November/December 2016

IMLA

# Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

## THE PRACTICAL ISSUE

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**Lead in Drinking Water: How to Get the Most out of Your Municipality's Insurance**

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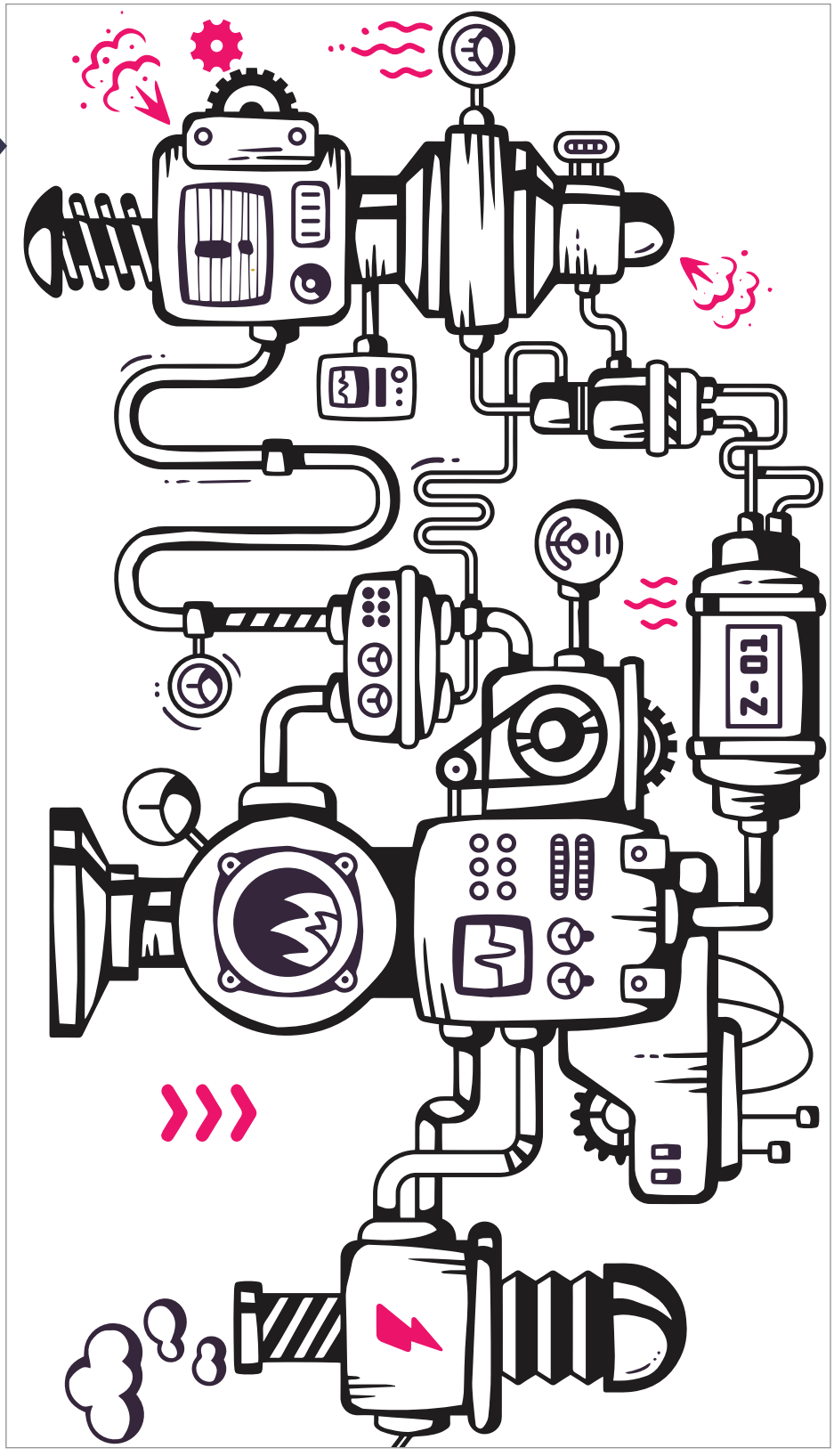




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THE MUNICIPAL LAWYER MAGAZINE



## THE PRACTICAL ISSUE

### HOW TO GET COUNCIL BUY-IN—WHILE MAINTAINING PROFESSIONAL ETHICS

*By: Nick Robichaud, City Solicitor, City of Moncton, New Brunswick*

No less than their American counterparts, Canadian municipal counsel face challenges in distinguishing between duties to municipal corporations and the councillors who lead them.

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## EDITOR'S NOTE:

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THE MUNICIPAL LAWYER MAGAZINE

Dear Reader:

Two years after America's Civil War concluded, Canada began its journey as a unified nation. On July 1, 1867, the Province of Canada, which would become Ontario and Quebec, was joined by the maritime colonists in New Brunswick and Nova Scotia to form the Canadian Confederation. Western neighbor Manitoba soon followed. The transformational Canadian Pacific Railroad spurred far-away British Columbia Colony to enter the new dominion in 1871, as did Prince Edward Island. Agricultural powerhouses Saskatchewan and Alberta were added in 1905, with outlier Newfoundland and Labrador finally pledging fealty to the Canadian flag in 1949.

These ten provinces, and Canada's northern lands spreading across Yukon, Northwest Territories and Nunavut, comprise the second most expansive nation on the planet. More significantly for American purposes, Canada's population of 36 million continue a tradition of mutual support between our countries–and enable the world's most important bilateral economic partnership. It is virtually impossible to measure the advantages that the United States and Canada have each gained by the presence of a peaceful and productive neighbor across an undefended border of nearly 4,000 miles.

Next year, IMLA will help celebrate Canada's sesquicentennial by holding our Annual Conference in Ontario, overlooking the spectacle of Niagara Falls. Appropriately, we will ring in 2017 under the leadership of our just-inaugurated IMLA President, Mary Ellen Bench, City Solicitor of Mississauga, Ontario–a city 100 kilometers from the Conference site. In her President's Letter, Mary Ellen issues an ambitious call to action for broadening our organization's demographics. This November-December *Municipal Lawyer*—the "Practical Issue" providing how-to advice across a spectrum of practice areas—continues a Canadian cast, with our lead article on ethics by Moncton, New Brunswick City Solicitor Nick Robichaud. We also feature prominently the image of Bruce Noble, IMLA's first Canadian President, as he delivers, *a cappella*, "The Star Spangled Banner" and "O Canada"—in English and flawless French—at our recent (and highly successful) Conference in San Diego.

Other "how to" articles discuss optimizing insurance for poisoned municipal water supplies (Finley Harckham of New York City's Anderson Kill P.C.); selecting the proper e-discovery vendor (Pete Haskel, Executive Assistant City Attorney, Dallas); developing a local high speed broadband network (Adrian Herbst of Bradley, Hagen & Gullikson, LLC, Washington D.C.); and practical tips for code enforcement officers (Sheri Russell, City Attorney, Lake Jackson, Texas). Brad Cunningham, City Attorney of Lexington, South Carolina, assesses the merits of "hangover buses" and absentee meeting attendance; and your IMLA editor looks at legislative prayer.

By the time the print version of this *Municipal Lawyer* is distributed, our 2016 American elections will finally be history. Despite murmurings to the contrary, a peaceful transition of power will have occurred. Those of us living below the 49th parallel will then be able to rejoin our Canadian colleagues in focusing on more substantive pursuits.

We hope you find this Practical Issue–and its occasional Canadian flavouring–useful in your practice.

Best regards-

Erich Eiselt

## DO YOU HAVE AN ARTICLE FOR THE MUNICIPAL LAWYER?



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

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

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

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

**We look forward to hearing from you!**

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

# PRESIDENT'S LETTER

## Our Mandate to Embrace Change

By: Mary Ellen Bench, City Solicitor, Mississauga, Ontario



I am honored to be writing this article as your new IMLA President, and to have taken on the mantle of IMLA leadership from Herb Thiele at our recent Conference in San Diego.

This role caps a long and very worthwhile relationship with our organization. Early in my career I was told about an amazing resource for municipal lawyers, then called NIMLO. Now known as IMLA, our organization has been an integral part of my professional career for over two decades. It has never failed to live up to the high standards first set by Charles Rhyne so long ago. IMLA is where I go to learn about municipal law topics and to compare what is happening at home to what is transpiring across Canada and the United States. Most importantly, IMLA has allowed me to develop a key network of sage advisors that I can turn to whenever I need help from experts who can relate to the issues that face a City Solicitor and involve more than just legal questions. They are all people I can trust (and if that isn't enough, I never get an invoice!).

Whenever I am asked about what makes my job so rewarding, I think about all of the different issues that land on my desk every day. It doesn't matter how full my calendar is, there is always room (and the necessity) to respond to something unexpected. In recent years, for example, the sharing economy has emerged. Our law department has been challenged to balance the interests of traditional service providers like taxis and hotels against new paradymes exemplified by Uber, Lyft, Uber Eats, AirBnB, and many others. Municipalities, state/provincial and federal authorities have all worked together to craft solutions that recognize these technologies are here to stay while preserving public safety, protecting impacted businesses, and finding ways to ensure these new entrants do not become nuisances and bear their fair share of the tax burden.

The upcoming year will be an exciting one for municipal lawyers as we tackle challenges new and old. Some of the new issues coming my way include the potential for "ranked" ballots (which are already in use in Minneapolis), and their impact on the municipal election; international trade agreements and their impact on municipal infrastructure projects; medicinal and recreational marijuana and distribution facilities; testing for drug usage versus privacy rights; the impact of foreign investment in driving up local real estate prices; and mental illness in the municipal workforce, to name a few. IMLA will help us address each of these challenges more effectively.

I am very engaged these days in responding to change, and am excited by many of the changes that are coming our way.

In a 2013 Emory Law Journal article titled "The Trouble with Lawyer Regulation," Washington & Lee Law professor and author James Moliterno commented:

> Lawyers tend to look backward to precedent and sideways to existing articulations of law. When lawyers do look forward, their primary task is to predict and guard against risk. It is not in lawyers' nature to be forward looking planners or sensitive to cultural trends.
>
> • • •
>
> Change happens. . . The unwelcome cure is to enlist . . . people, who have a wider view and can see the path ahead and not merely the ground already trod, [and] can regulate the legal profession without the same self-interest as established members of the bar.

He was talking about the need to have non-lawyers play a role in lawyer regulation, but the potential also exists for us to play this role, by staying abreast of the ever-changing world around us. We are subject matter experts and we are also business management experts. Much has been written lately about this subject, including Richard and Daniel Susskind's thought-provoking book, *The Future of the Professions-How Technology Will Transform the Work of Human Experts.*

Municipal lawyers have to respond to change and embrace it. Some of the topics I referred to earlier in this letter are evidence of that. More important are other matters, like responding to social and cultural change as reflected in our advice to clients on issues such as low income housing, policing, public health, crisis response, climate change, meeting the infrastructure challenge, and so on. Our world as municipal lawyers is not always logical (to other lawyers) but it is responsive and practical. It is responsive to the public; it is not driven by avoiding risk but by doing our best at risk allocation within a framework that allows municipalities to provide needed services within a legislated framework. We are problem solvers as well as legal advisors. In short, we see it all.

From time to time the courts have criticized law firms for their man-

*Continued on page 14*

# How to Get Council "Buy-in"— While Maintaining Professional Ethics

By: Nick Robichaud, City Solicitor, City of Moncton, New Brunswick



**Introduction**

Lawyers fulfill many roles within the organizations for which they work. They can be advocates for their clients in judicial or quasi-judicial proceedings; they can be the "deal- makers" in a variety of corporate/commercial transactions; and in many cases they act as trusted advisor in both legal and non-legal matters.

The above also holds true for in-house municipal counsel. Municipalities may rely on legal counsel for everything from strategic management advice to digging sewer trenches during a labour dispute (true story!). The old adage "every day is different" certainly holds true for municipal lawyers, and is perhaps one of the most compelling parts of the job.

Typically in the "CAO" municipal organizational structure, legal counsel reports to a chief administrative officer, and the CAO reports to council as its main employee. Having said that, legal counsel are in regular contact with councillors, both on an individual basis as well as with council as a whole. Councillors look to legal counsel to carry out the legal functions of the municipal corporation; to interpret by-laws and policies; to assist in answering questions from constituents; and for advice when faced with challenging decisions. The relationship between legal counsel and councillors may be complicated because the lawyer's client is the municipal corporation itself, not the councillors elected to manage it, a fact which may be lost on many elected officials.

