that an officer "violated their constitutional rights" or that the municipality had "a custom, policy or practice that was the moving force behind the alleged constitutional violation" without setting forth specific facts supporting those contentions.

In *Conley v. Gibson*,[1] Justice Hugo Black, writing the opinion of the Court, pointed out that a complaint need only provide a party with "fair notice" of the grounds

entitling them to relief. Under this standard, a complaint should not be dismissed unless there is "no set of facts" under which a plaintiff could recover. This standard allowed plaintiffs to survive a motion to dismiss whenever there was a possibility that they could discover facts, not yet disclosed, that would later entitle them to recovery.

The *Conley* standard made it virtually impossible for a defendant to prevail on a Motion to Dismiss when a complaint contained nothing more than conclusory contentions. However, in 2007, in *Bell Atlantic Corp. v. Twombly*,[2] the United States Supreme Court retired the relaxed standard set forth fifty years prior in *Conley* that allowed often vaguely-worded complaints to proceed. In doing so, the Court distinguished between the fact specific requirements of Rule 8 and the need for more than conclusory contentions in a complaint. Specifically, the Court held that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." The Court echoed the need for more than conclusory contentions two years later in *Ashcroft v. Iqbal*.[3] Specifically, the Court stated that:

> The pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.[4]

Thus, plaintiffs cannot simply include self-serving contentions without actual factual allegations supporting the claims. Consequently, a municipality/officers' first line of attack should be the complaint when it contains nothing more than conclusory contentions.

However, recently, the Eleventh Circuit loosened the pleading requirement for plaintiffs asserting a *Monell* claim against municipality in *Hoefling v. City of Miami*.[5] There, the Court stated "that identifying and proving that a final policymaker acted on behalf of a municipality is 'an evidentiary standard, and not a pleading requirement.' " Thus, a plaintiff would not have to identify the final policy maker in the pleadings stage, which makes it far more difficult for a municipality to prevail at the Motion to Dismiss stage.

Motion for Summary Judgment: Getting Another Bite at the Apple

Assuming the plaintiffs have made it past your Motion to Dismiss, the defendants still have another chance to get the case dismissed on summary judgment. Indeed, merely because the plaintiffs have survived the motion to dismiss stage does not mean that the case has merit; rather, it means that their plaintiffs have *alleged* sufficient facts to state a claim. However, at the summary judgment stage, plaintiffs must provide *evidence* to support their allegations. It is no longer enough that they have made sweeping and unsupported claims against your client. Indeed, even the *Hoefling* decision only allows the plaintiffs to survive the Motion to Dismiss stage; the Eleventh Circuit implicitly recognized that the plaintiffs must provide evidence to support their *Monell* claim to survive the Motion for Summary Judgment stage. Failure to provide evidentiary support for the allegations in the complaint provides the defendant with another opportunity to prevail without a trial.

Some plaintiffs believe that they can defeat a motion for summary judgment by simply introducing an expert report, concluding that your client violated the plaintiff's constitutional rights or otherwise acted unreasonably. However, in *San Francisco v. Sheehan*,[6] the United States Supreme Court made clear that if the officer is otherwise entitled to qualified immunity, a plaintiff cannot "avoid summary judgment by simply providing an expert's report that an officer's conduct leading up to a deadly confrontation was unprecedented, inappropriate or even reckless." Thus, the court's focus on summary judgment will be on whether the officer meets the qualified immunity standard without regard to any "expert" report submitted by the plaintiffs.

Further, you should always keep in mind that a diligent plaintiff's attorney may file a Motion for Summary Judgment against your client. Often time, as defense attorneys, we forget that, unlike a Motion to Dismiss, a Motion for Summary Judgment is a litigation tool that can be used by *both* parties. While plaintiffs seldom file a motion for summary judgment, they can file a motion when the evidence establishes a matter of law in the case against defendants. Moreover, it is important to note that it is not enough for the plaintiffs to rely on the *denial* of the defendants' motion, which does not mean the plaintiffs prevail as a matter of law. In the end, you should be mindful of the impact that evidence uncovered during discovery will have on any such motion filed by plaintiffs.

Continued on page 18



Tamara N. Baines has successfully litigated numerous Section 1983 cases, including a 2015 Georgia Court of Appeals case extending the Supreme Court's landmark decision in Scott v. Harris to Georgia court cases. She joined the City of Atlanta Law Department in 2004, initially providing counsel to Hartsfield-Jackson Atlanta International Airport. In addition to Section 1983 expertise, she has significant experience in federal minority contracting regulations. She graduated from Georgia State University and earned her JD from Georgia State University Law School, where she was an Associate Legislative Editor of the Law Review.



LaShawn W. Terry earned a dual undergraduate degree from Emory University and graduated from Georgia State University Law School in 1996. After more than a decade in private practice, she joined the City of Atlanta Law Department handling federal litigation, focusing primarily on Section 1983 cases. She has established a noteworthy success rate on behalf of the City of Atlanta in both Federal and State Trial and Appellate Courts.

Pleadings and Motions: Cont'd from page 17

Trial Motions

1. *Daubert* Motion: Excluding the "Non-Expert"

The admissibility of expert testimony is governed by Federal Rule of Evidence 702. Rule 702 permits testimony only by experts qualified by "knowledge, skill, expertise, training, or education," to testify "in the form of an opinion or otherwise" based on "scientific, technical, or other specialized knowledge" if that testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."[7] "In evaluating the admissibility of expert testimony, trial courts are guided by *Daubert v. Merrell Dow Pharmaceuticals*, Inc. [8]and its progeny.

In *Daubert*, the Supreme Court made clear that prior to the admission of expert testimony, the trial court "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[9] The burden is on the proponent of the expert testimony to establish the admissibility of the testimony under Rule 702 based on a preponderance of the evidence.[10] In *Kumho Tire Co. v. Carmichael*, the Supreme Court "conclude[d] that Daubert's general holding - setting forth the trial judge's general 'gatekeeping' obligation - applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."[11] Finally, in *General Electric Co. v. Joiner*, the high court set forth an abuse of discretion standard in reviewing the decision of a district court to exclude or admit expert testimony.[12]

While the District Court has broad discretion when determining the admissibility of an expert's opinion, the District Court must still undertake a rigorous review of the expert's opinion.[13] Indeed, the eleventh Circuit requires the District Court to engage in a "'rigorous three-part inquiry' assessing whether:

> 1. the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue."[14]

2. Motion *in Limine*: Chipping away at the Plaintiffs' Case

While the Court may have denied your Motion to Dismiss and Motion for Summary Judgment, your case is not over. Rather, the denial of these motions merely means that the plaintiff has alleged sufficient facts in the Complaint to survive a Motion to Dismiss and alleged a dispute of material facts sufficient to survive a Motion for Summary Judgment. However, surviving these pre-trial motions does not mean the plaintiff prevails; rather, now the plaintiffs must present their case to a jury. This is where a Motion *in Limine* can be useful as it is an effective tool in limiting evidence and preventing the introduction of certain evidence at trial.

2. A Motion *in Limine* may seek to limit or exclude evidence relating to: The criminal history of your client; Your client's internal disciplinary file, especially those documents related to incidents that allegedly occurred *after* the subject incident;

Expert testimony, especially testimony opining on the legal issues before the jury;

Settlements entered into by your municipality client in which liability was not admitted; and

Disciplinary decisions made by unrelated agencies and departments, especially when the plaintiff cannot show that your municipal client had notice.

3. Post-Trial Motions

Even if the jury finds against your clients and enters a judgment in favor of the Plaintiff, your job is not over. Your first remedy is to request a Judgment Notwithstanding the Verdict ("JNOV") under FRCP 50 or for a Motion for a New Trial under FRCP 59. As a caveat, though, you must be sure to move for a Directed Verdict at the conclusion of the plaintiff's case and your case before moving for a JNOV.

Rule 50 and Rule 59 Motions are especially important when dealing with immunity issues, because they are issues of law to be decided by the court. While the jury can certainly weigh in on whether, for example, your client acted with "actual malice," the ultimate decision regarding whether to grant immunity rests with the trial judge as immunity issues are *legal* questions. Further, even if the trial judge grants you a new trial but denies your JNOV, you still have a right of immediate review of the court's denial if it involves immunity issues. Thus, you should consider appealing the trial court's denial of immunity immediately before proceeding with a new trial as doing so may eliminate the need for a new trial or, at the very least, limit the issues in the new trial.

Conclusion

The effective handling of your case does not hinge on your ability to try the case before a jury, but rather on your pre-trial, trial and post-trial motion practice. Indeed, many cases never make it into the courtroom as they are resolved in dispositive motions. Thus, it is critical that attorneys defending police office and municipal clients are well-versed on these tools which can be instrumental in bringing about an early positive result for your client.

Notes

1. 355 U.S. 41 (1957).
2. 550 U.S. 544 (2007).
3. 556 U.S. 662 (2009).
4. *Id.* at 678.
5. 2016 WL 285358 (11th Cir. Jan. 25, 2016).
6. 135 S.Ct. 1765 (2015).
7. Fed. R. Evid. 702.
8. 509 U.S. 579 (1993).
9. *Id.* at 598.
10. *See Id.* at 593 n. 10.
11. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).
12. General Electric Co. v. Joiner, 522 U.S. 136, 146. (1997).
13. Hendrix v. Evenflo, Inc., 609 F.3d 1183 (11th Cir. 2010).
14. *Id.* at 1194.

