September/October 2016

IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

POLICE AND THE COMMUNITY

Procedural Justice and What Every Municipal Lawyer Should Know

Police Use of Lethal Force: Does Anyone Trust Prosecutors to Get It Right?

Recent FLSA Changes: Pay Now Or Pay More Later—What You Can Do To Minimize Your Risk

Endangered Fish v. Humans: The Fight Over Competing Water Needs

OP-ED: The First Amendment and Augmented Reality Games

LISTSERV: IMLA-Good Company on Your Journey

AMICUS CORNER: Looking Ahead to the Supreme Court's 2016 Term

SECOND LOOK: Impeaching an Entity Witness

CODE ENFORCEMENT: Violation? I Didn't Notice...

INSIDE CANADA: Cases of Interest





Have a job position that you need to fill?

Use IMLA's job board to reach top quality candidates.

Take advantage of our 20% discount until December 31st.

Promo code: MUZ69XDS.



IMLA

Phone: 202.466.5424
Fax: 202. 785.0152
E-mail: info@imla.org
Website: www.imla.org

51 Monroe Street,
Suite 404
Rockville, MD 20850

PRESIDENT
Herbert W. A. Thiele
County Attorney
Leon County, FL

PRESIDENT-ELECT
Mary Ellen Bench
City Solicitor
Mississauga, ON, Canada

IMMEDIATE PAST PRESIDENT
G. Foster Mills
Managing Attorney (retired)
New York City, NY

TREASURER
Andrew J. Whalen, III
City Attorney
Griffin, GA

GENERAL COUNSEL
EXECUTIVE DIRECTOR
Charles Thompson, Jr.
IMLA
Bethesda, MD

DIRECTORS
Barbara A. Adams
Village Attorney
Kenilworth, IL

Patrick Baker
City Attorney
Durham, NC

Marianne Landers Banks
Interim City Attorney
Springfield, MO

A. René Broker
Borough Attorney
Fairbanks North Star, AK

Tyrone E. Cooper
City Attorney
Beaumont, TX

Robert S. Croom
Deputy General Counsel
South Carolina Association of Counties

Gary Ebert
Director of Law
Bay Village, OH

Wayne Esannason
Village Attorney
Scarsdale, NY

Cathy D. Hampton
City Attorney
Atlanta, GA

Douglas C. Haney
Corporation Counsel
Carmel, IN

Roger Horner
City Attorney
Brentwood, TN

Rose Humway-Warmuth
City Solicitor
Wheeling, WV

Monica Joiner
City Attorney
Jackson, MS

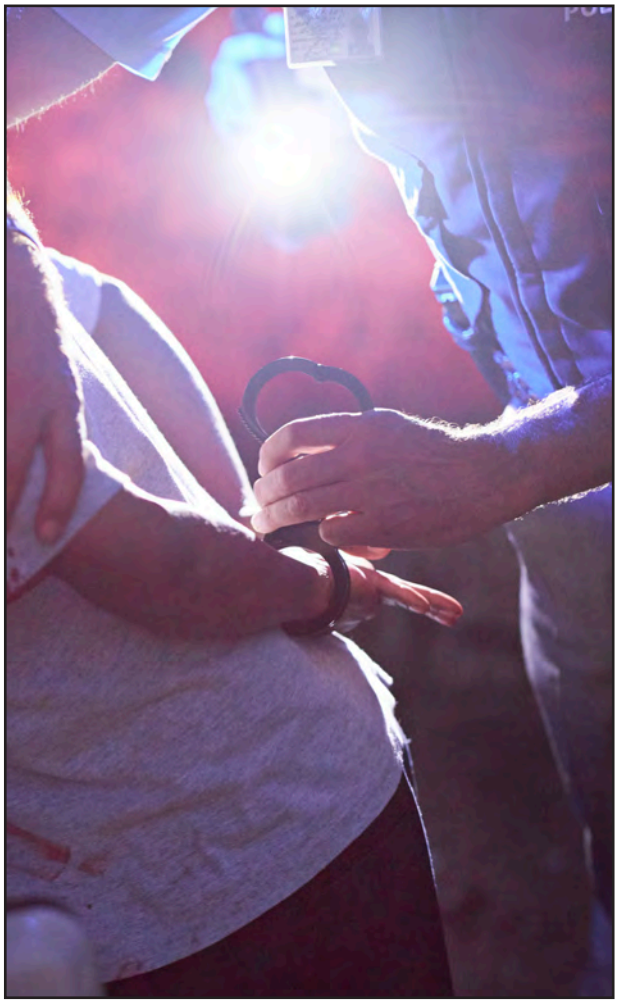
Stephen Kemp
Former City Attorney
Peoria, AZ