This paper examines the role of in-house municipal counsel and its dealings with municipal councillors. I will begin by discussing the possible rules of professional conduct and other sources of regulation which govern legal counsel in a municipal setting.

Once this framework has been established, I will then share some best practices for communication with councillors and council as a whole, tips that will hopefully help you in your practice to get "buy-in" from council when you need it.

## PROFESSIONAL CONDUCT

***Competence***

Like many other professions, lawyers must adhere to their respective law society's rules of practice, including a professional code of conduct. While these rules may vary slightly by province or territory, many jurisdictions have adopted, either in whole or in part, the Federation of Law Societies of Canada Model Code of Professional Conduct (the "Code").[1] Under the heading of "Competence", the Code recognizes that lawyers may be called upon to provide non-legal advice:

> Competence
> 3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.
>
> Commentary
> [10] In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.[2]

This is especially relevant to lawyers in a municipal setting, as the City Solicitor is often part of the municipality's senior management team which makes decisions regarding the strategic direction of the Corporation, or makes recommendations to Council for a decision on same. The City Solici-

tor's involvement in many matters can go beyond that of simply legal advisor. According to the above commentary, such non-legal advice should be qualified when necessary.

***Quality of Service***

One of the key roles of municipal counsel is to communicate effectively with council. Good communication is at the heart of quality service; as such, lawyers are expected to adhere to a minimum standard of professionalism with respect to client communication:

> Quality of Service
> 3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.
>
> Commentary
> [3] A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.
> [5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:
> (a) keeping a client reasonably informed;
> (b) answering reasonable requests from a client for information;
> (c) responding to a client's telephone calls;
> (f) ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
> (g) answering, within a reasonable time, any communication that requires a reply; ...
> (l) providing a client with complete and accurate relevant information about a matter; ...
> (o) being civil.[3]

Arguably, councillors would likely agree that the above list sets out their minimum expectations in terms of communication with legal counsel. In order to make informed decisions, elected officials require relevant and accurate information. Similarly, if information is required to answer a question from a constituent, there will be a certain service level expectation for the required information in a timely manner. Beyond being a professional responsibility, effective client communication is also a cornerstone best practice for any municipal lawyer.

***Open and honest***

While it may be difficult at times, municipal lawyers have a duty to be open and honest when advising their client, even if this could mean disagreeing with the client's position:

> Honesty and Candour
> 3.2-2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.
>
> Commentary
> [2] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.
>
> [3] Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.[4]

This is perhaps the most common situation where municipal legal counsel may find it challenging to balance their professional responsibilities towards their client (the municipal corporation – see Rule 3.2-3 below) with advising elected officials who make up the municipal council. Although usually well-intentioned, in certain circumstances councillors may have difficulty accepting the advice of legal counsel if they are not aligned with the needs of that councillor's constituents. Legal advice against a certain course of action could be perceived as "bureaucratic red tape," preventing the councillor from "getting things done" for her constituents.

In private practice, clients may choose to follow their lawyer's advice or not. If they feel their lawyer is not providing the quality of service they bargained for, they can choose to work with another lawyer, and the lawyer (hopefully) will have other clients with whom they continue to work.

In a municipality, the lawyer typically has only one client – the municipal corporation. However, council is the decision-making body of the corporation. The lawyer has a duty to provide honest and candid advice to protect the interests of the corporation; in some cases, that advice may not be aligned with the interests or views of some (or all) members of council, who ultimately have the authority to terminate the employment relationship.

In order to ensure that the lawyer is able to provide the best and most honest advice possible to protect the interests of the municipality without fear of retribution, some jurisdictions have included in their governing provincial statute a "job protection" clause for certain senior officers. For example, New Brunswick's *Municipalities Act*[5] contains the following provision:

*Continued on page 8*



**Nick Robichaud** is the City Solicitor for the City of Moncton in New Brunswick, Canada. Prior to entering the field of municipal law, Nick was in-house counsel at a large university in Atlantic Canada for several years. He obtained his JD from Dalhousie University, as well as a Bachelor of Education from the University of New Brunswick. As well as being a member of IMLA, Nick is also currently the Chair of the Municipal Law section of the Canadian Bar Association - New Brunswick Branch, as well as serving as a member of the Canadian Exam Review Board of the International Association of Privacy Professionals.

How to Get Council "Buy-in" Cont'd from page 7

74(1) The council of a municipality may appoint a chief administrative officer for the municipality.

74(2) The council of every municipality shall appoint a clerk, a treasurer and an auditor.

74(3) The council of a municipality may appoint an assistant clerk, an assistant treasurer, an engineer, a building inspector, a solicitor and such other officers as are necessary for the administration of the municipality.

74(4) A person may be appointed to more than one office.

74(5) With the exception of auditors, all officers employed solely by the municipality on a full time basis and appointed under this section, are entitled, subject to section 85 and subsection (6), to hold office until retirement, death, resignation, or dismissal for cause by the affirmative vote of at least two thirds of the whole council.

As further explained by Strat6on C.J.N.B. for the New Brunswick Court of Appeal in *Hughes v. Moncton (City)*:[6]

When one reads the whole of s.74 of the Municipalities Act, it is, in my view, important to note the scope of tenure granted by subsection 74(5). This protection is an extraordinary form of employment security. The Common Law and statutory right of an employer to give reasonable notice of termination to such employees is usurped by subsection 74(5). The subsection provides officers named in subsection 74(2), those named officers who are appointed by Council under subsection 74(3) and those other officers who are declared to be necessary for the administration of the municipality, a level of security available in very few other employment relationships.

While this type of provision does provide the municipal lawyer with a sense of employment security and independence, it is important to remember that professional rules regarding honesty and candour apply in all jurisdictions in one form or another, whether such statutory protection exists or not.

***Acting for the Municipal Corporation***

Generally speaking, municipalities in Canada are constituted as "municipal corporations," a unique form of corporate entity created by statute. The powers of a municipality are to be exercised by its council, which in many ways is the equivalent of a business corporation's board of directors. It is now well-settled that, like any other corporation, the municipal lawyer's "client" is the municipal corporation. This principle has also been codified in the Code:

When the Client is an Organization
3.2-3 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

Commentary
[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.[7]

The Code also addresses the lawyer's responsibility where the organization acts dishonestly, fraudulently, or illegally:

Dishonesty, Fraud when Client an Organization
3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7:
(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.

Commentary
[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with Rule 3.7-1. In some but not all cases, withdrawal means resigning from

his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.[8]

This rule is an important reminder of the lawyer's professional responsibilities when faced with dishonest, fraudulent, criminal or illegal client conduct, even when acting for an organization. While such behaviour would (hopefully) be exceedingly rare, there are examples where such situations may arise. For instance, in the case of *Toronto Party for a Better City v. Toronto (City)*,[9] the Executive Committee of Toronto City Council sought the City Solicitor's opinion regarding the validity of a grant program for councillors to cover approved extraordinary legal and audit expenses during an election campaign and subject to requests for compliance audits. The City Solicitor expressed the opinion that the City's grant-making power did not permit council to make a grant to assist candidates with their compliance audit costs. About six months later, she provided a further opinion that the courts have held that council lacks the authority to reimburse a councillor for legal costs for activities outside of his or her office, including activities related to candidacy for council.

The City Solicitor was then asked to review the reasonableness of legal fees related to the compliance audit process. Instead of answering the narrow question being asked, the City Solicitor took the opportunity to expand on her previous opinions regarding council's authority to reimburse such expenses. Finally, in a fourth report to all members of Council about three days before it was set to vote on a proposed by-law to authorize payments to two councillors, the City Solicitor reiterated her previous opinion that Council had no authority to reimburse councillors for legal expenses incurred resisting an application for a compliance audit of their campaign expenses.[10]

Despite the City Solicitor's repeated advice, Council approved the by-law, which was subsequently found by the Divisional Court to be *ultra vires* City Council, with leave to appeal by the City dismissed. The Toronto Party, a non-profit group promoting good government and fiscal responsibility, brought an application to the Ontario Superior Court to declare the individual councillors who voted in favour of the ultra vires by-law jointly and severally liable for the amounts paid out, on the basis that they breached their fiduciary duty to the taxpayers of the City of Toronto. One of their arguments advanced in this regard was that the councillors' repeated failure to follow the advice of the City Solicitor amounted to misfeasance and a breach of the fiduciary duty owed by councillors to the taxpayers of Toronto.

The application judge failed to find misfeasance by the councillors on this or any other basis. On appeal, the Court of Appeal agreed, and made the following comment:

> The councillors' repeated failure to follow legal advice may not have been wise, but it does not, on its own, or together with the subsequent declaration of invalidity, give rise to an inference, much less amount to proof of misfeasance.[11]

While not a case of "whistleblowing" per se, the facts and commentary regarding the role of the City Solicitor in this case are interesting for several reasons. First, it is a prime example of the municipal lawyer's duty to provide honest advice to council, even when it is clear that council does not want to follow that advice. Furthermore, it demonstrates the proper actions legal counsel should take when council decides on a course of action beyond the scope of their legal authority – the City Solicitor in this case provided advice on four separate occasions (two of which were unsolicited) of council's lack of authority to act in the manner they were proposing. Finally, the case shows the limits of the role of City Solicitor—it must provide opinions and advice to council, but ultimately council will decide on its own course of action, which may not always be in agreement with the advice of legal counsel.

### *Conflict of Interest*

Beyond a duty to act in the best interests of the corporate client, municipal legal counsel also have a duty to avoid any conflict of interest:

> Duty to Avoid Conflicts of Interest
> 3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.[12]

As further explained in the Code, a conflict of interest may arise not only where a lawyer has clients with competing interests, but also in situations where the lawyer acts in his or her own personal interests over those of his or her client.

In the municipal context, all elected officials should be familiar with the statutory provisions in their respective jurisdictions governing conflict of interest. However, it may surprise some municipal lawyers to know that, in certain jurisdictions, those same provisions could also apply to their own practice. For example, New Brunswick's *Municipalities Act*[13] contains conflict of interest provisions which also apply to "senior appointed officers," including "a municipal solicitor, or the person who has the primary responsibility to advise council on legal matters:"

> 90.2(1) Subject to subsection (1.1) and section 90.3, for the purposes of this Act a member or a senior appointed officer has a conflict of interest if
> (*a*) he or a family associate
> (i) has or proposes to have any interest in any contract in which the council or local board of which he is a member or by whom he is employed or was appointed has an interest; or
> (ii) has an interest in any other matter in which such council or local board is concerned that would be of financial benefit to him or the family associate;
> (*b*) he, his nominee or a family associate is a shareholder in, or is a director or a senior officer of, a private company that
> (i) has or proposes to have an interest in any contract with such council or local board; or
> (ii) has an interest in any other matter in which such council or local board is concerned that would be of financial benefit to the company;
> (*c*) he, his nominee or a family associate has a controlling interest in or is a director or a senior officer of a public company that
> (i) has or proposes to have an

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How to Get Council "Buy-in" Cont'd from page 9

interest in any contract with such council or local board; or

(ii) has an interest in any other matter in which such council or local board is concerned that would be of financial benefit to the company; or

(d) he or a family associate would other wise benefit financially by a decision of such council or local board in any contract, proposed contract or other matter in which the council or local board is concerned.

90.5(1) Upon the coming into force of this section, and thereafter upon assuming office, a senior appointed officer shall file with the clerk in the form prescribed by regulation a statement disclosing any conflict of interest of which he has knowledge or should reasonably have knowledge; but a senior appointed officer need not disclose particulars of his financial interest or the extent of any interest in any matter giving rise to a conflict of interest.

Beyond filing a statement regarding the senior officer's conflict, it is unclear what further steps the officer would be required to take (unlike members of council, who are also expected to remove themselves from the debate on that particular subject, such a provision does not appear to apply to senior officers). There do not appear to be any reported cases where action was taken against an officer of a municipality under this provision.

Perhaps more relevant to municipal legal counsel would be the provisions regarding the acceptance of gifts and gratuities, and the use of privileged information for personal gain:

90.8(2) A member or senior appointed officer shall not

(*a*) accept any fees, gifts, gratuities or other benefit that could reasonably be seen to influence any decision made by him in the carriage of his functions as a member or senior appointed officer, or

(*b*) for his personal gain or for the personal gain of a family associate make use in any way of his position or of any privileged information to which he may have access or to which he is privy because of his position.