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IMLA INTERNATIONAL

The Paradox that is Cuba

By Steven Meyers, Principal, Meyers Nave, Oakland, California





We climbed into the rear seat of a pink and white 1956 Chevy Bel Air with matching tuck and roll upholstery accompanied by the sounds of the Everly Brothers singing their 1958 classic "Bye Bye Love." No, this was not an auto show or the concours d'elegance, rather it was a taxi in Havana — and after a few mojitos, the national drink of Cuba, we were going from Habana Vieja (Old Town) to our hotel near the Central Park. The fare was five pesos. The warm Caribbean air was fragrant with the scent of white ginger mariposa but the engine's sound was not the smooth throb of a GM V-8 but that of a wheezing, tinny Czech or Polish diesel. The taxi's heavy truck leaf springs were not meant for Chevy "see the USA" cruising but were necessary to navigate the numerous patches, cobbles and potholes of old Havana streets. After 60 years the made-in-Detroit mechanical guts of this classic beauty were long gone, replaced by whatever the ingenious and creative Cuban mechanics could scrounge, beg or borrow. The quintessential 1950's American style and veneer were there and still beloved by the taxi driver and all Cubans alike. He was not the owner of the taxi because virtually everything is owned by the state, and much like the state it was cobbled together from disparate sources to make it work in what the natives refer to as "the Cuban way." Only in Cuba could the taxi fleet be over half a century old. Without an internet there is no Uber option either, but in the Cuban way there is also the "colectivo" or shared taxi which reminded us of another 1950 phenomena...how many college kids can be stuffed in a phone booth?

Along Paseo de Martí to the Hotel Parque Central we passed old churches, colonial forts, palatial baroque mansions and majestic plazas, almost all faded, decrepit, mildewed or in some state of desuetude. Even though there are no earthquakes in Havana, buildings just fall down with chilling regularity. The bars evoke memories of "Papa" Hemingway. Groups of men gather in the park not to debate politics but to argue about baseball, ERA's and batting averages. The ever-present salsa music is not imported but endemic to the island and based on 500 years of musical evolution as our host Professor Alberto Faya demonstrated one evening with a Cuban musical time machine starting with Mozart and African rhythms.

Havana is both visually lush and yet ruined, sad but vibrant, trapped in time but yet free spirited and creative. The sounds and smells are unique to this island and reflect a glorious history and uncertain future. There is both mystery and mystique for Americans long deprived of this exciting yet forbidden place. The colonial and neoclassical architecture is proud like the Cubans themselves, but the last coat of paint was applied in the days of Eisenhower not Obama. The beautiful and iconic "Capitolo" building, next to the rococo Gran Teatro de la Habana, is an intentional replica of and homage to our American national Capitol but has not had a deliberative body use it in 60 years. On the Malecón, a grand seaside boulevard of European pretensions, referred to by one travel writer as "Havana's sofa" because it's the romantic couples hangout, there sits the nearly empty Riviera Hotel built and paid for in cash by the mobster Meyer Lansky (aka Hyman Roth for Godfather II fans) and unchanged both inside and out since 1960. Our

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Cuba Cont'd from page 19

host, noted architect Pedro Vasquez, while rapturous of the 1950's modernist style (it's a Cuban national monument) told us that even the silverware and the dishes date from the mobster times of casinos, gambling and dance girls. There are few street lights, no credit cards, no ATM's, little cell or internet access...but there is also no traffic, few light signals, no armed police and no crime. The Cuban people are open, warm and sharing - yet Soviet style government billboards rail against America and decry "el bloqueo de cuba" which is the six decades old trade embargo imposed by the US. This is the paradox that is Cuba today. But that is likely to change dramatically. Cuba is on the hinge of history and the cusp of change. Diplomatic relations with Cuba were restored just a few months ago. The American embassy on the Malecón is no longer an empty useless shell. And a sitting American President has visited Cuba for the first time since Calvin Coolidge.

Under the auspices of IMLA and its International Committee 40 municipal lawyers and guests recently traveled to Havana Cuba under a "people to people" license issued by the Office of Foreign Assets Control, an obscure division of the U.S. Department of the Treasury which enforces the Cuban embargo laws. "Tourism" for Americans is still illegal so the official purpose of the trip was to observe and experience the coming transformation of a country and its political and economic system at an inflection point in history similar in some respects to the fall of the Berlin Wall and the end of apartheid in South Africa. The participants sought to engage in substantive and informative exchanges of ideas, knowledge and experience with our Cuban counterparts on a range of issues both local and regional. We were scheduled by the Cuban government to meet with judges, politicians, lawyers, artists, journalists and private entrepreneurs to appreciate their perspectives on the Cuban metamorphosis. After a 45 minute charter flight from Miami, we arrived at Jose Martí airport and curiously went through metal detectors after getting off the aircraft. The first image that greets the new arrivals is that of Che Guevara, yet there are very few images of Fidel or Raul Castro.

Over a week, our hosts described both the current political relationship between Cuba and the United States as well as some of the myths that they believe most Americans hold about the Castros and Cuba. Currently the Cuban trade embargo is enforced through six separate federal statutes and has its historical roots in the 1958 revolution which deposed President Fulgencio Batista and installed Fidel Castro, the subsequent conversion of Castro to communism and nationalization of American businesses, the country's alliance with the former Soviet Union, the 1961 Bay of Pigs invasion by CIA backed Cuban expatriates and the installation of medium range offensive nuclear missiles triggering the 1962 "Cuban Missile Crisis." Under Presidents Kennedy and Clinton, Congress expanded the initial trade restrictions to a complete







embargo on all trade with the exception of food and certain humanitarian products. The stated political purpose of one of these statutes, the Cuban Democracy Act of 1992 for example, is to maintain sanctions on Cuba so long as the Cuban government refuses to move toward "democratization and greater respect for human rights."

Frozen in time for almost 60 years, change is now occurring at both a tepid and yet rapid pace. The Soviet Union collapsed in 1992, signaling the end of the Cold War and potential casus belli between Cuba and the United States. Fidel Castro relinquished power to his brother Raul in 2008 and Raul has announced his own retirement and general elections.

In 2011 a new era of economic reforms was inaugurated to spur capital investment. Non-US foreign investments have been permitted during the US trade embargo but multinational companies have been previously reluctant to invest in Cuba because of fears of repercussions from the American government. Cuba has no foreign exchange assets and buys discounted petroleum from Venezuela, now another failed socialist state, by exporting doctors. Foreign capital investment is also hampered by the Cuban government requirements that it act as the middleman for procuring skilled labor and determining wages. We learned from our hosts that the construction of a cruise ship terminal at the Mariel Harbor is a victim of such governmental inflexibility.

Domestically, private businesses are slowly allowed to open and prosper. State owned restaurants provided decent fare but service is the epicurean equivalent of your state department of motor vehicles. Private restaurants called paladares started as family owned enterprises but are very successful and considered culinary incubators. On the main shopping street of Calle Obispo we engaged in an experiment with our hosts to determine which shops were state owned and which were privately owned. The more active the touts, the greater likelihood that is was a private business. If your shopping interests, however, were beyond cigars, rum and t-shirts it didn't really matter since there was very little to buy. In lectures by Rafael Hernandez, editor of Temas, the leading Cuban magazine in the social sciences and humanities, it is clear that the state can no longer control nearly all forms of economic activity as it has for so many years.

But once again the paradox that is Cuba ripples through discussions of privatization of the economy. There are no business regulations and no taxation system. Since virtually everyone is a government employee, there is no income tax. Since property is owned by the state, there is no property tax. Since most goods and services are sold by the state, there is no sales tax. To make things more complicated, the Cuban regime has instituted a dual currency system. Most Cubans are paid in Cuban pesos for which there is no foreign exchange or exchange rate but generally considered to be worth about 5 cents, but in the nascent tourist industry the Cuban Convertible Peso (CUC) is used and its value pegged to the dollar. As foreigners we were required to convert dollars to CUC's (for a nice service charge paid to the government) and could only pay for services with the CUC. In one day a waiter at a private restaurant, a bellman at a hotel or a bartender at a paladar can make more in tips paid in CUC's than a doctor or lawyer's monthly salary (all doctors and lawyers work for the state, there is no such thing as private practice). One of our hosts stated that the CUC would be abolished but there is no timetable for that.

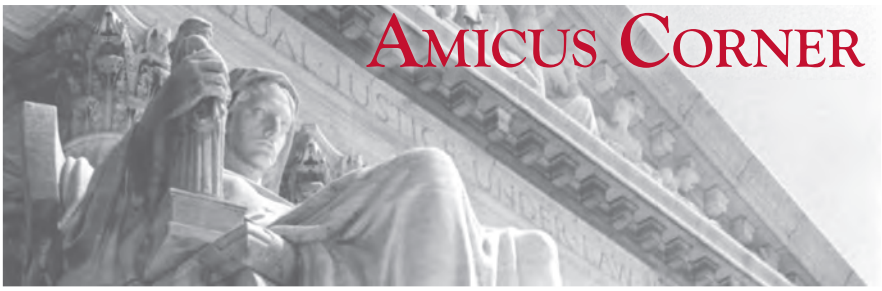
The participants learned many things about the judicial system in meetings with members of the Cuban bar and judiciary and shared perspectives with a former ambassador, foreign journalist, architect, music-professor as well as visiting state sponsored privatization experiments in creative dance, solid waste and recycling, municipal transport and agriculture. Our hosts spoke of freedom of speech and assembly, the lessening power of the communist party, but of particular note was the assertion that all Cubans are free to come and go from the island nation as they please. Yet in August of 2015, 23 Cuban men and one woman sailed 111 miles across the Florida Straits to Key West in a boat made from sheet metal and twelve welded 55 gallon steel drums powered by a pick-up truck engine. Again this is the paradox that is Cuba.