Art Pertile
City Attorney
Stafford, TX

Susan L. Segal
City Attorney
Minneapolis, MN

IMLA

THE MUNICIPAL
LAWYER MAGAZINE



POLICE AND THE COMMUNITY

PROCEDURAL JUSTICE AND WHAT EVERY MUNICIPAL LAWYER SHOULD KNOW
By Melinda Barlow, Kelly, Hart & Hallman LLP
Police shootings of African-American detainees are part of a wider racial disparity, from traffic stops to searches to sentencing. Law enforcement officers can achieve greater success through better relationships with the communities they serve.
Page 6

POLICE USE OF LETHAL FORCE: DOES ANYONE TRUST PROSECUTORS TO GET IT RIGHT?
By Philip Bogdanoff
Repeated fatalities at the hands of police are generating frustration when no criminal charges are filed. But existing laws–and politics–preclude criminal prosecution in seemingly compelling cases.
Page 12

RECENT FLSA CHANGES: PAY NOW OR PAY MORE LATER
By Larry Lee and Adam Brown, Fisher & Phillips LLP
Recent amendments to the FLSA require extra vigilance at the municipal attorney's office.
Page 16

ENDANGERED FISH v. HUMANS
By Gene Tanaka, Best Best & Krieger
Persistent drought is changing the landscape of the American West—and testing the efficacy of federal and local water laws.
Page 20

DEPARTMENTS

15 OP-ED
First Amendment Rights and Augmented Reality
By Caitlin Cutchin, IMLA Associate Counsel

24 LISTSERV
IMLA-Good Company on Your Journey
By Brad Cunningham, Municipal Attorney, Lexington South Carolina

27 AMICUS CORNER
Looking Ahead to the Supreme Court's 2016 Term
By Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

29 SECOND LOOK
Impeaching an Entity "Witness"
By Pete Haskel, Executive Assistant City Attorney, Dallas, Texas

30 CODE ENFORCEMENT
Violation? I Didn't Notice…
By Jerrod Simpson, Assistant City Attorney, Tampa, Florida

31 INSIDE CANADA
Cases of Interest
By Monica Ciriello, Ontario 2015

STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

EDITORIAL STAFF
Caitlin Cutchin

ART DIRECTION & PRODUCTION
Trujillo Design

Views appearing in Municipal Lawyer are those of the author. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2016 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. Municipal Lawyer is IMLA's membership magazine. It is published bi-monthly. Views expressed by authors and contributors are not necessarily the views of IMLA. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, MD 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. Municipal Lawyer reserves the right to refuse or edit manuscripts submitted for publication.

EDITOR'S NOTE:

IMLA
THE MUNICIPAL LAWYER MAGAZINE

Ferguson. Baltimore. Baton Rouge. Dallas. Chicago. St. Paul. Milwaukee. The list of cities and victims–whether residents known to their communities or officers sworn to protect them–lengthens inexorably. While some discern gradual progress in an emerging honesty about root causes, others are less sanguine, sensing that insolvable barriers persist.

All would agree that answers are desperately needed for the troubled relationship between police and the people in many of America's municipalities.

In this issue of *Municipal Lawyer*, we listen to two of the numerous voices in the discussion about law enforcement and the community. In "Procedural Justice," Melinda Barlow describes an approach to policing which emphasizes a foundation of mutual respect and posits that when police-public interactions are clothed in trust from the ground up, the number of tragic and catastrophic misunderstandings can diminish. Another perspective, articulated by Phillip Bogdanoff in "Police Use of Lethal Force," delineates the challenges facing prosecutors as they incur public outrage while operating within the limits of applicable law.