Beyond potential sanctions by the governing law society, lawyers who are in breach of any of the above provisions could also be faced with a large of additional Court-imposed penalties, including removal from their position:

90.9(1) Subject to subsection (2),

(*a*) a person who fails to comply with section 90.4 or 90.5 commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category F offence, and

(*b*) a person who fails to comply with section 90.8 commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category H offence, and in addition to or in lieu of any sentence which may be imposed in accordance with the *Provincial Offences Procedure Act*, the Court may make one or more of the following orders, namely

(*c*) order the person to resign his office or position on such terms and conditions as the Court prescribes,

(*d*) prohibit the person from holding that office or position or any other specified office or position during such period of time as the Court prescribes,

(*e*) where the contravention has resulted in financial gain to the person or a family associate, to return any gain realized thereby in accordance with terms and conditions imposed by the Court, or

(*f*) make any other order that the Court considers appropriate in the circumstances,

and a failure to comply with any such order shall be deemed to be a contempt in the face of the Court and is punishable as such.

Regardless of whether it arises under statute or professional code of conduct, lawyers must adhere to their duty to avoid any conflict of interest at all times.

## BEST PRACTICES FOR COMMUNICATING WITH COUNCIL

With the above framework in mind, what are some practical tips and best practices for municipal lawyers when dealing with members of council? How do you get "buy-in" from a group of individuals who have been elected to represent their various constituents, especially if the interests of those they serve do not always mesh with the interests of your client, the municipal corporation?

Below are some practical tips for effective communication with council, based on past experience:

### *Can council defend their actions to their constituents?*

Your client is the municipal corporation, but who does council work for? They are the body through which a municipality acts, and they are in a fiduciary position towards the residents of the municipality. At the same time, councillors are regular people from many different backgrounds, often with no other experience holding public office.

Each member of council will have their own priorities or projects about which they are passionate, however they will also react to issues which are brought forward by their constituents. At the end of the day, making the "right" decision is one thing, but councillors must be able to defend their actions and decisions to those who elected them to office, otherwise their constituents will speak their minds at the next ballot box.

While always respecting the duties of honesty and candour when advising clients, municipal lawyers should put themselves in the place of council, and ask themselves the following questions:

- How will this decision be viewed by the general public?
- Are there any particular groups or individuals who will be impacted?
- What would residents want/need to know about why this decision was made?

If elected officials can see that the above considerations have been taken into account when receiving a staff re-

port, it will make it easier for them to make a decision which is defendable to their constituents.

***No one likes surprises***

Each municipality has its own process for providing background information to council prior to a meeting, including deadlines for submission of written reports. Ideally, reports should be submitted far enough in advance that council has time to prepare themselves for discussion, ask questions of staff, and make an informed decision. This is especially true where the topic involves complex legal matters such as commercial transactions, land negotiations, or litigation.

As much as possible, municipal lawyers should try to give council the time to fully digest all information presented, ask questions, and be comfortable in making a decision. This may require discussing particularly complex or contentious issues over the course of multiple meetings; if this is the case, it is always best to let council know from the outset if they are not expected to make a decision right away. Otherwise, they may feel like the topic has been sprung on them at the last minute, and they were put in a difficult position to react without having the time to make an informed decision. Furthermore, if new information comes to light on a topic to be discussed with council, it is always best to provide them with such information prior to the meeting in which that item is scheduled to be discussed.

***Don't be afraid to make a recommendation***

Imagine you are a councillor and you receive a staff report on a controversial development proposal that will mean increased property tax revenue and act as a catalyst for future development; however it will also mean the loss of some green space and an increase in traffic in what is now a quiet neighborhood. All of the relevant staff departments have provided input on the report, but the staff "recommendation" is simply for council to direct staff on how to proceed, without staff having provided a recommended course of action.

Lawyers are typically called upon to provide advice or opinions. When working in isolation this is easier to do; however when working as part of a multi-disciplinary team seeking direction from council on a complex file, there may be hesitancy on the part of the staff or management to advise on a recommended course of action.

In my view this is exactly what council wants: advice from those who are closest to the file. Keep in mind that staff are hired to run the day-to-day operations of the municipality, and council act as the "board of directors" to provide overall management direction. Council are still free to make any decision they want on a file, but at least a staff-recommended course of action will provide them with some guidance from those who are "on the ground."

As part of our council report process, all reports must be approved by a representative from the legal department prior to going to the city manager for final approval. Personally, it would be an extremely rare occasion where I would approve a report seeking a decision from council that did not also have a staff recommendation included.

***Be open, but avoid information overload***

Recently I was involved in a file which involved a land swap with a private developer, whereby the City would be giving up land currently used as surface parking downtown in order to acquire a parcel of land located in front of a culturally significant building, and protect it as green space. The City had plans to eventually reconfigure some of the streets and parking areas adjacent to the conveyed parking lot, however there were no commitments made as part of this transaction, and any such plans would need to go back to council for approval as part of the capital budget process. Despite this fact, council tabled the proposed land transaction (which had originally been initiated at their request) no less than three times while they attempted to get more specifics on the future plans for those streets and adjacent parking areas, which actually had nothing to do with the land swap itself. The result was over a year's delay in getting the deal concluded, causing frustration on all sides.

In the above example, staff had provided council with some drawings and maps to show what the new streets and parking areas could look like if those projects were to proceed; many individual councillors then lost sight of the land transaction and focused on all of the potential issues and design flaws with drawings which were simply to provide some context and vision for the future.

Lawyers have a duty to provide their clients with all relevant information necessary to make an informed decision. When communicating with council, the question often becomes "how much information is too much?" In the above example, some members of council certainly latched onto vagueness in the future adjacent street plans to defer making what would have been a controversial decision; having said that, much of the frustration over this file could have been avoided by not discussing future plans which were irrelevant to the decision at hand, or by reminding council early on that they would have an opportunity to fully discuss any proposed future street plans once such plans were finalized and brought forward for council approval.

Legal counsel should keep in mind their duty to provide all relevant information necessary to make a decision, however they should try to avoid extraneous information which may unnecessarily complicate council's analysis of the issue.

***Put it in writing***

As mentioned above, like many other municipalities we have a process for the delivery of report forms to council prior to meetings, which must go through several layers of approval (including legal, finance, and city manager) prior to making their way to council. These report forms are a great tool for providing council with the relevant information pertaining to a file, as well as a staff recommendation, prior to the meeting.

Well-written, concise and comprehensive reports will result in less discussion during meetings, less questions, fewer items being tabled for further discussion or information, and better decisions being made by council. A sample report form could

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# Lead in Drinking Water: How To Get the Most Out of Your Municipality's Insurance

**By: Finley Harckham, Anderson Kill P.C., New York, New York**



Lead poisoning in drinking water has been a problem since ancient Rome, and it simply won't go away. As the recent history of Flint, Michigan demonstrates, lead in drinking water can result in multiple serious, and extraordinarily expensive, challenges for municipalities. Since the problem in Flint was discovered in 2014, unsafe levels of lead have been reported in drinking water in a number of cities and towns across the country. In addition to health risks, municipalities may face enormous expense resulting from elevated levels of lead, including legal liability and the costs of emergency and remedial measures. Some or all of these costs may be covered by liability and first party property insurance, depending upon the specific factual scenario involved and the exclusions present in potentially applicable policies. Municipalities faced with lead contamination issues should identify and carefully analyze all potentially applicable insurance policies, promptly report all claims, losses and occurrences as required by the policies, and develop a plan for securing coverage.

**General Liability insurance:** When faced with claims of bodily injury or damage to third party property, municipalities should look to their general liability insurance. Such policies provide broad coverage for liability resulting from accidental injury or damage, but often contain exclusions for pollution that may bar coverage for lead contamination.

General liability policies typically provide coverage for an "occurrence," which is often defined as an "accident" which includes "continuous or repeated exposure to conditions." Therefore, exposure to contaminated drinking water should be considered an occurrence as long as it was not expected or intended by the insured. Most general liability policies provide coverage for injury which occurs during the policy period, even if the "occurrence" took place at an earlier time. If injury or damage takes place over an extended period of time, coverage may be provided by more than one policy period, meaning that multiple policy limits may be available. This may be very important to municipalities faced with enormous liability exposures and relatively low limits of coverage in any one year. Bodily injury claims, including claims for emotional distress, by people who drank from allegedly contaminated water supplies, will fall within the coverage grant of many commonly used general liability policies. Likewise, physical damage to, or contamination of, piping systems owned by third parties may be an "occurrence" under a general liability policy. Further, some general liability policies provide "personal injury" coverage for nuisance, trespass and/or an "invasion of the private right of occupancy." Personal injury coverage has been subjected to differing interpretations by the courts, so that it may or may not apply to a claim of lead contamination to property, depending upon which state's law is applied.

Most general liability policies contain one or more exclusions for bodily injury or property damage resulting from "pollution" or "contamination." However, it is difficult to generalize about whether those exclusions will bar coverage for claims involving lead in

drinking water, for a number of reasons. First, a variety of substantively different exclusions exist, including many non-standard wordings. Some may explicitly apply to contamination of water, while others do not. Second, whether a particular exclusion applies may depend upon the specific facts of a claim. For example, a pollution exclusion might apply to contamination of water from corroding lead pipes, but not to the damage to the pipes themselves. Third, insurance policies are interpreted under state law, which means that the same standard form clause can be given different meanings in different jurisdictions.

The courts have interpreted certain standard form pollution exclusions inconsistently, so coverage may turn upon which state's law is applied. For example, there is a split among the courts on the issue of whether certain standard form pollution exclusions apply only to contamination of the environment, as opposed to confined spaces such as a home or factory. An argument certainly can be made that when water is contaminated in a pipeline, as allegedly happened in Flint, that is not pollution of the environment. Also, some courts have ruled that pollution exclusions which apply to bodily injury and property damage claims are not applicable to personal injury coverage.

**Municipal E & O and Public Officials Professional Liability Insurance**

In addition to general liability insurance, some municipalities have coverage for liability resulting from errors or omissions by public entities and officials. Claims alleging lead poisoning or lead - related property damage are likely to assert malfeasance on the part of municipal officials and departments which may be covered by such policies. Also, these policies may not contain a pollution exclusion, or if they do it may be different from the clause in the municipality's general liability coverage.

Thus, lead exposure claims may be covered under errors and omission policies even if they are excluded from general liability coverage. Further, errors and omissions policies may provide some coverage for "crisis management" costs. That coverage is usually subject to low sublimits, but may help to offset public relations related costs. Errors and omissions insurance is often written on a "claims made and reported" basis, which means that coverage is only provided by policies in force at the time a claim is asserted, and only if the claim is reported to the insurer during the policy period or extended reporting period.

**Third Parties' Insurance**

A municipality may be covered for lead contamination claims as an additional insured under the insurance policies issued to its contractors. Many "additional insured" provisions of contractors' policies limit coverage to claims "arising out of" the work of the contractor. Fortunately, such language has been broadly interpreted by a number of courts to provide coverage even if the liability claim was not based upon conduct of the contractor, as long as there is some nexus between the contractor's work and the alleged injury. So, for example, a municipality may be covered under the insurance of a contractor who is involved with the monitoring of drinking water supplies.

**The Importance of Defense Coverage**

Widely publicized allegations of lead poisoning will undoubtedly result in a number of law suits which may cost many millions of dollars to defend. Therefore, the litigation defense coverage provided by many liability policies - often in addition to the limits of liability – can prove to be extremely valuable. It is very important to keep in mind that defense coverage may be provided even if a judgment or settlement in the case is ultimately excluded. As a general rule, defense coverage is triggered as long as any one allegation of a complaint is ***potentially*** covered. Thus, even if many of the allegations of a complaint would be excluded under a pollution exclusion, as long as a single allegation ***might*** not be excluded, a policyholder may be entitled to very valuable defense coverage.

**First Party Property Insurance**

The media has reported that the Flint, Michigan problem stems in part from corrosive river water which caused lead from aging pipes to leach into drinking water. Reportedly, it will cost tens or hundreds of millions of dollars to replace damaged pipes. To the extent damage like that occurs to a municipality's own pipes it may be covered by first party property insurance. Further, property policies often cover extra expenses resulting from a covered loss. So, for example, the costs of making alternative water supplies available to residents might be covered. Like general liability policies, property policies insure against damage which occurs during the period of coverage, which means that multiple years of insurance may be available. Property policies contain a number of exclusions, including pollution exclusions, which might apply to property damage involving lead contamination.