The current evolving policy of the United States toward Cuba is accelerating the changes we learned from our hosts. While the President cannot repeal the various embargo laws, he has ordered the restoration of diplomatic relations and eased travel and credit restrictions. While IMLA was in Cuba, regulations were promulgated providing credit to Cuba, something they are sorely lacking. Those who support normalization of relations with Cuba insist that Western influence and private economic growth and development will be beneficial to the people of Cuba. Those who oppose such normalization believe that the authoritarian government will simply be stronger and that the people will not see any material benefits. While it is not up to the author or IMLA to wade into that political morass, it is important to point out that this very issue was openly and frankly discussed between IMLA members and our hosts.

There was no hint of censors nor was any topic considered taboo. In fact the best evidence of this is openness is a timeworn joke told by one of our hosts... "Fidel Castro is a great man, he has such wisdom, intellect and talent. He is a patriot and a man of the people and the savior of our country...but he is a terrible bartender. After 60 years of practice he still cannot make a cuba libre." ML



Steven Meyers co-founder of Meyers Nave, has practiced public agency law for over 40 years, serving as city attorney and general counsel to dozens of public agencies, specializing in municipal and public agency law, economic development, land use and environmental work, and extraordinary writs and appeals. In 1986 he formed Meyers Nave, which today numbers 85 attorneys in six offices throughout California. He chairs the firm's California Public Utilities Commission Practice Group and co-chairs its Transportation and Infrastructure Practice Group. He provided the cover and other photographs used in the article.



A Look at Agency Deference and Drunk Driving Implied Consent Laws

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

At IMLA's recent Mid-Year Seminar in Washington D.C., we recognized our dedicated pro bono counsel who drafted amicus briefs on behalf of local governments and IMLA in 2015. Two of those cases are discussed in this article. More information about the amicus service award recipients follows on page 23. We are grateful for their dedication and hard work on behalf of IMLA.

United Student Aid Funds, Inc. v. Bible

On February 3, 2016, IMLA and the State and Local Legal Center filed an amicus brief in *United Student Aid Funds, Inc. v. Bible,* a petition stage Supreme Court case. The underlying facts of this case paint a sympathetic plaintiff, but are not entirely important for IMLA's purposes. The question this case presents is whether the Court should overrule *Auer v. Robbins,* 519 U.S. 452 (1997), which requires courts to defer to agency interpretations of their own regulations, even where such interpretations first appear in things like an amicus brief (as was the case here).

When Bryana Bible defaulted on her student loan, USA Funds stepped in as the guarantor of the loan. The loan is governed by a Promissory Note subject to the Higher Education Act and regulations promulgated by the Department of Education. When Bible signed the Note, she agreed that "[i]f she default[s] on any loans, [she] will pay reasonable collection fees and costs, plus court costs and attorney fees." After Bible's lender found her in default, USA Funds paid the default claim and the lender transferred the loan to USA Funds. USA Funds sent Bible a letter providing options for rectifying her default, including an alternative payment plan or a rehabilitation agreement. Bible and her lawyers chose the latter and agreed to pay $50 a month for at least nine months so that the default would not remain on her record. And consistent with the terms of the agreement, USA Funds assessed reasonable collection costs.

Bible sued, on behalf of a putative nation-wide class of defaulted borrowers, alleging that charging her collection costs not only breached the terms of the regulations incorporated into the Note, but also violated RICO—and entitled her (and the putative class) to treble damages and attorneys' fees.

The district court dismissed the complaint for failure to state a claim. On appeal, the Seventh Circuit panel invited the Department of Education to submit an amicus brief expressing its views. The Department did so, announcing for the first time that it interpreted its regulations as categorically *prohibiting* the collection costs. In support, the Department invoked another, separate, regulation stating that collection costs may not be assessed when a borrower undertakes a "repayment agreement" that the guaranty agency determines to be "satisfactory," and the Department asserted that a "rehabilitation agreement" is, and must always be, a "repayment agreement on terms satisfactory to the [guaranty] agency"—even though the Department's own website (as well as the statute) states that collection costs "may" be applied to rehabilitation agreements, and even though that website states that "repayment" is an option separate from "rehabilitation" for those in default on their student loans.

The Seventh Circuit was divided and Judge Flaum provided the controlling concurrence, holding that the court is required by *Auer* to accept the agency's view that collection costs may not be assessed against borrowers who sign rehabilitation agreements.

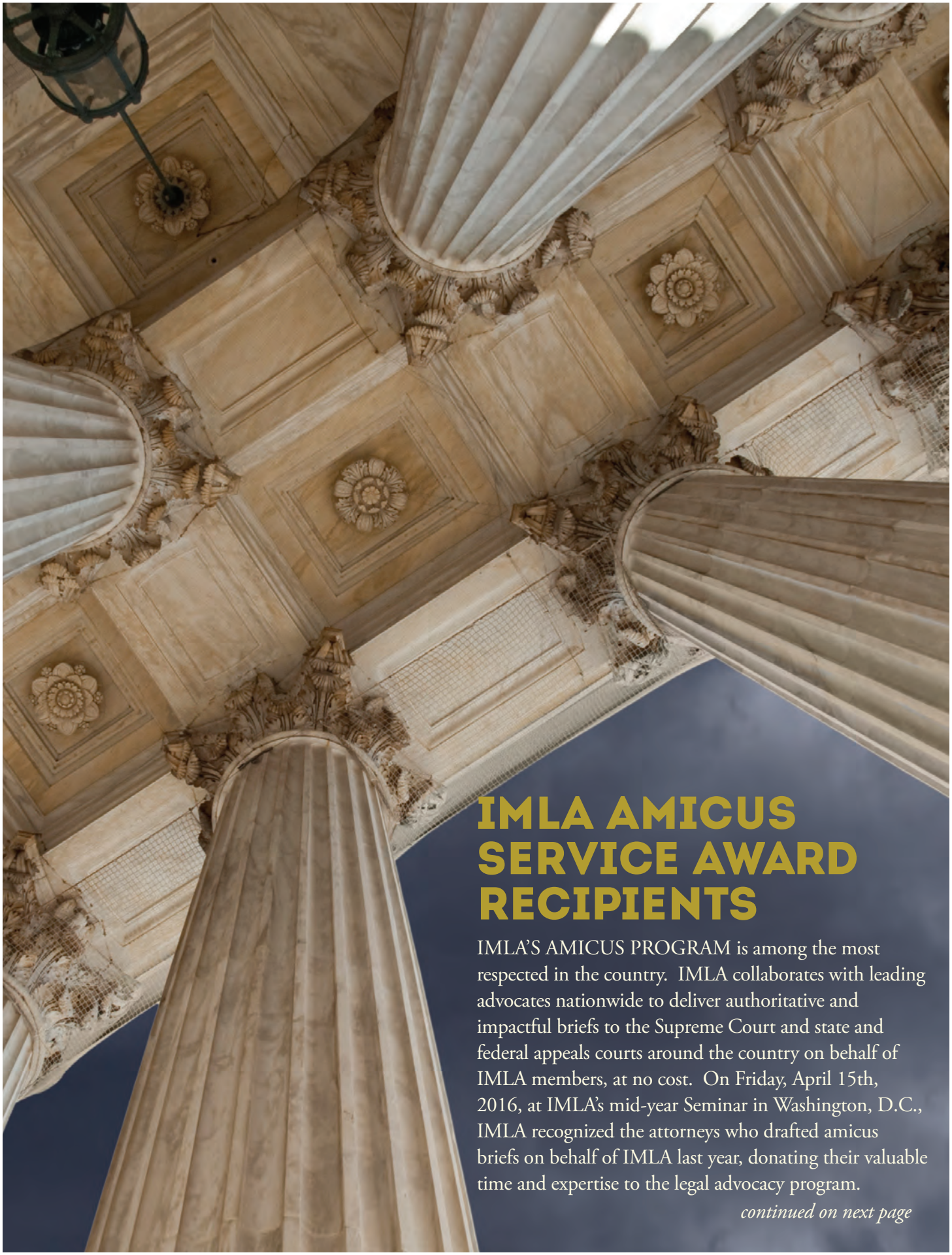
In denying the petition for rehearing en banc, Judge Easterbrook teed up the case for review in his concurrence in the denial:

> [W]hether *Auer* supports the Secretary's current position . . . is a substantial and potentially important question, but an antecedent issue is whether *Auer* is sound. In concurring opinions to *Perez v. Mortgage Bankers Association*, three Justices (including *Auer*'s author) expressed deep reservations about deferring to the position an agency adopts through means other than rulemaking.
>
> I do not think that it would be a prudent use of this court's resources to . . . consider how *Auer* applies . . . when *Auer* may not be long for this world. The positions taken by the three members of the panel show that this is one of those situations in which the precise nature of deference (if any) to an agency's views may well control the outcome.

The issue in the petition for certiorari is whether the Court should overrule *Auer,* which generally requires courts to defer to agency interpretations of their own regulations.