The solutions to these problems will not be easily found, but IMLA members will no doubt be involved. Municipal lawyers have a unique role to play in helping to craft and promote policies that can enhance societal harmony. It is both a responsibility and a privilege.

IMLA appreciates the opportunity to be a part of that process.

We look forward to seeing many of you at our upcoming Conference, where we will continue the dialog about police-community relations and the many other critical issues facing local government attorneys.

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.

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

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

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

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

We look forward to hearing from you!

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

PRESIDENT'S LETTER

Herbert W.A. Thiele, IMLA President and County Attorney, Leon County, Florida



As my term as your President of the International Municipal Lawyers Association comes to a close (my term will end at the conclusion of the IMLA Conference in San Diego, California that is taking place September 28 through October 2, 2016), this is my final opportunity to communicate to you through *Municipal Lawyer*.

First and foremost, let me say that it has been a distinct honor and privilege to have served as the President of the International Municipal Lawyers Association for 2015-2016. As with many of you who have held leadership positions in various organizations, it is my hope that I will be leaving the Presidency of IMLA with the organization stronger and better than when I took over the reins from Foster Mills last year (who did an outstanding job). Each president of IMLA has sought to accomplish the same goals, and I believe they have done so. While the duties and responsibilities of the President of IMLA are not significantly burdensome, they do provide an opportunity to get an even greater understanding of the needs of the organization and its inner functions. By participating in many phone conferences, writing letters to both IMLA members and prospective IMLA members, attending our Mid-Year Seminar and our Annual Conference, as well as having attended the IMLA in Canada Conference and the Top 50 Conference, I was able to broaden the number of contacts with local government lawyers around North America even more so than my membership in IMLA had provided over the last thirty-six (36) years.

In making new acquaintances, I have clearly had a great deal of fun, and learned a significant amount from each of you during those meetings and conversations. So, thank you for your membership in IMLA, your contributions to IMLA, and for those who I have met and gotten to know much better, for your friendship which will last much longer than the last few months of my Presidency. It is my intention to remain a member of IMLA during the remaining portion of my tenure here as County Attorney for Leon County, Florida

Secondly, I call upon each of you to continue to promote IMLA and seek to broaden our member base. IMLA members are the life blood of our organization, and while we serve our members by providing all of the information, the literature, the magazines and newsletters, and the seminar and conferences, all of which provide a certain amount of revenue to IMLA, it is the membership that is our primary source of income that allows us to do all of those things. So, whenever in the course of your representation of your local government you come across a fellow local government lawyer who is not a member of IMLA, please tell them about our wonderful organization, how it could benefit them and their office to become a member, and to seek their commitment to joining IMLA if not in the current fiscal year, then as part of their budget for the next fiscal year.

Never before in the history of our respective municipalities have so many relied upon local government to provide for their needs, to provide services, and with that comes the new areas of the law which need to be explored and fashioned by IMLA member local government lawyers. Your role as local government lawyer in helping maintain equal justice and the role of law in your communities has never been more important. This while addressing the continuing legal challenges brought forth by recent SCOTUS decisions and struggles with individual rights and liberties. Your continued participation, the sharing of ideas on the LISTSERVE, at our conferences, and in our hallway conversations is of utmost importance now. I can tell you from my experience as an IMLA member all these years, and as President, that there is no other organization which has provided the background information, legal representation, and comradery as IMLA has. The openness by which IMLA members share their research, their written work product, and their experiences is unmatched anywhere by any other organization which involves local government lawyers.

Further, I want to thank each and every one of the Officers and members of the Board of Directors of IMLA who so unselfishly give their time to have assisted me, and assist IMLA in providing such superior services to our membership. Each of those Board members has in the past, and will continue into the future to provide significant leadership in achieving IMLA's goals and objectives. For those members of the Board of Directors who are leaving the Board in September, a very special thank you for your years of service to IMLA. For those new members of the IMLA Board of Directors who will be joining the Board in September, welcome, and you can look forward to a valuable and worthwhile experience in your service to IMLA on our Board of Directors over the term of your office.