**Tips for Getting the Most Out of a Municipality's Coverage**

Lead contamination of drinking water is likely to result in a complex set of problems presenting a number of insurance coverage issues. With so much at stake, municipalities faced with such problems should make their insurance an urgent priority, taking steps that include:

1. Assembling a team of experts to identify and analyze all potentially applicable insurance. For first party property and extra expense claims, the team should also include loss quantification experts.

2. Complying with contractual obligations to provide insurers with prompt notice of claims, losses and circumstances;

3. Complying with all reasonable requests for documents and information from insurers. These requests may be burdensome and inconvenient, but failing to provide relevant information will delay the insurance claim and could even result in a forfeiture of coverage.

4. Complying with all contractual

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**Finley Harckham** is a senior litigation shareholder in the New York Office of Anderson Kill and serves on the firm's Executive Committee. He represents corporate and government policyholders in insurance coverage matters, specializing in property loss, business interruption, environmental, construction, professional liability, aviation and general liability claims. He has successfully litigated, arbitrated and settled hundreds of complex coverage cases.

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deadlines for the filing of proofs of loss or coverage actions (or securing written extensions of such deadlines);

5. Providing insurers with an opportunity to accept or reject the settlement of any potentially covered claim. An insurer may not unreasonably withhold its consent to a settlement, but coverage may be forfeited if a claim is settled without giving the insurer advance notice of settlements or other developments which may be deemed by a court to prejudice the insurer's rights.

6. Developing a plan for dealing with insurance claims handlers. For example, sustained vigilance is often needed to resolve large and complex claims in a reasonable period of time. The policyholder should keep a written record of everything of consequence that happens, and does not happen, in the adjustment of a claim. That record should be communicated to the insurer on a regular basis so it knows that its conduct is being monitored. This may deter dilatory claims handling and make a record, if needed, for a bad faith claim. Also, for many reasons a policyholder needs a clear idea of the insurer's coverage position, yet coverage determinations and reservations of rights letters may consist of nothing but lengthy quotations of policy provisions followed by a conclusory statement that "for the foregoing reasons the insurer denies coverage" or reserves its rights. The policyholder should respond to such letters with a demand for an explanation of the insurer's position. Further, the policyholder should be prepared to pursue its legal rights without delay in the event the insurer denies coverage. The policyholder may have a choice of court venues, or the option of different forms of ADR that are provided for in some policies. Those choices should be made, and acted upon, before the insurer seizes that opportunity for itself.

**Conclusion**

Insurance coverage for the serious problems being faced by Flint and other municipalities is too important to be put aside while dealing with other issues. Making insurance recoveries a high priority from the outset of a crisis gives you the best chance of success. ML

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agement practices when a lawyer's actions are directed by the firm or where training has not been adequate in a specific office management area, but I am not aware of the courts commenting on the operation of municipal law departments. Given the pressures to keep costs low and continuously meet service needs, I doubt many of us would say that entity regulation will not impact our operations and how we use our resources. That impact can be both positive and negative. I can't wait to hear that discussion at next year's conference!

IMLA is doing its share to ensure that as an organization serving the needs of municipal lawyers, we are also responsive and forward thinking. I am proud to have been on the Board for a number of years as former IMLA President Susan Rocha's 20/20 Vision has been implemented. This year sees a new phase of that program come into place as we are faced with the impact of term limits. I am grateful for the forward thinking of those with whom I served under Herb Thiele's leadership, who created a new Executive and Policy Committee to ensure that we can still tap into the passion and expertise of those no longer on the Board. Together with our Vision 20/20 Committee, we are still changing to better reflect the diversity of our membership.

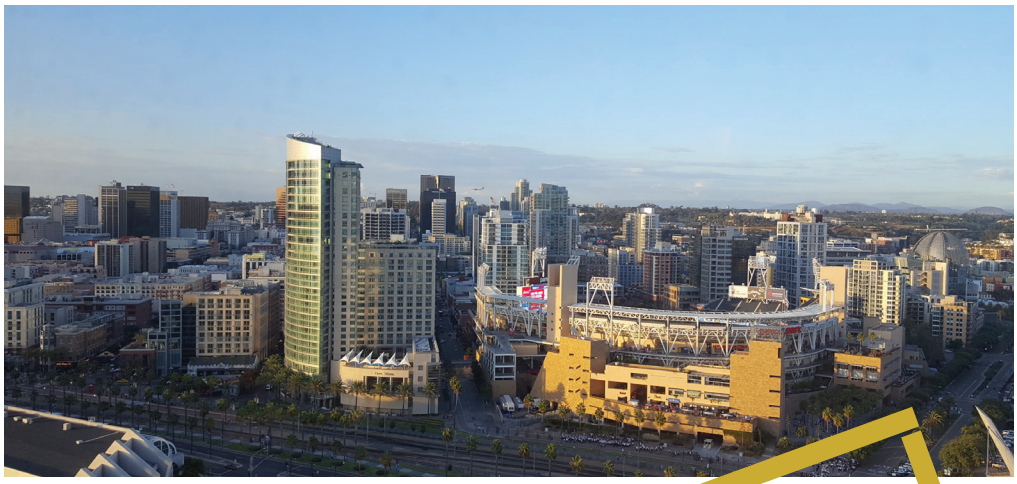
Change is never easy but we are good at embracing it. I will be relying on my colleagues on the Board to help cultivate the talents and ideas of our rising stars. Many of IMLA's leaders of tomorrow cannot be present at our Conferences due to budget constraints. We need to think about how to ensure that IMLA represents all municipal lawyers, and helps you all in your practice. Let's carry that discussion forward this year. I am looking forward to welcoming our younger members into a closer connection with IMLA. Join a committee and become active in our organization. And please feel free to contact me at president@imla.org and share your ideas.

Yours respectfully,

Mary Ellen Bench, IMLA President ML



# IMLA'S 81ST ANNUAL CONFERENCE SAN DIEGO





















# IMLA'S 81ST ANNUAL CONFERENCE


























## SAN DIEGO 2016

# IMLA'S 81ST ANNUAL CONFERENCE AWARDS

**At our 2016 Annual Conference in San Diego, IMLA acknowledged a select group of municipal lawyers who have contributed significantly to our profession and to our communities. Please join IMLA in congratulating our 2016 award winners!**

### Charles S. Rhyne Lifetime Achievement Award
**Anna Kinastowski**
City Solicitor (ret.), Toronto, Ontario, Canada

### President's Award: Most Outstanding State Chair
**Laszlo Pinter**
Deputy Corporation Counsel, Danbury, Connecticut

### President's Award: Most Outstanding Associate Member
**Susan Trevarthen**
Member/Chair of Public Land Use and Zoning Practice
Weiss Serota Helfman Cole & Bierman, Fort Lauderdale, Florida

### Outstanding State League Counsel Award
**Susan Moore**
General Counsel, Georgia Municipal Association, Atlanta, Georgia

### William I. Thornton, Jr. IMLA Faculty Award
**Peter Letzmann**
Attorney & Consultant, Peter Letzmann Associates,
Grand Rapids, Michigan

### Daniel J. Curtin Young Public Lawyer Award
**Joanna Klein**
Deputy City Solicitor, Philadelphia, Pennsylvania

### Brown, Mulligan, Rocha Distinguished Public Service Award
**Moses Johnson, IV**
Assistant City Attorney, Anaheim, California

### Brown, Mulligan, Rocha Distinguished Public Service Award
**Jan Goldsmith**
City Attorney, San Diego, California

### Bruce A. Noble Award
**Byron Werry**
City Solicitor, Regina, Saskatchewan, Canada

### Brad D. Bailey Assistant City/County Attorney Award
**Brent Lloyd**
Assistant City Attorney, Austin, Texas

### Marvin J. Glink Private Practice Local Government Attorney Award
**Alan Bojorquez**
Partner, Bojorquez Law Firm PLLC, Austin, Texas

### James H. Epps, III Award for Longevity of Service to a Community
**William Geary**
City Attorney, Kansas City, Missouri

### James H. Epps, III Award for Longevity of Service to a Community
**Gary Ebert**
Law Director, Bay Village, Ohio

### James H. Epps, III Award for Longevity of Service to a Community
**Frederick Stavins**
City Attorney, Champaign, Illinois

### James H. Epps, III Award for Longevity of Service to a Community
**Jennie Granahan Tarr**
Chief Assistant County Attorney, Hillsborough County, Florida

### James H. Epps, III Award for Longevity of Service to a Community
**Steven Moore**
City Attorney, Yuma, Arizona

### James H. Epps, III Award for Longevity of Service to a Community
**Theodore Fitzgerald**
Town Attorney, Hebron, Indiana

















## SAN DIEGO 2016

# IMLA'S 81ST ANNUAL CONFERENCE FELLOWS

## Please join us in welcoming the following members as new IMLA Local Government Fellows:

Christopher R. Behrens
**Deputy City Attorney**
Appleton, WI

Sharon L. Dickgrafe
**Chief Deputy City Attorney**
Wichita, KS

Donna Marie Alexandria Fairweather
**Assistant City Attorney**
Galveston, TX

Victoria T. Huynh
**Deputy City Attorney**
Plano, TX

David S. Johnson
**Assistant City Attorney**
Arlington, TX

Shannon T. O'Connor
**Goldberg Segalla LLP**
Syracuse, NY

## And we congratulate our re-certifying IMLA Fellows:

David L. Barber
**Assistant City Attorney**
Arlington, TX

Steven J. Britzman
**City Attorney**
Brookings, SD

Debra A. Drayovitch
**Drayovitch P.C.**
Denton, TX

Benjamin E. Griffith
**Board Attorney**
Griffith Law Firm
Oxford, MS

Douglas C. Haney
**Corporation Counsel**
Carmel, IN

Garry E. Hunter
**General Counsel**
Ohio Municipal Attorney's Association
Columbus, OH

William Clark Mann, III
**Chief Deputy City Attorney**
Little Rock, AR

Stephen C. Nick
**City Attorney**
Eau Claire, WI

Ursula Monroe Patterson
**Assistant City Attorney**
Arlington, TX

Randall Van Vleck
**General Counsel**
New Mexico Municipal League
Santa Fe, NM




# Virtual Attendance and Hangover Buses

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

It has been a great couple of months on the listserv and the Water Cooler. But, I must admit to having to mix my work and listserv participation into a family schedule that has included marching band competitions, two visits to the Emergency Room, one emergency surgery at midnight, a significant loss of sleep and the untimely death of a former co-worker's son. Such is life for many of us, I suppose, but it sure is nice to be able to save time by exchanging ideas on a variety of issues through the listserv as we all throw our shoulder to the wheel and face similar problems.

One very popular topic on the listserv recently was whether the various jurisdictions allowed or participated in virtual meetings for their Municipal Council. Responses were all over the board from various states and cities.

My Town Council addressed the issue this month, and ended up coming to a sort of middle ground with a mixed Council. What was approved was the idea that a Town Council member could "listen in" remotely, but could not count toward the establishment of a quorum, participate in the discussion or vote remotely. Additionally, this extended only to "informal" meetings such as Work Sessions, Committee meetings or budget workshops. Town Council meetings where formal action is to be taken and Executive Session meetings were not to be included. The idea was to allow the remote attendee to at least "keep up" with the issues when he or she could not attend a meeting.

First off, let me say that we have very little problem with member attendance at our meetings, so the issue wasn't exactly categorized as an emergency. At any rate, there were several issues we faced in coming to this result. One was simply technology. We do not currently have the equipment to tackle this issue. Yes, it could be bought but it just isn't in the tight budget right now. We do all have iPads, so Facetime could be an option, but where do you place the devices so the remote attendee can see best? Sure, we could add a phone line…All of these issues could eventually be solved, but not quickly or cheaply. The Town Council established the above goal, but it is going to be up to the IT staff to figure out the best way to make it work.

I personally am glad one Council member nixed the idea of allowing virtual attendance during Executive Session. For one, it is supposed to be confidential. I didn't much care for the idea of my confidential legal advice being piped over the lines to put it within earshot of people over whom I have no control. But, perhaps that is just my style.

Digressing, as we mentioned above, the advantages of virtual attendance are easy to spot. There could be a cost-saving element, due to the cut in travel. A member out of town for their day job could still attend meetings, and a member could attend even if ill in many cases. The conveniences are obvious and can go on and on.