Local governments have significant interests in the outcome of this case given the substantial role *Auer* deference plays in allowing admin-

Continued on page 32



IMLA AMICUS SERVICE AWARD RECIPIENTS

IMLA'S AMICUS PROGRAM is among the most respected in the country. IMLA collaborates with leading advocates nationwide to deliver authoritative and impactful briefs to the Supreme Court and state and federal appeals courts around the country on behalf of IMLA members, at no cost. On Friday, April 15th, 2016, at IMLA's mid-year Seminar in Washington, D.C., IMLA recognized the attorneys who drafted amicus briefs on behalf of IMLA last year, donating their valuable time and expertise to the legal advocacy program.

continued on next page

IMLA AMICUS SERVICE AWARD RECIPIENTS

Continued from page 23

John Baker, a founding partner of Greene Espel PLLP, and **Todd Leishman**, with Best Best & Krieger LLP, drafted the brief in *Lamar Central Outdoor, LLC v. City of Los Angeles*, a case before the California Court of Appeal. The court held that neither the First Amendment nor the California Constitution prohibits Los Angeles' ban on off-site signs, and that a distinction between "billboards"/off-site signs and on-site signs amounts to an improper content-based distinction.

Erek Barron, with Whiteford, Taylor & Preston LLC, drafted the amicus brief in *Bruni v. City of Pittsburgh*, a Third Circuit case. At issue is the validity of Pittsburgh's buffer zone ordinance in light of the Supreme Court's decision in *McCullen v. Coakley*.

Blithe Smith Bock, with the City of Los Angeles, drafted the amicus brief in *Obergefell v. Hodges*, the Supreme Court case holding that same-sex couples have the right to marry under the Constitution.

John D. Echeverria, Professor at the Vermont Law School, drafted the amicus brief in the Supreme Court case *Horne v. Department of Agriculture*, which held that the Fifth Amendment requires that the Government pay just compensation when it takes personal property, just as when it takes real property.

Gregory Garre, the Chair of Latham & Watkins' Supreme Court & Appellate practice group, drafted the amicus brief in the Supreme Court merits case *Birchfield v. North Dakota*. At issue is whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

Thomas C. Goldstein and **Eric Citron**, partners with Goldstein & Russel, drafted the amicus brief in *Newegg & Crutchfield v. Testa,* an Ohio Supreme Court case. The issue is whether Ohio's Commercial Activity Tax is unconstitutional per *Quill v. North Dakota.*

Shawn Hagerty and **Andre Monette,** partners with Best Best & Krieger LLP, drafted IMLA's amicus brief in *Hawaii Wildlife Fund v. County of Maui,* a Ninth Circuit case. The issue is whether a municipality can violate the Clean Water Act by discharging pollutants into injection wells that eventually migrate to navigable waters via groundwater.

Travis Hawkins, with the Hawkins Law Firm PLLC, drafted the brief in Metropolitan Government of *Nashville v. The Board of Zoning Appeals*, a Tennessee Supreme Court case, which held that Nashville had standing to challenge the Board of Zoning Appeals' decision because the city could be "aggrieved" by the actions of the zoning board.

Janis Herbstman, associate counsel with the County Counsels' Association of California, drafted the brief in *Lynch v. California Coastal Commission*, a California Supreme Court case. At issue is whether landowners can irrevocably commit to non-fee permit conditions in writing, but then later renege and claim that they only agreed to the conditions under protest or duress.

John Hightower, managing partner of Olson & Olson LLP, and **Eric Farrar,** an associate with the firm, drafted the amicus brief in *City of Dallas v. Albert*, a Texas Supreme Court case involving the question of whether multiple, unrelated documents and ordinances drafted and enacted at different times and for different purposes can be pieced together to create a written binding employment contract.

Thomas Hungar, a partner with Gibson Dunn & Crutcher LLP, and **Jason Neal** and **Andrew Davis,** associates with the firm, drafted the amicus brief in *City of Houston v. Zamora*, a petition stage Supreme Court case. The issue is whether the cat's paw theory of liability recognized in *Staub v. Proctor Hospital,* a case requiring a finding that the animus was a "motivating factor" in an adverse employment decision, also applies to a retaliation cause of action which requires a "but for" showing of causation.

Erik S. Jaffe, with Erik S. Jaffe, P.C., drafted the amicus brief in the Supreme Court petition stage case *Wasatch County v. Ute Indian Tribe.* The issue IMLA focused on was whether a municipality was generally thought to be in privity with its state for preclusion purposes.

Ashley Johnson, with Gibson Dunn & Crutcher LLP, drafted the brief in *United Student Aid Funds, Inc. v. Bible,* a petition stage Supreme Court case. The question is whether the Court should overrule *Auer v. Robbins*, which requires courts to defer to agency interpretations of their own regulations.

Kira L. Klatchko, a partner with Lewis, Brisbois, Bisgaard & Smith LLP, and **Irene Zurko**, an associate with Best Best & Krieger LLP, drafted the amicus brief in *Ardon v. City of Los Angeles*. The California Supreme Court held that, in reviewing the California Public Records Act as a whole, the city did not waive the attorney-

client privilege by inadvertently disclosing privileged documents pursuant to a public records act request.

Devin Lyon, a staff attorney with the City of Knoxville, drafted the amicus brief in *The Tennessean v. Metropolitan Government of Nashville*, a Tennessee Supreme Court case, which held that the media outlet had no right under the state's public records act to request information related to an ongoing criminal investigation during the pendency of that criminal case and any collateral challenges.

Mary Massaron, a partner with Plunkett Cooney, P.C., drafted the amicus brief in the Supreme Court merits case, *Luis v. United States.* In a divided opinion, the Court held that preventing a criminal defendant from using assets not traceable to a criminal offense to hire counsel of choice violates the Sixth Amendment's right to counsel.

Thomas McPherson, of Mersereau, Shannon LLP, drafted the amicus brief in *Johnson v. Gibson*. The issues certified to the Oregon Supreme Court are: (1) Whether individual city employees can each properly be considered an "owner" of recreational city-owned land and therefore immune from actions against them for their own negligence; and (2) If employees can be considered to be an "owner" under the Public Use of Lands Act, does the Act, as applied to them, nonetheless violate the Remedy Clause of the Oregon Constitution.

Francisco Negrón, general counsel for the National School Boards Association, drafted the amicus brief in *Schott v. Wenk*, a petition stage Supreme Court case. The issues that were addressed by IMLA were: (1) Whether a mandatory child abuse reporter is entitled to qualified immunity when there is evidence in the record to support a reasonable basis to suspect abuse and the report is not materially false; and (2) Whether a constitutional retaliation claim under the First Amendment against a mandatory reporter of child abuse is cognizable under Section 1983 even where reasonable grounds exist to suspect abuse and where the report is not materially false.

Christopher Petrini, the founding principal of Petrini & Associates P.C., and **Christopher Brown**, an associate with the firm drafted the amicus brief in *Lopez v. City of Lawrence*, a First Circuit case. At issue is how statistics may be used in a disparate impact case, including whether plaintiffs may aggregate data - either across time or across jurisdictions/employers - in order to prove a prima facie case of discrimination in a disparate impact case.

Adam Rosenberg, with Williams Kastner, and **Daniel Lloyd,** with the City of Vancouver, drafted the amicus brief in *Kamakeeaina v. City and County of Honolulu*, a Ninth Circuit case. At issue is whether the police officers acted with deliberate indifference to the arrestee's medical needs by failing to provide him with medical attention based on his threats to jump off the apartment's balcony.

Sarah Shalf, the faculty advisor for Emory Law's Supreme Court Advocacy Program, drafted the Supreme Court petition stage amicus brief in *Blanchard and Walworth County v. Brown*. The issue is whether a circuit court must accept a district court's conclusion that there is a material or genuine dispute of fact on an interlocutory appeal of the denial of qualified immunity.

Quin M. Sorenson, a partner with Sidley and Austin LLP, drafted both the petition stage and merits stage amicus brief in the Supreme Court case *Franchise Tax Board of California v. Hyatt.* The issue before the Court that IMLA focused on is whether a Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts.

Lisa Soronen, executive director of the State and Local Legal Center, and **Ron Parsons**, the head of Johnson Janklow Abdallah Bollweg & Parson's appellate division, drafted the amicus brief in *Direct Marketing Association v. Brohl.* The Tenth Circuit held that Colorado's internet taxation reporting laws do not violate the dormant commerce clause.

Marcelyn Stepanski, with Johnson Rosati Schultz Joppich, drafted the amicus brief in the petition stage Supreme Court case *Michigan Gaming Control Board v. Moody.* One of the issues is whether the Fifth Amendment hamstrings regulators by requiring them to obtain a formal grant of immunity from prosecutorial agencies before taking administrative action such as revoking a license from a licensee who invokes his Fifth Amendment privilege not to answer regulatory-related questions.

Aaron Streett, with Baker Botts' Supreme Court and Constitutional Law practice group chair, drafted the amicus brief in *Kingsley v. Hendrickson,* the Supreme Court case which held that to prove an excessive force claim under 42 U.S.C. § 1983, a pretrial detainee must show only that the officers' use of that force was objectively unreasonable.

Collin O'Connor Udell, with Jackson Lewis P.C., drafted the amicus brief in the Supreme Court merits case *Heffernan v. City of Paterson.* The issue is whether the First Amendment bars the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate.

Op-Ed: Avoiding Zombie Foreclosures: Better Judicial Supervision Needed

By: Gregg Hagopian, Assistant City Attorney, Milwaukee, Wisconsin



In judicial-foreclosure states, better judicial supervision of mortgage-foreclosure cases can prevent zombie foreclosures, lessen blight, and improve neighborhoods.

A zombie foreclosure occurs when a mortgage-foreclosure case in litigation becomes stalled without good reason. The defendant/owner/mortgagor hasn't filed for bankruptcy, isn't seeking loan modification, and hasn't been deployed for the armed services. The lender that started the case simply isn't proceeding diligently to conclude it. The lien of the mortgage and the stalled or slow-moving lawsuit cloud title, thereby paralyzing the parcel into a zombie state where neither the plaintiff/lender/mortgagee nor the defendant/owner/mortgagor is maintaining or repairing the parcel. With the foreclosure case not finished, the lender doesn't own the parcel yet, so the lender isn't repairing or maintaining, or assuming owner duties. And the owner/defendant who couldn't afford the mortgage loan can't afford to repair, maintain, or put money into a home he thinks he has lost or will lose to foreclosure anyway. The parcel falls into disrepair, and becomes a blighting influence on the block and to the neighborhood.