The disadvantages (or "mischaracterized advantages") stir more interesting and robust discussion. Many of these came from the listserv discussion, and some come from various articles I read in magazines and on the Internet. One contributor had encountered people who were afraid video attendance would be an "excuse" or "incentive" not to attend. Why would people travel if they didn't need to? Others worried about the effect on public participation in meetings. If a member is attending remotely, what effect does this have on the ability of the public to address that member? How does the member attending remotely know for sure who is speaking if there is not a camera on that person?

If attendance is via phone only, how do we know when the remote attendee wants to talk, and how does the remote attendee know for sure who is talking on the other end? And what about background noise? I currently serve on the SC Bar Committee on the Unauthorized Practice of Law, and I attend remotely. Once I tried it while traveling in the car. Of course, I had to do it hands free since I was driving, but this amplified the background noise tenfold. I had to give up because the highway noise interrupted everyone's ability to hear. Not much better in the office, because every time I coughed or moved my chair everyone could tell, due to the noise. They really didn't enjoy hearing me eat lunch (even though they were also eating), so I had to engage the mute button. Then, it became like using a radio or walkie talkie. I pushed a button to talk. Then I pushed another to listen. Not very convenient.

There were other interesting stories and discussions on the issue. One member reports virtual attendance is only allowed in an emergency. Another reports that it is allowed, but the parameters make it not worthwhile. There was a mixture of answers on whether the remote attendee counted toward a quorum. Another was concerned about members of the public who might bring handouts to a meeting. How would the remote attendee receive these?

And what of a meeting where a quorum is not physically present but is present in a virtual fashion? One member of the listserv indicated that in their procedures, it is contemplated that the entire Council could attend a meeting remotely. In such a case, the Council must designate at least one physical location where the public can attend and participate in the meeting. Imagine this – a Council meeting with zero Council members "present," but a room full of citizens?

A little more research reveals a story where the Councilman forgot to press

*Continued on page 28*



SECOND LOOK

# How To Select An e-Discovery Vendor

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

**Ethical duties in choosing eDiscovery vendors**

Due diligence in choosing an eDiscovery vendor is not just a prudent business practice, it is an ethical mandate. The ethical requirement stems from at least five separate duties under the ABA's Model Rules of Professional Conduct.[1]

Model Rule 1.1 mandates professional competence including, per Comment [8] to the rule, familiarity with technology developments and associated risks.

Model Rule 1.6 requires protection of client confidential information. Model Rule 1.7(a)(2) prohibits representing one client that has any interest directly adverse to another client. Although the conflict can be resolved under certain circumstances by an informed client's written consent. Rule 1.7(b)(1) – (4). A latent potential for conflict is often overlooked – if the eDiscovery vendor is a lawyer's agent and the vendor is working for a party adverse to the lawyer's client, is that conflict imputed to the lawyer? I think so at least sometimes, depending on the facts. My belief is supported by Model Rule Model Rule 5.3 (addressed below), which makes lawyers responsible for the conduct of retained non-lawyers who assist them in providing legal service. Therefore, my checklist includes conflicts of interests questions to the potential vendor.

Model Rule 1.5 requires care in the safekeeping of client property. Does this rule apply to intangible electronically stored information? I think so. So do the legal ethics committees in the 20 whose bars have issued ethics rules for the handling of client information in the cloud.[2] I see no meaningful distinction from a legal ethics perspective in the due diligence required before putting client information on cloud servers administered by a vendor and the diligence required before giving client information to an eDiscovery vendor (who may be using cloud storage for your client's data, or not – I do not see that as material). I think some of the cloud ethics rules are unduly burdensome and of questionable value. But a lawyer could not go far wrong in applying his or her state's cloud ethics rules when choosing an eDiscovery vendor.

Finally, Model Rule 5.3 makes lawyers responsible for the conduct of any "nonlawyer employed or retained by or associated with a lawyer." (Emphasis added). I think this responsibility extends to the selection and supervision of eDiscovery vendors, and imputes their conduct to the lawyer.

Does it extend to subcontractors – does the lawyer's due diligence also extend to questions about subcontractors? The lawyer should be careful not to impose duties or unnecessary limits on the vendor's selection of subcontractors (except prohibiting their use) to prevent the vendor losing its status as independent contractor.

**The Checklist**

Here are some suggested topics for discussion with vendors when selecting eDiscovery support services. The same topics might be incorporated into an RFP or other procurement instrument. eDiscovery in this context includes almost the full range of activities covered by such resources as EDRM[3], from information management through legal hold, collection, review, production, and presentation. My focus is on practical questions from a litigator's perspective that are relevant to the vendor's competence. I strongly recommend consulting with your technology staff to tailor these questions to your own technology architecture and to add specific technology questions on topics not covered here. Procuring eDiscovery support services must be a team effort. Neither the legal nor technology departments should act without the other in this effort. Each department, plus your procurement staff, will need help from the others in the procurement process.

I skip over some very fundamental issues in this list of questions. Before or while interviewing vendors, you may wish to revisit some basic issues: Should we do our own eDiscovery support without outside assistance? Do we need the assistance of a disinterested (not competing for your support business) outside consultant to help us interview the competing vendors? Is the occasion for eDiscovery support procurement a good time to review all software that we use for litigation (such as standalone applications for courtroom presentation, video recording, accident recreation, or internal document review)?

**Basics**

**1. Alternative sources for the services?** Can you, and if so should you, procure your eDiscovery support services through a federal, state or local government-consortium procurement process that may already have done much of your due diligence and negotiated good pricing? You should have investigated this possibility before your conversations with vendors, but ask them too – they may participate in programs for which you are eligible but that you might not have discovered.

**2. Range of supported activities within EDRM eDiscovery model?** Is the vendor offering a bundled all-in-one package or can buyer select among modules (*e.g.*, get collection and review modules but defer procuring legal hold module)? Are there some important functions that you need but that the vendor does not provide (*e.g.*, annotation of transcripts, associating transcript excerpts with exhibits, or perhaps courtroom presentation).

**3. Protecting confidentiality.**

a. Does the contract obligate vendor to protect your client's confidential information and to impose that duty on all employees and subcontractors?

*Continued on page 29*



# Practice Tips

## Key Considerations for Developing a Community Broadband Network

*By: Adrian Herbst, Bradley, Hagen & Gulickson LLC*

The rapid deployment of high-speed broadband service to many large and mid-sized cities throughout the United States has led rural communities to believe that they are left out because incumbent providers have not committed to deploying the necessary capital to upgrade the seemingly antiquated networks. Rather than doing nothing or waiting for cable television and television companies to improve the existing network, many communities are considering the options available to develop a community broadband network.

Regardless of the size and resources of a community or the deployment options that a community may have, it is important to organize a general approach for the process and adjust the approach as necessary as the process proceeds. Because each community broadband project is unique, the process suggested below is for guidance purposes to get the process underway.

1. Create a project team: Although policy makers within a City are responsible for ensuring the authority exists to ensure the development of upgrading the existing networks and affordable access to them, it is important to unite additional players and key stakeholders in the process.

2. Identify and set community goals by identifying the needs for high-speed Internet access through surveys and needs assessment.

3. Identify existing providers and the current available services and prices for the services they provide. Engage with these providers, because it may be in their best interest to work with a community than compete.

4. Identify the broadband network requirements.

5. Conduct an inventory assessment, identifing the existing infrastructure and any available services that exist.

6. Review and streamline existing zoning, permitting and construction processes.

7. Review fee and tax structure to identify what incentives, if any, can be provided to potential, providers.

8. Identify target time periods for network deployment

9. Identify whether proposed network is for the specific community only or will surrounding communities in region be included in the network by engaging with neighboring cities, towns and counties.

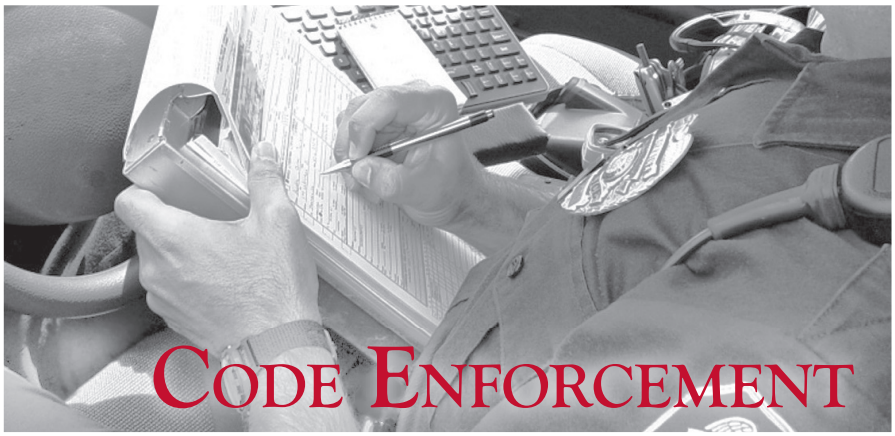
10. Consider bringing in a consultant to help assess and organize information gathered and provide guidance on various business/entry models including: legal analysis, development of a feasibility study, developing a business model(s), and review proposals that would meet the business model and assist in negotiating terms of agreement.

11. Consider and review available financing options including sources for capital funding.

There are many funding sources that may be available to a community including federal and state funding. Consider public-private models rather than relying exclusively on municipal funding. ML

More information is available from Mike Bradley, Adrian Herbst and Leslie Herbst-Saporito who are telecommunications attorneys of Bradley, Hagen and Gullikson, LLC (bradleylawmn.com) in Minnesota at 651-379-0900; and Bob Duchen, Vice President of River Oaks Communications Corporation (www.rivoaks.com) in Colorado at 303-721-0653. Both Mr. Duchen and the telecommunications attorneys of Bradley Hagen and Gullikson are frequent speakers and authors on communications matters throughout the country. All together, these individuals have worked on communications or other similar projects in more than 35 States and Puerto Rico for more than 30 years.




# Practice Tips for the Code Enforcement Officer

*By: Sherri Russell, City Attorney, Lake Jackson, Texas*

**1. PICTURES AND VIDEO:**

Always take clear, usable, dated pictures that will make sense if you are not there to explain them. Carefully log pictures to record time, date, name of photographer, reference to layout, map, satellite image, or other graphic depiction of the overall property, and picture sequence.

Most cameras have time and date stamps (on the photos and/or in the metadata of the digital image). Make sure to check the time and date so that it is correct BEFORE taking photos. Don't assume it is correct. Some cameras have automatic settings to adjust for daylight savings time, but you do need to check those settings.

Many cameras now also have a GPS feature. This is useful if the Code covers a large area.

I like inspectors to get a good overall photo or two showing the whole scene. Then shoot closer photos of violations. If you just have close-ups, it is sometimes hard to tell where the violation is, but wider views alone don't show the detail.

If you are dealing with vegetation violations, have a yardstick or stake or something (could even be a person) to indicate the scale of the height of the vegetation. Other types of violations may also benefit from having something to give scale.

If applicable, you may also want some photos of better-maintained adjoining properties to illustrate what this person is doing to the neighborhood. (On the other hand, if the neighborhood is generally under-maintained, the violator's property may look like it fits in and he/she may raise questions about what violations you are citing against other property owners).

If practical, avoid capturing in the pictures any lawyers or anyone else who may have accompanied you unless they're amenable to becoming witnesses – including perhaps getting deposed and potentially (though unlikely) being disqualified. (I'm not suggesting concealing that they were present, just avoiding emphasizing that point). HOWEVER, if staff are available, show at least one other inspector as present at the scene; if the photographer becomes unavailable the other inspector can authenticate the pictures as accurately depicting the appearance of the property on the dates/times of the pictures.

Be careful about recording audio (particularly of owners and their agents without their consent) to ensure you comply with applicable state law. Also be careful what you say while you are recording.

**2. COMMUNICATIONS TO LAWYERS AND FILE NOTES:**

Keep good understandable file notes in case someone else needs to work on the case.

Write down as much information as possible about the number and type of contacts and keep logs of all contacts – especially phone calls and in-person visits.

Remember that your documents and email are subject to open records requests. Avoid derogatory comments or coarse pictures.

Call your attorney before a problem gets serious. (Example—"Mother of Five Arrested for not Cutting Grass").

Please, if there are multiple problems, point them out all at once instead of inflicting a thousand paper cuts. (Example—"Violator Initially Told There Were No Citations").

Ask questions of the prosecutor before you issue citations, so the correct citation is issued rather than the prosecutor having to amend the charge later.

If you write a citation, let the City Attorney know and provide him/her all information you have – on the same day or as soon as possible. Include a cite to the code provision.

Let administrative or legal staff know if an ordinance needs to be changed or created. When the attorney sends you a rough draft of the new ordinance, review it carefully from an enforcement standpoint. The attorney is not going to amend a recently passed ordinance.

**3. COMMUNICATIONS WITH VIOLATORS**

***In person communication***

Your first contact should focus on education. Explain why tires or tall grass are against the Code.

The violation is the issue, not the personality of the violator. If the Code recommends a fine, it should be based on the seriousness and repetition of the violation, not based on the personality of the violator.

The violator is not going to be happy and may behave very badly, but just do the job - and stick to the facts. Keep emotion out of the case/issue.

Don't argue with (alleged) violators.

No enforcement is worth the inspec-

tor's safety. Have the police meet you at the location if the person got rowdy the last time you were there.

It doesn't matter who else is violating the same law.

Some issues are private matters. The Code cannot solve neighbor incompatibility or civil issues.

If the violator threatens to contact a lawyer, it's okay. We prefer to deal with lawyers – they generally understand the issues. Let the City Attorney know what the problem is and that a lawyer might be contacting him/her. (However, do not stop working on the case).

Your job is not to solve problems. Your job is to point them out. Offering suggestions on how to fix a problem will just lead to more problems. The violator may well misinterpret what you say, or think that one suggestion is the only way to fix the violation.

***Written communication***

Make sure that recipients of violation notices know where to find copies of the city code sections which have been violated.

Your warning letters need to be specific – about the problem and about the consequences. Include pictures and definite dates or deadlines.

"Notice" is the most important topic for Code officers. (I handle code enforcement for about 20 cities and would guess that 80% of all issues raised on the 'enforcement' side stem from notice).

**CITATIONS:**

Make sure you have sufficient evidence to issue the Notice of Violation before issuance. Some inspectors think that they can let the paper fly on a hunch and put the burden on the citizen to prove that they are innocent. (I see this a lot for illegal rental units when the inspector can't get inside but suspects that the unit is being rented out. I occasionally have to remind inspectors that the municipality always has the burden of proof, and the reality is - "It's not what you know – It's what you can prove").

Anticipate ownership transfer and protect city liens and costs appropriately by recording or other method. If the property gets swapped among family members to avoid abatement, file the notices in the real property records of the county.

The Notice of Violation should include the code section that contains the applicable prohibition. (In my jurisdiction, NOV's are automated when the inspector creates a case, so there should ideally be some level of review to make sure there isn't a glitch in the automation. The number one lesson for both of these is that the Inspector needs to own up to his or her case and not blame the machine or the clerk when insufficient notice goes out).

You can put a cover sheet on a citation that lets the court/judge know how many attempts have been made to get the violator to solve the problem. Include pictures. This way the judge probably won't continue the case to give the violator another 30 days to fix the problem.

State how many violations are included within the citation. When the court receives one ticket from Code Enforcement, it may think that only one violation is involved.

**WARRANTS:**

If you have to ask the City Attorney whether you need a warrant, there's a really good chance you need a warrant!

The warrant should tell a story. Start with how the property initially looked, how much time has been given, etc. Include pictures. Remember the Four Corners Doctrine. You need to convince the judge, in writing only, that you have enough evidence to violate someone's privacy or to take their property.

**PROCEDURES:**

It is OK to peek. If someone invites you into their yard to look at the neighbor's yard, go ahead and have a look. You may be able to tell the neighbor that the issue in the backyard isn't a code violation. Or, you can start your case with that one peek. Don't write a citation, but start working on getting the issue resolved. You could take pictures and ask for a warrant based on what you and the neighbor have seen.

A city inspector is no different than a police officer for analyzing constitutional violations.

Correctly identifying the person responsible is an often overlooked step, particularly with absentee or corporate owners/rentals. Officers need to first review the SPECIFIC code section to determine whether liability falls on "owner" or "tenant" or "person in control of the property" (or all three jointly/severally). Then they need to follow the correct method to determine the notice address. But don't just rely on the legally-mandated address. Send notice to any place where you think the responsible party may be.

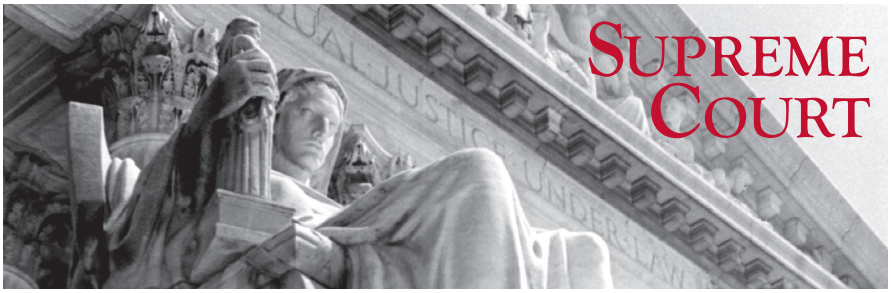
Make sure that the inspectors know that there are two different types of notices that go out: 1) Notice of Violation and 2) Notice of Hearing. The City has the due process burden of "making reasonable efforts" to deliver both notices. Even if you send the notice certified, if it comes back unclaimed, it is the City's burden to prove a reasonable effort was made. Posting on the property, in addition to mailing, is the safest bet.

**TRIALS/HEARINGS:**

The Notice of Hearing needs to go out in sufficient time prior to the hearing to allow the individual to prepare. In Florida, state law requires a minimum of 10 days if you are posting the Notice to the property. The city clerk's office typically handles the Notice of Hearing in my jurisdiction, so the inspectors try to wash their hands of it. But ultimately they are the ones in the field and have the best chance of achieving actual notice. I've also seen inspectors try to rush cases through by posting the NOH to a property two days before a hearing, and I've continued those cases based on due process concerns.

If practical, shortly before deposition, hearing and trial, revisit the scene to be able to compare its current condition to the conditions depicted by the pictures. Whether the property has improved isn't relevant to the case, but the jury will want to know.

Stay calm and answer the questions. The violator may be emotional and will try to bend the truth. Just answer the questions or correct the violator. The best weapon you have against the defendant is to remain professional. ML




# Legislative Prayer on the Docket Again?

*By: Erich Eiselt, IMLA Assistant General Counsel and Editor*

The thorny issue of legislative prayer seemed to have been put to rest, albeit uneasily, two years ago by *Town of Greece v. Galloway*.[1] There, a slim majority of the Supreme Court upheld the Town Board's practice of starting its meetings with invocations by local religious leaders invited by the Board. Greece, New York was located on the shores of Lake Ontario, far from more diverse urban centers and its 95,000 residents were overwhelmingly Christian. Every Board invocation from 1999 to 2007 had been Christian, with many invoking Jesus Christ and the resurrection. Non-Christian residents objected.

A panel of the Second Circuit invalidated the process, finding that "the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint" because Greece had not reached out to a more diverse group of clerics or clearly stated that the prayers were not indicative of the local government's beliefs.[2]

The Supreme Court reversed, upholding the town's policy. A 5-4 conservative majority said legislative prayers need not be stripped of references to a given religion, and prayer-givers should be "unfettered" as to the text of their invocations. Justice Kennedy's opinion cited the admonition that prayers must neither demean nor promote: "Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation."[3]

Two years later, a new Fourth Circuit decision is again subtly testing the parameters of permissible legislative prayer. *Lund v. Rowan County*[4] assesses the practice by Rowan County, North Carolina's Board of Commissioners of commencing its twice-monthly meetings with a religious invocation. *Rowan County* parallels in many respects the facts in *Town of Greece*. The overwhelming majority of prayers offered invoke the Christian faith; many include references to "Jesus," "Christ," and "Lord." It is typical for the invocation to begin with some variant of "let us pray" or "please pray with me." Although not required to do so, the audience largely joins the speakers in standing and bowing their heads during the prayer.

The salient difference in *Rowan County is* that the invocations are not given by guest chaplains or residents of the community, but by the five members of the Board themselves, on a rotating basis. The content of each prayer is determined by the individual commissioner, and the Board has no role in prayer selection or content. But all Board members are Christian, as are virtually all invocations.

Several non-Christian Rowan County residents filed Establishment Clause challenges alleging the prayers aligned the Board with one faith and caused plaintiffs to feel excluded as "outsiders." They further alleged that the Board meetings coerced them to participate, by making them feel compelled to stand during the invocation so that they would fit in with the majority. Plaintiffs sought a declaratory judgment that the Board's prayer practice violated the Establishment Clause, along with an injunction preventing any similar future prayers.

The district court for the Middle District of North Carolina acknowledged that in *Town of Greece* the Supreme Court had "dismantled" the Fourth Circuit's legislative prayer doctrine which had focused on whether invocations were sectarian. Nonetheless, the district court struck down Rowan County's invocation practice, concluding that "[s]everal significant differences" distinguished it from *Town of Greece*. It found the fact that only commissioners delivered the prayers, instead of invited clergy or volunteers, meant that "The prayers are effectively being given by the government itself."[5] It also found that, in inviting all in attendance to stand during the invocation, the Board created a constitutionally-suspect coercive atmosphere for non-Christian attendees. It granted summary judgment to plaintiffs and permanently enjoined the Board's prayer practice.

The County appealed, drawing the support of thirteen states as amici and retaining well-known appellate practitioner Allyson Ho of Morgan Lewis & Bockius to state its case. The Fourth Circuit reversed in a 2-1 vote.

It recounted the long history of legislative prayer in the United States as outlined in *Marsh v. Chambers*.[6] There, the Supreme Court had noted that the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. This made it wholly illogical that the Framers would have "intended the Establishment Clause . . . to forbid what they had just declared acceptable" and allowed the Court to uphold Nebraska's 16-year history of utilizing an appointed Presbyterian chaplain to open its state legislative sessions.

The Circuit also reiterated the Supreme Court's statement in *Town of Greece* that legislative prayers need not be neutral or reference only a generic God, rebuffing "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard." And it cited the Court's disagreement in *Town of Greece* with the Second Circuit's finding that the "steady drumbeat of Christian prayer . . . tended to affiliate the town with Christianity."[7]

The Fourth Circuit majority also addressed the district court's conclusion that Supreme Court silence meant legislators should not be the sole prayer-givers in public meetings. It was not relevant that *Town of Greece* involved a rotating group of local clergy and *Marsh* involved a paid chaplain, because the Supreme Court had attached no significance to the speakers' identities and had simply confined its discussion to the facts surrounding the prayer practices before it. "We find the Supreme Court's silence on the issue of lawmaker-led prayer to be simply that: silence." It cited numerous Circuit precedents in support, including its own opinion in *Simpson v. Chesterfield County Board of Supervisors*, where it noted that the Court, "neither in Marsh nor in Allegheny, held that the identity of the prayer-giver, rather than the content of the prayer, was what would affiliate the government with any one specific faith or belief."[8]

The Circuit included statistics to support its position: 31 states, including seven of the ten states within the Circuit's jurisdiction, allow

legislators to offer invocations. It also cited *Town of Greece's* view that the primary audience for such prayers is other lawmakers at the event–who collectively seek contemplation and wisdom before commencing–rather than the public:

> Not only are the legislators themselves the intended "congregation" for legislative prayer, but the practice carries special meaning to the thousands of state and local legislators who are citizen representatives. In this respect, the Supreme Court has specifically singled out "members of town boards and commissions, who often serve part-time and as volunteers," as lawmakers for whom "ceremonial prayer may . . . reflect the values they hold as private citizens."[9]

The district court had found that, because Rowan commissioners authored every prayer, "the government" was controlling the content of the invocations. Again the Circuit disagreed: "The record is devoid of any suggestion that any prayer in this case is anything but a personal creation of each commissioner acting in accord with his or her own personal views."[10]

Similarly, the fact that virtually all prayers were Christian-centric was a function of the Board members' personal beliefs. "Absent proof the Board restricted the prayer opportunity among the commissioners as part of an effort to promote only Christianity, we must view its decision to rely on lawmaker-led prayer as constitutionally insignificant."[11]

Finally, the Circuit dispensed with the district court's finding of coercion. It turned again to *Town of Greece*. There, the Court noted that "reasonable observers are aware of the multiple traditions acknowledging God in this country" and that citizens could appreciate the town's prayer practice without being compelled to participate. As Justice Kennedy had stated, "[o]ffense . . . does not equate to coercion." "Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum."[12]

The Fourth Circuit found that the Rowan County process permitted attendees to avoid joining in prayers if objectionable; for example, they could enter the session after the invocation. And despite plaintiffs' argument that they would be "less effective" advocates for their positions by not joining in the invocation, there was no evidence that non-adherents were prejudiced in the meetings themselves.