If the owner in a stalled foreclosure case moves out and abandons the parcel, the zombie problem becomes far worse. The downward spiral in the physical condition of the house and the blight become even more pronounced.

Judges play a critical role. As supervisors of the litigation before them, judges can take simple steps to net huge neighborhood-improving results. They can ensure that the plaintiff/lender/lawyers move the case along to actual completion. They can require periodic scheduling conferences or status reports from the lender lawyers to ensure that the case is progressing to actual completion. Those simple steps, inherent in the court's power to control court dockets and manage cases, will have a huge impact on the parcel, its physical condition, the neighbors, and the neighborhood. Those simple steps reinforce the rules of professional conduct that the plaintiff/lender/lawyers must follow anyway: to, in good faith, diligently pursue and advance the lawsuit that they filed to actual completion and to refrain from acting in a way that causes harm to others and improper purpose like delay. The ABA Model Rules of Professional Conduct require lawyers to act with reasonable diligence and promptness in representing the client (Rule 1.3), to make reasonable efforts to expedite litigation consistent with client interests (Rule 3.2), and to not use means aimed at causing delay or burden to third persons (Rule 4.4).

The Milwaukee County, Wisconsin Circuit Court, and Judge Nancy Margaret Russo in the Cuyahoga County, Ohio Common Pleas Court have adopted measures mandating periodic scheduling conferences to ensure that mortgage-foreclosure cases advance and don't stall. Judge Russo said it works: "We move properties fast…neighborhoods are safer."

While each state's mortgage-foreclosure law is unique, there are commonalities. The lender lawyer files a foreclosure complaint, the lender gets a judgment of foreclosure, the judgment starts a redemption period in which the owner can pay off the loan to stop the foreclosure, and if the owner doesn't redeem, the parcel gets scheduled for auction or sheriff sale, and the parcel is sold to the high bidder. The Court confirms the sale, and a sheriff or foreclosure deed gets issued to the buyer.

Note the anomaly. Unlike other litigation where the judgment brings the case to a close, in mortgage-foreclosure litigation, the judgment doesn't end the case. There are post-judgment steps to accomplish (wait-out redemption, sheriff auction, confirmation of sale, deed) before the case can come to a true end when the sheriff or foreclosure deed gets issued.

In distressed urban neighborhoods, where home values and conditions have declined, lenders and their mortgage servicing companies can have an incentive to bring foreclosure cases to induce redemption (loan payoff). If the case filing, however, doesn't result in loan pay-off, they also have an incentive to not finish the case. Lenders don't necessarily want to own the homes (they don't want to add "REO," bank-owned, parcels to their inventory) because if the lenders own, they also have to maintain, repair, manage, and sell. While lenders don't have to bid at the sheriff's sale or foreclosure auction, if it is unlikely that there will be bidders who will bid an amount to reasonably minimize the lenders' loss, the lenders sometimes freeze, and put the foreclosure litigation on hold,

zombie-izing the parcel and the foreclosure case.

It is at this point, in the post-judgment, post-redemption period, when the court can step in with the simple steps to stop the zombie state. The court should require the lender lawyer to advance the case and schedule the post-judgment auction sale. If no one wishes to bid, then the lender and lender lawyer should move for dismissal of the case and satisfy the mortgage of record, to finalize the case in that manner, and conclude the litigation and remove the cloud on title. With the cloud removed and the foreclosure case ended, the defendant/owner/mortgagor is clearly responsible for the parcel.

One way or another, the lender lawyer that invokes the judiciary by filing a foreclosure lawsuit must be held accountable by the court to finish the case, either by consummating the post-judgment duties to get a sheriff or foreclosure deed issued to another who will be responsible for the parcel and its upkeep, or by dismissing the litigation if the lender or third parties don't want to own the parcel. Requiring case completion by sale or dismissal removes the cloud on title caused by foreclosure.

Better judicial supervision of mortgage-foreclosure cases truly can prevent zombie foreclosures, lessen blight and improve neighborhoods.

ML



Gregg Hagopian, Asst. City Attorney, City of Milwaukee. Gregg is a graduate of the University of Wisconsin Law School, where he was admitted to the Law Review and Order of the Coif. After practicing real estate and corporate law at Foley & Lardner he moved to the Milwaukee City Attorney's Office in 1994. He has been recognized for developing an efficient property-tax-collection alternative to foreclosure, for his work regarding detection and prevention of illegal property flipping and mortgage fraud, and for coming up with an idea that is now Wis. Stat. 75.106 - a tool that allows government to get tax-delinquent, brownfield property into the hands of those who will remediate and improve, and has received numerous other awards for his legal contributions. In the great cookie debate between "chocolate chip" and "oatmeal raisin," Gregg picks "oatmeal raisin."

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Some Alternative Ways to Resolve Discovery Disputes

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

Sane lawyers hate discovery litigation. So do their clients. And without a doubt, judges and magistrates have little patience for discovery litigation.[1] Although a judge may assert that he or she only hates "unnecessary" discovery disputes, I have never met a judge who does not think that lawyers could (and therefore should) have resolved most discovery arguments that are referred for judicial resolution. For example:

> The parties' behavior explains the belief among lawyers that judges hate discovery disputes. This court finds that generalization too broad—in the court's experience, it isn't that judges hate discovery disputes. It is that judges dislike unnecessary discovery disputes that involve unprofessional (some might say puerile) behavior by the lawyers or the parties. When the parties fail to courteously and cooperatively work through a good-faith scheduling error, this judge (and probably other judges) considers the need to resolve such a dispute somewhat embarrassing.[2]

As a very recent comment from the bench illustrates, judges see acrimonious discovery issues as impeding the proper functioning of their courts:

> Currently before the Court are a ridiculous number of discovery disputes, perfectly capturing the rationale for recent reforms to the Federal Rules of Civil Procedure to address concerns that civil litigation has become too expensive, time-consuming and contentious, thereby inhibiting effective access to the courts by parties seeking a just resolution to their dispute.[3]

All can agree that discovery litigation usually is time-consuming and inordinately expensive, and often distracting from what will be the dispositive issues.

So what are some alternatives?[4]

Meet and Confer

The pretrial conference among counsel is the Federal Rules' default method for resolving discovery disputes.[5] Many local rules or orders require in-person attendance by counsel, apparently in the belief (which I share) that in-person meetings are more likely than email or even telephone to foster substantive dialogue and resolution of disputes, or at least a narrowing of issues and adoption of a method for resolution that includes the court only as a last resort. For the same reasons, local rules also now often require good faith negotiations before the filing of pretrial discovery motions or even the service of discovery objections.[6] I cannot sufficiently emphasize how important the fullest use of these conferences has become; how appreciative judges are when the parties provide them with practical approaches to discovery based on those conferences; and how unpleasant litigators' lives quickly become in so many ways if we are dilatory in fulfilling our pretrial conference obligations.

The pretrial conference is both a pretrial discovery ADR method and a vehicle for counsel to consider and adopt (usually subject to judicial approval) various alternative procedures for resolving existing and potential discovery disputes. I suggest some of those alternatives here, but am sure to a moral certainty that there are others that I fail to mention.

Among the many discovery issues that a pretrial conference and the resulting proposed pretrial order might resolve are: the scope of document and electronically stored information (ESI) preservation, the order and scope of discovery, number of different types of discovery requests, duration and number of depositions; types of metadata to be included with produced ESI, and possible segmented discovery (*e.g.*, first round of discovery limited to jurisdictional issues).

The Value of Stipulations

Starting at the pretrial conference and continuing as additional facts emerge through discovery, counsel should consider and discuss possible fact stipulations, and (subject to stricter judicial constraints), stipulations of law. I like to think of stipulations being both offensive and defensive. Obtaining material stipulations from the opposing party can be an important offensive tool of course – achieving quick and inexpensive fact resolutions without having to do discovery. But I also find it useful to consider the defensive value of granting stipulations: they can be used to limit burdensome and even potentially embarrassing discovery against our clients.

For example, if we do not want to subject our mayor to substantial deposition questioning, consider offering to stipulate to those few facts that the opposing party asserts only the mayor knows. Alternatively, consider stipulations that narrow areas for such deposition questions. In either of such instances, the fact stipulations should be accompanied by corresponding agreed or court-ordered limits on discovery to ensure we get the bargained-for advantage of the fact stipulation. If we make such offers and the other side rejects them, we have created strong ammunition for our motion for a protective order.

Obtain an Order That Production Does Not Waive Privileges

It has been frequently observed,[7] and I agree, that failure to obtain an order under Fed. R. Evid. 502(d) can almost be *per se* malpractice except perhaps in small cases:

> **(d) Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by

> disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

Unfortunately, not many states have adopted an equivalent rule. Perhaps this is at least in part because of doubts that federal courts or courts of other states would abide by a state court's non-waiver orders – even though Fed. R. Evid. 502(c) implicitly recognizes the validity of such state court orders.[8] Such an order, which can be by agreement or over objection, serves an important role in situations wherein one party's resistance to certain discovery requests is motivated primarily by concern about possible future use of disclosures in other litigation. However, a Rule 502(d) protects only against waiver of attorney-client and work-product privileges by disclosure – it does of itself not render any information privileged or confidential. While Rule 502(d) is limited to protecting against waiver of attorney-client and work-product privileges, I have successfully argued that federal courts have inherent authority under the common law to enter orders to protect against waiver of other privileges as to future state and federal proceedings:

> The motion is GRANTED, and it is hereby ORDERED that pursuant to Federal Rule of Evidence 502(d) and the Court's inherent powers, no privilege or protection for communications or other information claimed as privileged by the City of Dallas, Texas, is waived by disclosure connected with the litigation pending in this case, and that any such disclosure is also not a waiver in any other Federal or State proceeding.[9]

Requests for Admission

It may seem strange to consider using a classic discovery method as an alternative way to dispose of discovery disputes. But I am thinking of the provision in Fed. R. Civ. P. 36(b) barring use in other litigation of any admission made in response to an admission request:

> An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding."

In that respect, Fed. R. Civ. P. Rule 36(b) has an effect similar to that of an order under Fed. R. Evid. 502(d) – it protects a party from use of the matter disclosed or admitted in future litigation. An advantage of the protection for matters admitted under procedural Rule 36 over the protection of an order under evidence Rule 502(d) is that the evidence rule only protects privileged information against later assertions of waiver, whereas the procedural rule can limit future use of any information communicated through admissions. As noted in the above discussion about Rule 502(d), a party's principal concern about providing discovery may be feared collateral consequences. Treating the matter under Rule 36 rather than in depositions, interrogatories, or even requests for production, can help protect a party from future adverse use of the matter admitted at minimal expense.[10]

Sealing and Confidentiality Orders

When properly used, sealing and confidentiality orders can protect against further disclosure of trade secrets or other sensitive competitive information, thereby reducing legitimate hesitance to provide such information in discovery. As with Rule 502(d) orders and admissions under Rule 36, confidentiality orders can protect parties from adverse use of disclosed information in future proceedings. However, courts are legitimately starting to push back against abuses, such as when parties seek to protect information that is not worthy of judicial protection, try to protect information for too long a period, or try to protect information on which court orders approving settlements are based. Also, confidentiality orders are interlocutory, and therefore a court can reconsider them at any time (of course Rule 502(d) orders are interlocutory too).

Motion for Partial Summary Judgment or Dismissal

Early partial summary judgment and dismissal motions can be used to test whether disputed discovery is really material. Staying discovery except as to matters directly relevant to jurisdiction while such motions are pending has great potential for mooting discovery requests and associated disputes.[11] However, courts retain broad discretion to stay or not to stay discovery – and many decline to do so:

> While a party's filing of a motion to dismiss may be an appropriate circumstance in which to limit discovery, the filing of a motion to dismiss by itself does not mandate a stay of discovery pending resolution of that motion, nor does the right to discovery continue in light of a pending dispositive motion. Rather, whether a stay of discovery is warranted depends on the individual case. A stay is appropriate where the motion to dismiss can resolve the case, where ongoing discovery is unlikely to produce facts necessary to defeat the motion, or where the motion raises a potentially dispositive threshold issue, such as a challenge to plaintiff's standing.[12]

Perhaps because I am usually on the defense, I see stays or limits on discovery pending resolution of non-frivolous dispositive motions as conserving judicial and party resources. Of course discovery should be permitted to proceed to prevent loss of testimony or other evidence, or to prevent other demonstrable prejudice. Courts also grapple with the harder question of whether to stay discovery entirely, not at all, or only as to the defendants whose dispositive motions have been dismissed where such motions from other defendants remain pending.[13]

Shifting Preservation, Collection, Review, and/or Production Costs

I mention these possibilities here but the mechanics are beyond the scope of this piece. Cost shifting does not directly resolve discovery disputes but a requesting party who is required to pay discovery expenses before the discovery is had might understandably decide that the requested discovery just might not be that crucial after all.

Discovery Master or Mediator (or Referral to Magistrate Judge)

Retaining neutral non-judicial referees can help resolve discovery disputes if the case warrants the expense. Some federal districts use magistrate judges as discovery mediators too, with impressive success at less out-of-pocket cost to the parties. Federal judges often refer discovery disputes to magistrate judges, either to issue dispositive orders or to recommend orders to

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Second Look Cont'd from page 29

the district judge. A mediator can either recommend settlement terms on scope of disputed discovery to the parties or recommend procedure for resolving such dispute. Using mediation can allow the parties to keep information confidential – sometimes even from the judge – while referral to magistrates or masters require confidentiality orders for such protection.

Sneak peeks and other methods of testing disputed data sets for responsiveness

Discovery disputes often center on whether a set of data contains enough relevant information to justify the expense and time to review that data. Courts have started to approve proposed testing methods – often using sophisticated statistical tools for selecting representative test sets. For example, the parties might be ordered to use agreed key words to search a randomly-selected statistically valid sample from a disputed data set based on an agreed or court-determined level of reliability. The results of such tests can inform future settlement of discovery disputes and/or court discovery rulings.[14]

Notes

1. By "discovery litigation" I mean the usual objections, motions to quash, motions for protective order, motions to compel, and motions for sanctions. Some jurisdictions have different names for these procedures or vary discovery litigation from the federal model, which I treat as a benchmark here.
2. SV Gopalratnam v. Hewlett-Packard Co., 13-CV-618-PP, 2015 WL 5772864, at *7 (E.D. Wisc. Sept. 30, 2015).
3. Spin Master Ltd. v. Bureau Veritas Consumer Products Serv., Inc., 08-CV-923A (SR), 2016 WL 690819, at *1 (W.D.N.Y. Feb. 22, 2016).
4. *See generally,* Federal Judicial Center, Manual for Complex Litigation, §§ 11.4.423-.424 at 56-62 (4th ed. 2004), https://public.resource.org/scribd/8763868.pdf (last accessed Feb. 28, 2016).
5. *See* Fed. R. Civ. P. 26(f).
6. *See generally* Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery)* Road, 19 Rich. J.L. & Tech. 8 (2013) (now outdated because of rapid developments, but a useful discussion).
7. *See, e.g.*, Pearl Zuchlewski, The Uses and Abuses of Electronic Discovery, 57 Wayne L. Rev. 1391, 1409 (2011) (attributing statement to U.S. Magistrate Judge Andrew Peck, S.D.N.Y.).
8. Fed. R. Evid. 502(c) provides in pertinent part: "When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver . . .." The drafters' note on Rule 502 relies on full faith and credit principles to take the position that ". . . a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings." Explanatory Note on Evidence Rule 502. I suppose the drafters would have taken the same position as to such state court orders being enforced by courts in other states.
9. *See* Order Granting Motion for Entry of a Protective Order as to City of Dallas, ECF No. 934, United States v. Don Hill, Crim. Action No. 3:07-CR-289-M (N.D. Tex. Aug. 14, 2009). My concern was to preserve the legislative deliberation privilege for city council communications, but the order also would have protected other privileges too.
10. However, assuming the admission is not sealed, a future litigant in a later law suit could ask the same question as the request for admission, or seek the information using another discovery method. Nothing in Rule 36(b) would prevent that, nor in my view should it. Rule 36 cannot and should not immunize a party from the adverse consequences of unfavorable facts – it merely limits the adverse use of the admission of such fact in a law suit. The 1970 drafters' notes to Rule 36 contain some interesting passages: "The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. . . . In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party." Notes to 1970 Amendments, Fed. R. Civ. P. 36 (citations omitted). These excerpts imply that admissions or denials in pleadings in one case cannot be used against the pleader in a later case. However, I think that implication is incorrect. *See* New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001) (court discretion to invoke judicial estoppel to prevent litigant from taking position contrary to the party's pleadings in a prior case); In re Zonagen, Inc. Sec. Litig., 322 F. Supp. 2d 764, 783 (S.D. Tex. 2003) ("Statements a party makes in pleadings in one case that are inconsistent with the positions a party takes in another case may be admissible as admissions against interest and for impeachment"). I could not find any federal cases on whether Rule 36(b) would bar the use of an admission in impeachment as a prior inconsistent statement, but the plain language of the rule does suggest that the impeachment use of the admission would be prohibited. Interestingly (at least to me) is another implication from a literal reading of Rule 36(b): It bars future use of admissions but not of denials or refusals to admit. A carefully phrased request for admission could draw a denial that might haunt the denying party in future litigation if the rule is to be literally applied. And what about deemed admissions arising from failure to respond to admission requests? Does the dilatory party get to use the Rule 36 shield for deemed admissions in future litigation? I would think not but have not tried to research the question.
11. "The Court retains ample discretion to tailor discovery to minimize incidental costs incurred by defendants with pending motions to dismiss." In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100, 106 (D. Mass. 2002) (citations omitted because post-2002 Fed. R. Civ. P. amendments have redistributed courts' authority – but preserved it).
12. Nexstar Broad., Inc. v. Granite Broad. Corp., 1:11-CV-249, 2011 WL 4345432, at *2 (N.D. Ind. Sept. 15, 2011) (internal quotation, typographic changes and citations omitted).
13. *See* In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100 (D. Mass. 2002).
14. *See generally* Ruling Regarding Electronically Stored Information ("ESI"), Strauch v. Computer Sciences Corp., Civ. Action No. 3:14-cv-00956, 2015 WL 7458506, *3 (D. Conn. Nov. 24, 2015), for a good discussion of some of these approaches. Additional insight appears in the lawyers submissions on the discovery issue, available from PACER. ML



Yes, I *Do* Love the ListServ

By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina

Hello... I should start off by paying homage to my good friend Kelly Addy for taking such good care of this column for the past few years. Kelly's insight on ListServ issues was always welcome, as was his sage advice.