Plaintiffs had cited the Board chairman's public statement that "I am sick and tired of being told by the minority what's best for the majority. My friends, we've come a long way – the wrong way. We call evil good and good evil"[13] as indicative of an underlying hostility to non-adherents. The Circuit disagreed: "Such isolated incidents do not come close to showing, as *Town of Greece* requires, "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose."[14]

DISSENT: Judge Wilkinson vociferously dissented. He viewed the majority opinion as cobbling together a spectrum of elements to justify a fact pattern that he found unprecedented:

> Whereas guest ministers led prayers in [Town of Greece], it was public officials who exclusively delivered the invocations in Rowan County. Those prayers served to open a meeting of our most basic unit of government, a local board of commissioners that passes laws affecting citizens in the most daily aspects of their lives. The prayers, bordering at times on exhortation or proselytization, were uniformly sectarian, referencing one and only one faith though law by definition binds us all. I have seen nothing like it.
>
> • • •
>
> The parties have not cited any legislative prayer decision combining the particular speakers, audience involvement, prayer content, and local government setting presented here. [15]

Wilkinson found the facts—in 139 of 143 Rowan County Board meetings, elected lawmakers had explicitly referenced Christianity in their invocations, and most had closed with "in Jesus' name"—to create an undeniable Establishment Clause violation, blending religion and government. As one commissioner had put it, "Lord, we represent you and we represent the taxpayers of Rowan County." For Wilkinson, "[w]hen the state's representatives so emphatically evoke a single religion in nearly every prayer over a period of many years, that faith comes to be perceived as the one true faith, not merely of individual prayer-givers, but of government itself."[16]

And when the Board members, as governing officials, suggested that attendees "pray with me," it necessarily involved a governmental imprimatur not present when visiting clerics made the same suggestion. In such an atmosphere, the alternatives proffered by the majority—entering the meeting late or sitting during the prayer—would hardly eliminate the risk of coercion.

For Wilkinson, the Rowan County proccess had ominous political implications. Because elected Board members gave all invocations, voters might avoid otherwise qualified non-Christian candidates: "Failure to pray in the name of the prevailing faith risks becoming a campaign issue or a tacit political debit, which in turn deters those of minority faiths from seeking office. It should not be so."[17]

Town of Greece confirmed that, where a variety of speakers are given the opportunity to present invocations before the public, the fact that most prayers invoke one denomination is not constitutionally infirm. The Fourth Circuit seems to advance that boundary in Rowan County, allowing a group of elected Christian municipal lawmakers to give religiously-themed prayers at every commission meeting attended by members of the community–in the process excluding the opportunity for prayers by other denominations.

The Supreme Court has repeatedly emphasized that its legislative prayer determinations, however decisive, are highly fact-specific. Whether Rowan County– which confronts the Establishment Clause with a novel combination of juridical ingredients–elicits the scrutiny of a post-election and reconstituted high court, remains to be seen.

Notes

1. Town of Greece v. Galloway, 134 S.Ct. 1811 (2014).
2. Galloway v. Town of Greece, 681 F.3d 20 (2012).
3. *Town of Greece,* 134 S.Ct. at 1822.
4. Lund v. Rowan County, No. 15-1591, 2016 U.S. App. LEXIS 17064 (4th Cir. Sept. 19, 2016).
5. Lund v. Rowan County, 103 F. Supp. 3d 712, 724 (M.D.N.C. 2015).
6. Marsh v. Chambers, 463 U.S. 783 (1983).
7. *Town of Greece*, 134 S.Ct. at 1818.
8. Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276, 286 (4th Cir. 2005).
9. *Lund,* 2016 U.S. App. LEXIS 17064, at *27.
10. *Id.* at *38.
11. *Id.* at *30.
12. *Town of Greece,* 134 S.Ct. at 1838.
13. *Lund,* 2016 U.S. App. LEXIS 17064, at *56.
14. *Id.*
15. *Id.* at *59.
16. *Id.* at *67.
17. *Id.* at *69.

How to Get Council "Buy-in" Cont'd from page 11

include the following headings:

- Issue
- Current status
- Recommendation
- Other options
- Risk analysis
- Legal considerations
- Financial considerations
- Community sensitivities
- Environmental considerations
- Intergovernmental considerations

Even for issues of a purely legal nature, our department would still use this template report form, albeit there may be a separate legal opinion memo attached. Regardless of the type of form used, in my experience a best practice would certainly be to provide council with a background staff report, giving them sufficient lead time to review and fully digest prior to the meeting.

***Anticipate questions***

Similar to the comment above regarding anticipation of the general public's reaction to a council decision, municipal legal counsel should also try to anticipate what questions council may ask of them during a meeting, and where possible try to proactively answer those questions in the background report, or at least have a "back pocket" answer ready in the event that it comes up in the meeting. This holds true whether the item is being brought forward as a purely legal item, or if it is from another department but may have some elements that could require minor legal input on issues such as liability, by-law enforcement, etc.

***It's okay if they don't agree with you***

This point was saved for last, because in my view it is one of the most important principles to keep in mind in order to preserve your sanity and maintain the longevity of your career.

There is one particular file that has been kicked around various lawyers' desks in my department for over a decade, and it involves the city's ability to regulate or prohibit the practice of private companies placing vehicle immobilization devices on cars parked without permission in private parking lots. This is a priority issue for our council, mainly because they continually receive emails and telephone calls from irate residents and visitors to our city who have come out of a restaurant after a nice, romantic dinner only to find a "boot" on their vehicle, and a note on the windshield specifying who to call to pay the fee to have the device removed. Legal opinions from our office as well as outside counsel have consistently been that municipalities in New Brunswick lack the legislative authority to regulate this practice. Nonetheless, the issue continues to be raised by council year after year, some of whom would like the city to simply enact a by-law to regulate, whether we have the authority or not.

While it may be frustrating for some to re-visit the same issue time after time, one must keep in mind that councillors are simply trying to appease their constituents and find a solution to a long-standing problem. Similar to the *Toronto* case cited above, there is nothing malicious in councillors disagreeing with the advice of the City Solicitor. The lawyer's job is to provide the best advice possible to protect the interests of the municipal corporation; whether or not council chooses to follow that advice is up to them, and (in most cases) should not be taken as a personal attack.

In rare circumstances, municipal counsel may have personality conflicts with one or more individual councillors. Such conflicts usually arise out of an experience on a previous file, where a councillor may feel that the lawyer has provided the wrong advice, or advice which goes against the interests of his or her constituents. Such conflict is inevitable in a municipal setting; however, it is incumbent upon the lawyer to maintain professionalism and to not let such conflict cloud his or her judgement or ability to provide sound legal advice. If an elected official's conduct towards legal counsel falls below an acceptable standard of behaviour, there are usually other avenues available to deal with such behaviour, for example a councillor's code of conduct, or a workplace harassment policy.

**Conclusion**

Municipal lawyers fulfill a variety of roles for their client, the municipal corporation. They are in frequent contact with council, the "board of directors" elected to carry out the functions of the corporation. Maintaining effective communication with council is an invaluable tool in ensuring the lawyer's ability to carry out his or her role within the corporation.

Like all other lawyers, those in a municipal setting must respect certain rules of professional conduct, as well as any other statutory regimes in place in their respective jurisdiction. Adherence to these rules must be balanced with providing advice or opinions to council, even in those difficult situations where such advice is met with resistance.

Like any other client, councillors expect to receive all relevant information in a timely fashion in order for them to make an informed decision. They expect open and honest communication, delivered in a professional manner.

The main factor which distinguishes the relationship between municipal legal counsel and councillors from a traditional lawyer-client relationship is that council, both collectively and as individual councillors, effectively answers to its constituents, while municipal lawyers have a duty towards the municipal corporation. A successful relationship between council and the municipal lawyer is one in which the lawyer is able to carry out its duties towards its client, while at the same time being cognizant and respectful of council's political realities.

**Notes**

1. As amended October 10, 2014.
2. *See* the Code at pages 18-20.
3. *See* the Code at pages 21-22.
4. *See* the Code at page 24.
5. R.S.N.B. 1973, c. M-22.
6. 118 NBR (2d) 306.
7. *See* the Code at page 25.
8. *See* the Code at pages 28-29.
9. 2013 ONCA 327.
10. *Id.* at par. 9.
11. *Id.* at par. 66.
12. *See* the Code at page 38.
13. *Supra* note 5. ML

ListServ Cont'd from page 21

the mute button when he went to the restroom. No further description needed.... Or the one where the member with a sinus infection attended remotely and "sniffled," coughed and blew her nose through the whole meeting. Of course many of these problems can be overcome with behavior changes and technological adaptations, but some members have questioned whether it is worth the effort.

If it renders me old-fashioned so be it, but sometimes there is no substitute for a face

to face meeting. When meeting face to face, body language comes into play. A chairman can use body language to gauge the mood in the room and adjust accordingly, if needed. A chairman can tell when a member wishes to speak, or when a member is irritated or distracted. It seems a good deal of the challenges fall upon the Mayor or Committee Chair. Some feel it is not worth the trouble, or even the risk.

Like many issues, individual jurisdictions probably need to look at this issue themselves and judge what is best for their own particular circumstances. Available technology, individual personalities and state legal frameworks such as Sunshine Laws all play a role in whether this is a good decision for your respective jurisdiction. There is no cookie cutter answer.

Another discussion which ended being steered to the Water Cooler involved a relatively new municipal challenge known as the "Hangover Bus." We learn from a contributor in Texas that a hangover bus is a vehicle, usually a "bus or RV/motor coach that parks in the bar district and provides IV's and other mystery fluids and elixirs to intoxicated individuals" with the advertised goal of "curing a hangover." Much more complicated than the tried and true Alka Seltzer, these buses are staffed with a medical professional and come with a price of up to $100 per rider.

Questions went up from the crowd immediately about permitting, zoning, business licensing, enforcement and what happens when the intoxicated persons are "discharged." Does liability arise for the medical staff on the bus if a person is "discharged" and then injures himself or gets in to an accident and injures others? Can the police hang out near the bus and nab unsuspecting "victims" and charge them with public drunkenness? Or, nail them for DUI when leaving the bus and proceeding to drive? Sure, the police can do the same thing for person coming and going from a pub. But, perhaps the bus seems to be like a lightning rod to an intoxicated person. "Look at me – I'm going in here so I must be drunk."

When the discussion steered "south," the proximity of these buses to munchies became important. Are the hangover buses adjacent to the food trucks? Do the hangover buses have nachos and cheese? How close will they be to the football stadium? Does all of this require a separate license? There was one comparison to mobile mammography buses or blood donation buses which are often owned or operated by well- known existing medical facilities. Would such a "sponsorship" lend more credibility to the idea?

Mobile hangover buses, virtual meetings and what to do about technology… Increased mobility and instant results… "The world went and got itself in a big damn hurry!" (To quote Brooks Hatlen in *The Shawshank Redemption*). We've developed so many ways to communicate that nobody knows how to talk anymore. I am reminded of these advances by the young girl in the tire shop who approached the TV and tried to change the channel by swiping her finger on the screen. Or the colleague whose daughter looked at the telephone (a landline) and wanted to know what it was. When told it was a telephone, she replied "but where is the keyboard? The camera? How do you text? You mean you can only use it to talk?"

Yes, for those of us leftover from the baby boomer generation, these things sometimes seem challenging. But for the newer generations who have never lived without the technological advances, virtual attendance and mobile medical treatment make perfect sense. As kids we used to cut out cardboard rectangles, draw numbers on them and pretend they were "mobile phones" we could carry around and talk to anyone we wanted. "Wouldn't that be great?" we thought. Now, such items are considered a necessity, and some folks can't even remember life without them. Each of our generations will cast aside older procedures, and accept the challenges of new ones. Maybe someday the bars will be mobile instead of the patrons?

From the humor corner, and relating to technology, does anyone use a phone book anymore? Probably very few. Why? Of course we have the Internet and Google. But, please be careful when googling people. A friend recently advised me that a Google search for my name reveals a novel called "Dead by Sunset," based upon a true story of a man named Brad Cunningham who is a convicted serial killer. It seems each of his wives (he was a serial groom too) had disappeared mysteriously and he had gotten away with it several times before someone put all the pieces together. Just to be clear, if any of you are looking me up on the "net," that is not me. Keep scrolling… The only thing I have killed is a pint at Murphy's….