In case you missed it, Kelly was the Deputy City Attorney for the City of Billings, Montana, for many years, and also is an ordinated Methodist minister. He has retired, and the Bishop had the wisdom to give Kelly his own congregation full-time. And what an assignment! Kelly is now the Pastor at Big Fork United Methodist Church in Bigfork, Montana. Bigfork is situated at the edge of Glacier National Park, one of the most beautiful places in the United States. As Kelly said in parting, "I'm headed off to work full-time in the place where I used to go to get away from it all." Congratulations Kelly, and thanks for your years on the ListServ column, and for being a valued and trusted colleague.

Now, it is my turn and although many of you on the ListServ have certainly had the occasion to hear from me in type (rather abundantly), I feel it only appropriate to formally introduce myself. I am Brad Cunningham, Municipal Attorney for the Town of Lexington, South Carolina. We are a small city of about 22,000 which sits 10 miles west of Columbia, site of the State Capitol. I attended the University of South Carolina in Columbia for undergraduate (B.S. – Finance) and Law School. (J.D.) These degrees were granted 12 years apart and came sandwiched around a stint in the banking business in Myrtle Beach, South Carolina. I think the law is a passion, and I was never able to put it out of my mind, so I embarked upon law school at 34 years of age.

After only three years in the private practice of Real Estate Law, I was fortunate enough to land the Municipal Attorney job here in Lexington and have never regretted the change. Our City is of course a Municipal Corporation, and being the Municipal Attorney makes me a Corporate In-House Counsel like my late father, Robert G. Cunningham Jr. He is the greatest single influence and inspiration not only in my career, but also in my personal life. I only wish he were around to share this part of my life, but alas, he passed away in 1996 at the age of 61, and never even was around to see me go to law school.

My involvement in the International Municipal Lawyers Association consists of serving as the IMLA State Chair for South Carolina, and working with the Disaster Preparedness Committee. And, of course, I make frequent use of the IMLA ListServ and the Water Cooler, serving as a co-moderator for the Water Cooler.

I began involvement with IMLA very early in my career in Municipal Law, and one of the first things I did was join the. My impression of the ListServ is that it is like having a quick word of advice from a law firm of several hundred attorneys at your fingertips. It is much as though we are members of a large "electronic law firm." One of the first great successes on my job was a direct result of the IMLA ListServ.

Many of you will remember a Cable TV class action suit which came about several years ago. I might not have known about the suit, but for my participation in IMLA and the ListServ. After careful consideration, I decided to opt in.... Not too much later I received a letter and a check for around $55,000. I don't get to contribute to the budget that often, so I took it into the Town Administrator's office. I presented it to him and said "I guess this covers my costs for the IMLA membership and conferences." His eyes almost popped out, and he said "We get to keep this?"

You have to understand that at the time, we were only about half as large as we are now, with a corresponding smaller size to our annual budget. That meant a huge chunk to the legal department budget, and helped to confirm my plans to stay active in IMLA through the ListServ and conferences. I cannot put a price on what IMLA has meant to me, but certainly this helped me get off to a great start.

We are a fraternity, of sorts, and I like to think that we are the best in the country at what we do in our special little corner of the legal world. The ListServ has not only brought us together professionally as we share a common bond, but often it also has reminded us of the other common bonds we share – husband/wife, parent/child, teacher/student and onward... So, an often overlooked value of the ListServ is what we do after the law is "applied" or what we do once the proverbial clock is punched and we get out from behind the desk. Do we stop being lawyers? The obvious answer is no, but we do (in many cases) have to live with and according to the decisions we make and the laws we interpret in guiding our municipal leaders. Advice in doing that is a secondary benefit of belonging to the ListServ.

For example, here in South Carolina, we live in hurricane territory. There is plenty of advice available on the ListServ about negotiating the FEMA maze and other rules and emergency legal procedures we need to follow. But, we also share real life experiences and advice in the aftermath of these types of emergencies and how they affect our personal lives. When some of us find ourselves without power after a hurricane, others of us are able to send suggestions on meals to be prepared out of a box, ways to

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Bradford T. Cunningham has served as the Municipal Attorney for the Town of Lexington, South Carolina since 2002. He is Past President of the South Carolina Municipal Lawyer's Association and IMLA State Chair for South Carolina, and received IMLA's Joseph I. Curtin Award for Distinguished Public Service in 2014. He earned both a B.S. in Finance and his J.D. from the University of South Carolina. He is licensed to practice law in South Carolina and Georgia, and worked in banking before earning his law degree. At night, Brad is a sportscaster for a local radio station.

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istrative agencies to impose onerous regulations on businesses and governments without fundamental procedural safeguards. And while it was a less than ideal position in this case to side with the seemingly predatory guarantor, the legal issues in this case are compelling. From a practical standpoint, *Auer* deference provides a perverse incentive for administrative agencies to draft vague regulations or effectively rewrite their regulations without going through notice and comment rulemaking, under the guise of merely "interpreting" those regulations, knowing that reviewing courts must in nearly all instances give those "interpretations" binding effect—even when they are announced for the first time in an amicus brief, as in this case.

Not only are local governments burdened through litigation by agencies that interpret their regulations in this manner, but local governments also often regulate in the same space as those agencies so they have an interest in those agencies providing clarity in their regulations so that local regulations do not inadvertently conflict with federal regulations and risk preemption. IMLA's amicus brief also points out the additional problems *Auer* deference creates for state and local governments when an agency authoritatively interprets its regulations for the first time via an amicus brief as it did here because such deference results in the possibility that local governments would need to scour court decisions to ensure that a filing by an agency did not authoritatively interpret a regulation in a way that is inconsistent with state or local law, thus preempting it.

This is a case that seems ripe for consideration by the Court. Four Justices must vote to grant certiorari and up until Justice Scalia's recent passing, that seemed like a fairly certain proposition. Now it is perhaps less clear, though there is certainly still strong support from the Court's more conservative Justices for the overturning of *Auer*. According to sitting members of the Court, as well as the author of *Auer,* the late Justice Scalia:

Auer deference undermines courts' "obligation to provide a judicial check on the other branches" but also "subjects regulated parties to precisely the abuses that the Framers sought to prevent." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

Auer deference also raises "understandable concern about the aggrandizement of the power of administrative agencies." *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).

"The opinion… raises serious questions about the principle set forth in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945), and *Auer* v. *Robbins*, 519 U. S. 452 (1997). It may be appropriate to reconsider that principle in an appropriate case." *Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326 (2013) (Roberts, C.J., concurring in part and dissenting in part).

As the author of *Auer* himself has explained, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment) ("I would therefore restore the balance originally struck by the [Administrative Procedure Act] . . . by abandoning *Auer* and applying the Act as written.").

It is worth noting that regarding this particular sympathetic plaintiff, at least one of the judges on the Seventh Circuit panel believed there was an independent basis to hold that the guarantor was prohibited from assessing collection costs against the student without relying on *Auer* deference. Thus, even if *Auer* is overturned, it seems that this particular student could still prevail.

Birchfield v. North Dakota

There are three consolidated cases before the Supreme Court involving the question of whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood. The cases are: *Birchfield v. North Dakota, Bernard v. Minnesota,* and *Beylund v. North Dakota*. For the purposes of this article, *Birchfield v. North Dakota* is summarized. Relevant to all three cases is that for decades, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to [blood-alcohol] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013).

In this case, Birchfield drove his car into a ditch and when an officer arrived on the scene he believed Birchfield was intoxicated. Birchfield failed a field sobriety test and a preliminary breath test showed a blood alcohol level of .254. The officer placed him under arrest and thereafter, Birchfield refused to submit to a chemical test. Such a refusal is a violation of North Dakota law and Birchfield was therefore charged with a refusal to submit to a chemical test, which is a class B misdemeanor.

Under N.D.C.C. § 39-20-01(1), an individual who drives "is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test" which may only be administered after placing the individual under arrest. N.D.C.C. § 39-08-01 provides that a person may not drive a vehicle if that person refuses to submit to a chemical test to determine the alcohol concentration in his/her blood and any such refusal is a criminal offense.

Birchfield claimed that the statute criminalizing the refusal to submit to a chemical test violates the Fourth Amendment. Relevant to this case is the Supreme Court's decision in *Missouri v. McNeely*, which held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Additionally, in *Camara v. San Francisco*, 387 U.S. 523 (1967), which involved a city ordinance that allowed the warrantless inspection of

property, the Court held there could be a violation of the Fourth Amendment even if no search was conducted. The North Dakota Supreme Court distinguished *Camara* noting that implied consent laws only authorize chemical testing where an officer has probable cause to believe the defendant is under the influence and has already arrested the defendant.

The North Dakota Supreme Court held that the criminal refusal statute satisfies the general reasonableness requirement of the Fourth Amendment. In so holding, the North Dakota Supreme Court discussed a number of court decisions from around the country that have similarly held that these implied consent statutes do not violate the Fourth Amendment.

As noted, all 50 states have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the state, to consent to a blood alcohol concentration test if they are arrested or detained on suspicion of drunk driving. Typically, these laws also provide for the immediate suspension/ revocation of the motorist's license if the motorist refuses to take the test. Local governments have a clear interest in preventing drunk driving and ensuring there are consequences for those that endanger the public by driving while intoxicated.

IMLA joined the State and Local Legal Center's amicus brief in this case, arguing that these laws do not impermissibly burden motorists' Fourth Amendment rights given that consent is a well-accepted exception to the warrant requirement of the Fourth Amendment. The petitioners argue that even if a state can constitutionally require advance consent, the state cannot impose criminal penalties for drivers who accept that condition and then later renege on that consent. IMLA's amicus brief points out the flaw in the petitioner's logic with the following hypothetical:

> Citizen A and Citizen B both apply for driver's licenses. Neither is willing to submit to a Breathalyzer if he is pulled over by an officer who has probable cause to believe that he is driving drunk. Citizen A is forthright about this, and the State therefore denies him a driver's license. Citizen B, by contrast, stays mum and receives a license. Citizen A and Citizen B meet at a bar and have several cocktails. Both make the wrongheaded decision to drive home instead of taking Uber. Both are pulled over. Both – knowing that they are certain to fail – refuse to take Breathalyzers. Both evade a conviction for driving under the influence because the police were unable to secure the key evidence needed for a conviction.
>
> No one would dispute that Citizen A could be criminally punished for a criminal offense of driving without a license. But under petitioner's view, Citizen B cannot be criminally punished for refusing to take the Breathalyzer test. Instead, the State would be limited to suspending Citizen B's license. That puts Citizen B in a *better* position than Citizen A, because Citizen B is in the same position *after* his decision to drive drunk (*i.e.*, he no longer has a license) that Citizen A was in *before* he decided to drive drunk (*i.e.*, without a license). In effect, petitioners' rule creates an incentive for residents to accept a government benefit when they have no intention of complying with the State's constitutionally permitted reciprocal condition, knowing that if they are caught the worst that will happen to them is that they will lose a privilege they should not have received in the first place.

This case has some parallels with another case IMLA recently filed an amicus brief in at the petition stage, involving the issue of whether a government may revoke the license of a licensee who refuses to answer questions related to the license (the case was *Michigan Gaming Control Board v. Moody*). In that case IMLA argued that for example, if extended to the building code, would we allow a licensee to continue building if we approached the licensee and asked for proof regarding the content of the concrete in the footers and they refused to answer? The issue is analogous here. Should a person, who has been given the privilege (not the right) to hold a license to operate a motor vehicle refuse to submit to a chemical test to test for the presence of alcohol, the government should have the ability to revoke that person's license and exact the same level of punishment they would have been able to if the person was convicted of the offense (in this case driving under the influence of alcohol).

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





PRACTICE TIPS

Municipal Sign Ordinances after *Reed v. Town of Gilbert:* Do's and Don'ts

By: New Hampshire Municipal Association

Because the Town of Gilbert sign code placed stricter limits on temporary events signs but more freely allowed ideological and political signs—despite the fact that all three sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement of strict scrutiny.

As a result of *Reed*, a sign code that makes any distinctions based on the message of the speech is content based. Only after determining whether a sign code is neutral on its face would a court inquire as to whether the law is neutral in its justification.

Municipalities should review their sign codes carefully, with an eye toward whether the code is truly content neutral. If the sign code contains some potential areas of content bias—for example, if the code contains different regulations for political signs, construction signs, real estate signs, or others—consider amending the code to remove these distinctions.

In cases where a sign code update might take time, local planners and lawyers should coach enforcement staff not to enforce distinctions which might cause problems.

Check to be sure your sign code has all of the "required" elements of a sign code.

- The code should contain a purpose statement that, at the very minimum, references traffic safety and aesthetics as purposes for sign regulation.
- The code should contain a message substitution clause that allows the copy on any sign to be substituted with noncommercial copy.
- The code should contain a severability clause to increase the likelihood that the code will be upheld in litigation, even if certain provisions of the code are not upheld.
- In preparing the purpose statement, it is always best to link regulatory purposes to data, both quantitative and qualitative. For example, linking a regulatory purpose statement to goals of the local master plan, such as community beautification, increases the likelihood that the code will survive a challenge.
- If traffic safety is one of the purposes of the sign code (it should be), consult studies on signage and traffic safety to draw the connection between sign clutter and vehicle accidents.

In conducting the review of the sign code recommended above, planners and lawyers should look to whether the code contains any of the sign categories that most frequently lead to litigation. For example, if the code creates categories for political signs, ideological or religious signs, real estate signs, construction signs, temporary event signs, or even holiday lights, it is likely that the code is at greater risk of legal challenge. As a general rule, the more complicated a sign code is—i.e., the more categories of signs the code has—the higher the risk of a legal challenge.

Sign Code Guidance from the Court (Alito's Concurrence):

A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny.

The requirements of your ordinance may distinguish among signs based on any content-neutral criteria. Here are some specific standards the Court might uphold:

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event.

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Possible Sign Code Changes:

Increase the overall allotment of temporary signs to accommodate the maximum demand for such signage at any one time, and allow that amount of temporary signs. A regulation that singles out off-premises signs that does not apply to a particular topic, idea, or viewpoint is probably valid because it regulates the locations of commercial signs generally, without imposing special burdens on any particular speaker or class of speakers.

Define government signs and Traffic Control Devices as signs, but specifically authorize them in all districts. Provide a base allotment of signs, and allow additional signs in relation to activities or events. Every property has a designated amount of square feet of signage that they can use for any temporary signs on their property, year round. For example: [x]

square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and perhaps with spacing of signs from one another. All properties get additional noncommercial signs at certain times, such as before an election or tied to issuance of special event permit. They key is to tie the additional sign allowance to the use of the property, rather than the content of the sign. Consider the following:

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new occupational license (real estate or grand opening signs).
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater (drive thru, gas station price, and theater signs).
- Allowing additional sign when special event permit is active for property (special event signs). Key: not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity.
- Grant an exemption allowing an extra sign on property that is currently for sale or rent.
- Grant exemptions allowing an extra sign (up to 10 sq. ft., up to 48 inches in height, and up to six feet from a curb cut), for a lot that includes a drive-through window.

Every parcel shall be entitled to one sign up to 36 sq. inches in surface area to be placed in any of the following locations: On the front of every building, residence, or structure; on each side of an authorized United States Postal Service mailbox; on one post which measures no more than 48 inches in height and 4 inches in width.

Provide a content-neutral application process: Citizens can apply, by postcard or perhaps online, for seven-day sign permits, and receive a receipt and a sticker to put on the sign that bears a date seven days after issuance, and the municipality's name. The sticker must be put on the sign so that enforcement officers can determine whether it's expired. Because the expiration date is tied to the date of issuance, there is no risk of content-discrimination. The sticker itself would be considered government speech.

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help keep food fresh and how long food can sit before it spoils. We have shared information following a disaster on places to stay and places to find resources that are not legal in nature. And once the issues discussed have spilled mostly over into "non-legal" matters, we can shift the conversation over to the Water Cooler for further advice to help get us through the life challenges we face following an emergency.

I recall reaching out to folks in Missouri, Alabama and Oklahoma following tornadoes, and to the folks down in Florida following a series of hurricanes several years ago. I even helped our Town Administrator arrange to send some of our utilities workers down to Florida to help with the manpower needs that come after a devastating storm. They brought water and shovels and other equipment to help the municipal workers recover and dig out from under the damage. Needs such as these are frequently discussed on the ListServ.

Following Hurricane Katrina, I volunteered with the Red Cross in helping at an evacuation center in Columbia. I encountered people who had no idea where their loved ones were located, whether they were alive, or what conditions were like back home. I was able to get reports from folks on the ListServ as to conditions back home, and as to when folks might be allowed to return. I even located a relative for an elderly man. All of this is a spinoff from getting involved in and participating with the IMLA ListServ. As much of our lives as we devote to the "law," we're all part of our hometowns and this great country. We can and should use our electronic resources to help each other even when it goes beyond legal matters. It helps make our profession greater, but more importantly can help our fellow citizens out of difficult circumstances.

Those of us in the United States live in and come from all fifty states, and must apply different state law to a given situation. Obviously, this affects the type of advice we can give, though the common guiding principles do not waiver. But, we do all follow federal law and share great discussions of constitutional issues which affect us all. One of the most recently discussed issues on the ListServ involved efforts of the ACLU and DOJ and their recently increased focus on fines and fees. In a specific case, the ACLU had apparently sued a municipality, and the city agreed to settle on the issue of "debtor's prisons." Obviously, these were eliminated many years ago, but according to the ACLU had slipped in the back door and had essentially started operating again in the form of jailing indigents for failure to pay court fines.

Most folks understand the unique issues involved concerning indigent folks and non-payment of "legal debts." But, I couldn't help but wonder if I was the only one thinking of the possible unintended consequences of such lawsuits. After reading a couple of the cases I found that I was not, as shown in former Justice Blackmun's concurring words in one such case:

> *"The Court's opinion is couched in terms of being constitutionally protective of the indigent defendant. I merely add the observation that the reversal of this Texas judgment may well encourage state and municipal legislatures to do away with the fine and to have the jail term as the only punishment for a broad range of traffic offenses. Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible Eighth Amendment considerations... If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable."*

Whether this result is desirable may be another issue for debate, but Justice Blackmun makes a valid point. In order to stay out of the way of the issue, some governing bodies could very well seek to "solve" the issue by eliminating the possibility of the fine. I fear this may result in a situation that is unfair to even more people, and one where the result will end up being that the very people who were being protected from an "unfair" jail sentence will end up there anyway. I'm not sure there is an easy answer for this one.

Lastly, to make it through the tough times in this job, I would suggest there is often a place for recognizing humor or irony to help us along the way. This often is shared on the Water Cooler.

I recently had a defendant named Jack Daniels come to court. The charge? You guessed it – DUI. According to officers, he reportedly smelled like a distillery when he was arrested. Fact is often stranger than fiction...

The prosecution rests, your honor... ML

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