The prosecution rests, your honor ML

**Second Look Cont'd from page 22**

b. Does the contract obligate vendor to notify you immediately of any breach?
c. What actual protections for confidentiality does the vendor use? Encryption? Firewalls? Anti-malware software? Other?
d. What training and qualifications do employees have as to confidentiality protection?

**4. Will vendor negotiate modifications of its form contracts?** If not, can you lawfully contract with the vendor--and even if you can, do you want to?

**5. Basic platform information:**
a. Cloud or Hardware?
b. Where will data reside? What laws will apply to data access depending on location and your contract(s)?
c. Can you get all data back and ensure destruction of any copies, duplicates, or images by whatever name?

**6. Service level agreements:**
a. What level of downtime or error percentage at each EFRM stage will constitute a breach of contract giving the lawyer remedies such as liquidated damages, specific performance at no additional costs, free expert testimony, etc.?

**7. Compatibility with other software, cloud service, and hardware (including mobile devices) for each EDRM stage (each eDiscovery activity):**

a. Compatible with other software or cloud services that you already use or are considering (i.e., can and should you try to mix and match from different vendors).
b. Compatible with other software, service & hardware that you are considering procuring.
c. Beware of compatibility claims. They often assume cumbersome and unstable workarounds. Test for true compatibility before buying.
d. Will the compatibility remain when vendors upgrade their products? The upgrade might be by the eDiscovery vendor being considered or the provider of another service for which you want to ensure continued compatibility with the new vendor's product.

*Continued on page 30*

Second Look Cont'd from page 29

**Expert testimony:** Will vendor at no additional charge (or at negotiated charge) provide expert affidavits and live testimony to explain their product & services and defend their methodology for discovery disputes, evidentiary arguments, and to convince jury that their results are credible?

a. Make the vendor explain its identification, collection, storage, processing, review, production, and presentation processes to you in plain English to test whether are satisfied that it can effectively defend its processes.

b. If the vendor will not do this for no charge, and you still want to use this vendor, negotiate witness rates and terms to include in the contract, or in a separate contract with an expert consultant that the vendor recommends and has certified for competence for the product you are considering.

**The vendor's experience, track record and expertise:**

a. How long has the company been working with eDiscovery?

b. Relevant experience

i. Local government clients?

ii. Other government clients?

iii. Law firms? (Use this topic both to obtain references and to explore potential conflicts. Do you want to risk using the same vendor used by a frequent opposing counsel? If so, what "Ethics Wall" arrangements can be implemented?)

iv. Does the vendor do work for a party adverse to the City in a pending case? This might be a deal-breaker unless the exceptions under Model Rule 1.7(b)(1) – (4) can be satisfied.

c. Specific functions for other clients? (Was their role limited to specific projects or functions? Were they consultants or did they or their product do the work?)

d. Cases in your locality?

e. Cases before a specific judge or of a specific case type or subject-matter? On what major cases has the vendor previously worked & how recently? What was their role in each case?

g. Vendor's experience with discovery, production, or presentation software commonly used not only by you, but by your frequent opposing counsel and by the local courts. Familiarity with the software used by opponents and the courts will important for being able to process incoming discovery production and for putting on a case.

h. Vendor's level of understanding of the litigation and eDiscovery process?

I. Vendor's familiarity with any rules, protocols or procedures unique to local government or local courts?

j. Do the vendor's employees have relevant certification or accreditation (you will need input from your technology staff to ask the right questions and to interpret the answers).

k. Does the vendor have legal professionals on staff or retained and will that staffing level and quality be substantially maintained?

**10. The scope of the vendor's services:**

a. What services does the vendor offer? Do these services meet your particular needs in this case?

What services, if any, does the vendor subcontract out to third parties? Who is the third party, and what are its credentials?

Does data ever leave the vendor's site or system? Where are vendor's servers located? Is there redundancy?

How will the vendor price the project? Is the vendor's pricing structure appropriate for the particular needs of your case? Is the pricing structure competitive? (Pricing is further discussed below)

If the scope of the case, the resources devoted by the lawyer to eDiscovery such as the number of "seats" using the product, or the scope of vendor work increases, can the vendor's product be scaled up efficiently and effectively? How will the added services affect pricing?

Will there be sufficient storage capacity for your project at the quoted price? What are prices for additional capacity if needed?

Can the vendor's products also be used for responding to open records requests in compliance with state law?

Can your work product and vendor's data be exported to different platforms if necessary? Production to adverse parties? Your decision to use different review platform? Archiving at close of case?

At the end of each project and at the end of the contract, will the lawyer get ALL data back in usable form (a definite obligation, data format(s), inclusion of all annotations and other input by client, and timing).

Any vestige of client data left on vendor's system should be wiped, including metadata, backups, etc.

**11. Technical support:**

a. Is the vendor using proprietary or off-the-shelf processing and review tools? If proprietary, what is the age of the product, and has it been reviewed? If off-the-shelf, is there a risk that the vendor will not be able to or will decide not to renew its license for the product? If off the shelf will the maker or seller provide technical support at no charge? Is there any EULA or manufacturer's warranty running to the retail buyer? Is the buyer obligated by the EULA to defend the maker from intellectual property challenges or other claims?

b. Does the vendor provide the technical assistance that you require in your specific case? (For example, does the vendor offer de-duplication, the generation of load files, smart searching, predictive coding or computer-assisted review, etc.?)

c. What is the database and document review infrastructure?

d. What software will the document review team require in order to search, review and manipulate the data?

e. Does the vendor have experience with any unique or uncommon types of ESI that may be applicable in your present case (e.g., architectural rendering software files, construction schedule support files, accounting and time-keeping program files, medical or other specialized computer programs software files)?

**12. The vendor's customer service:**

a. How are the cases managed and staffed?

b. Can the vendor accommodate the level of work intensity that you require? Do you expect your team to be working 24/7 and, if so, can the vendor support that level of work intensity?

c. How much lead time, if any, is required for collection, processing and production work?

d. How available are the vendor representatives during off-hours?

e. Is technical support free or, if not, are clear terms for technical support put into the contract.

f. Will the vendor provide training? Will the trainer be experienced and qualified? Will the manufacturer provide training for an off-the-shelf product? At what prices? Scope of training? Online tutorials and other training resources? For how long will training be provided (refresher training; training to use any upgrades or new versions; training for new attorneys and support staff during the term of the contract)?

g. Will there be a primary point of contact person?

**13. The vendor's quality of services:**

**a.** How does the vendor ensure speed and efficient performance? (see section on service level agreements below)

b. Does the vendor track mistakes and errors for future improvement?

c. Is the vendor a thought leader in the industry? Participation in EDRM, seminars, CLE programs, etc.

d. Is the vendor respected among other similar vendors?

e. Has the vendor ever been sued by customer? If so, details.

f. Has the vendor any of its customers been sanctioned for discovery abuse & if so to what extent might it have been the vendor' fault?

**14. Pricing:**

a. What are the costs for installation, testing, training, and related start-up costs? Pry for hidden charges & ensure all you need is within the start-up price.

b. What hardware or software or SaaS services is the lawyer supposed to procure for compatibility?

c. Price terms, conditions, and structure after initial installation and testing. Per seat? Based on data volume? Other pricing basis? Will lawyer have to pay for additional data storage capacity as volume grows?

d. Guaranteed pricing or future limits on price increases.

e. Pricing on future upgrades and versions – try to lock in.

f. Separate pricing for each module within a bundle?

**Recommended Resources :**

**Matthew I. Cohen**, *et al.*, Navigating the Vendor Proposal Process: Best Practices for the Selection of Electronic Discovery Vendors (June 2007) The Sedona Conference® (WG1 Working Group), https://thesedonaconference.org/publication/Best+Practices+for+the+Selection+of+Electronic+Discovery+Vendors (last accessed Feb. 5, 2015) [pdf download free with registration].

eDiscovery Vendor Viability: Considerations Beyond Technology and Talent | @ ComplexD, http://www.complexdiscovery.com/info/2013/05/13/ediscovery-vendor-viability-comparisons-beyond-technology-and-talent/ (last visited Feb. 6, 2015).

**Gregory L. Fordham**, Selecting an E-Discovery Vendor A Best Value Approach - e-discovery, computer forensics, damages quantification - Fordham Forensics, Atlanta Georgia (Updated Sept. 2014), http://www.fordhamforensics.com/publications/selecting-ediscovery-vendor.html (last visited Feb. 6, 2015).

**Daniel B. Garrie,** Top Ten Tips for Managing e-Discovery Vendors, ThompsonReuters (Apr. 3, 2013), http://www.acc.com/legalresources/publications/topten/tttfmev.cfm (last visited Feb. 6, 2015).

**Maura R. Grossman,** *et al.*, The Sedona Conference Commentary on Defense of Process Public Comment Version September 2016, https://thesedonaconference.org/download-pub/4815 (last accessed Sept.11,2016) [pdf download free with registration].

**David Houlihan,** Key Questions When Selecting E-Discovery Vendors - Law360 (Jan. 29, 2015), http://www.law360.com/articles/615180/key-questions-when-selecting-e-discovery-vendors (last visited Feb. 6, 2015). (subscription required unless it is in your WL package).

**Judah Lifschitz,** George Carry, Technology: 5 considerations when choosing an e-discovery vendor, Inside Counsel (July 6, 2012), http://www.insidecounsel.com/2012/07/06/technology-5-considerations-when-choosing-an-e-dis (last visited Sept. 12, 2016).

**Andreas Mueller,** Selecting eDiscovery Vendors | Modus eDiscovery (three parts): Part 1: Selecting an eDiscovery Vendor is like Buying the Right Car – But Don't Forget about the Dealership (Sept. 17, 2014), http://discovermodus.com/blog/ediscovery-vendor-selection-methodology/ (last visited Feb. 17, 2015); Part 2: Learning What You Want to Know (Oct. 13, 2014), http://discovermodus.com/blog/ediscovery-vendor-selection-2-rfi-rfp/ (last visited Feb. 17, 2015); Part 3: Making Your Choice (Nov. 10, 2014), http://discovermodus.com/blog/ediscovery-vendor-selection-part-3-making-your-choice/ (last visited Sept 21, 2016).

**Mark Yacano,** Vetting Your E-Discovery Vendor: The Lawyer's Perspective, ABA Law Practice Today (Mar. 2004 article date, Nov. 2005 publication date), http://apps.americanbar.org/lpm/lpt/articles/ftr07043.html (last visited Feb. 6, 2015).

**Request for Proposal Forms :**
**(Caution: Some of the following were drafted, or at least customized, by vendors):**

Alabama Attorney General, RFP-eDiscovery Solutions - 027-201401 - File-RFP-eDiscovery-Solutions-027-201401, http://www.ago.state.al.us/File-RFP-eDiscovery-Solutions-027-201401 (last visited Apr. 22, 2015).

Clearwell, Microsoft Word - Sample E-Discovery RFP.doc, http://www.lmgintl.com/downloads/whitepapers/clearwell/Sample_E-Discovery_RFP.pdf (last accessed Feb. 17, 2015).

City of Kirkland WA (April 30, 2012), http://www.kirklandwa.gov/Assets/RFP+for+Electronic+Discovery+Services+%28PDF%29.pdf (last accessed Feb. 17, 2015).

City of Seattle WA RFI (not RFP) (Aug. 23, 2013), www.seattle.gov/purchasing/docs/**bid**s/**RFI**FAS4387.doc (last accessed Feb. 17, 2015).

City of Memphis TN RFP (Sept. 9, 2014), http://www.memphistn.gov/Portals/0/pdf_forms/eDiscovery%20Solution%20RFP%20-%20Final.pdf (last accessed Feb. 17, 2015).

**Notes**

1. *See* Model Rules of Prof'l Conduct (2016) available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (last accessed Sept. 11, 2016).

2. Annotated links to these Rules are on the ABA Web site at https://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (as of Sept. 11, 2016). However, the ABA has been dilatory in keeping up with new ethics developments on some of its online charts, to there may be additional states not listed on this Web site.

3. EDRM is the eDiscovery Research Model organization, now acquired by Duke Law School. *See* .edrm.net for more information about the organization, its thoughtful and though-provoking work-flow models, and a rich trove of other eDiscovery resources.

International Municipal
Lawyers Association
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**Codification Services**
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- enCodePlus Zoning Solutions

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