Finally, and certainly not least, I want to thank Chuck Thompson, our General Counsel and Executive Director, Veronica Kleffner, our Deputy Executive Director, and all the other members of the IMLA Staff who have not only assisted me, but who have provided such significant service to IMLA in running our operations. To those on the IMLA Staff, thank you! Not only thank you for your service to IMLA and your hard work in making our organization better every year, but thank you for making my term as President of the organization so worthwhile, so rewarding, and a heck of a lot of fun.

So, in closing, I wish Mary Ellen Bench, the incoming President of IMLA much success, along with the other Officers who will be serving with her, and the Board of Directors, during the upcoming years, and I pledge to be available to you whenever you need any assistance or if you need any tasks that you would like addressed by members of the "old regime" like myself.

Thank you.

ML

Procedural Justice and What Every Municipal Lawyer Should Know

By: Melinda Barlow, Kelly, Hart & Hallman LLP



Years ago a former employee of the city where I was an attorney was engaged in a protracted battle with the city and on the verge of litigation. Although the battle began a year earlier, I became involved when the matter garnered media attention and the employee hired an attorney. City management wanted to facilitate a resolution to end the matter and in preparation for meeting with the employee, I was providing the legal basis for the city's position when the city manager informed me that sometimes people just want to hear that you are sorry.

Internally I was indignant. My experience with hostile, litigious folks was that it wasn't about an apology. Of course, there were times that attorneys and their clients professed lofty goals about achieving justice and ensuring no other person would suffer a same or similar fate. Yet in my experience, at the end of every claim and lawsuit, my client wrote a check and rarely was the settlement predicated on a policy change.

Years later I will confess that the city manager was right, as was I. I was correct because at the point in time where I typically became involved, opportunities to resolve the matter in any manner other than monetary payment were far behind. He was right in that most people do not start out intending to engage in protracted battle with the city. Most people, whether they are employees or citizens, begin any interaction with the city with the intent of being heard, understood and having their concerns validated.

Fast forward to the present and the post-Ferguson media attention and national dialogue concerning law enforcement and their interaction with the public they serve. Law enforcement, as well as the municipal courts, are some of the largest employee groups in any city and arguably have the most contact with constituents--certainly if not the most contact, generally the most memorable contact. A person is unlikely to remember the routine transaction of paying a water bill versus going to court as a juror or defendant or being pulled over for speeding.

Undoubtedly, a city's entire image and all the things it does right can be erased by one negative encounter with law enforcement. This is where procedural justice makes the difference in perception by changing the reality. Procedural justice describes a theory of interaction in the criminal justice system based upon basic principles of fairness, unbiased decision-making, transparency and engagement. The precept behind procedural justice is simple: if people understand the process and are treated respectfully during the process, then even when they don't like the outcome, they will be more apt to accept the decision as just. Consider two examples of two very unfortunate encounters with law enforcement and the very different community and media reaction.

On October 21, 2014, the life of Laquan McDonald ended when Chicago Police Officer Jason Van Dyke shot him. Van Dyke was one of the last officers to arrive at the scene of a call about a person vandalizing vehicles. Police videotape captured Van Dyke exiting his vehicle, gun raised and immediately firing. The first shot hit McDonald, holding a 3 inch knife, who fell to the ground.[1] While McDonald lay motionless, Van Dyke continued to unload his magazine, firing a total of sixteen shots.[2] The City of Chicago, after intense scrutiny and public outcry, released the police video thirteen months post-incident after a Judge ordered the release in response to a media request.[3] The national press covered the incident extensively with a largely negative portrayal of police behavior. Department of Justice scrutiny continues regarding this incident as well as systemic concerns. The city created a Police Accountability Task Force which recently issued its findings, again bringing Chicago back into the headlines. As the *New York Times* reported, the city's own data

provided "validity to the widely held belief the police have no regard for the sanctity of life when it comes to people of color."[4]

On August 7, 2015 in the early morning hours, Arlington Texas Police Officer Brad Miller fatally shot 19 year old Christian Taylor, who was unarmed, during a burglary call at car dealership. The incident began after private security for the car dealership called 911 shortly after 1 a.m. to report that Taylor was damaging a car in the parking lot. Officer Miller was a rookie who was on his last day of field training and arrived at the scene with his field training officer along with other officers. Before a plan and perimeter was set, Officer Miller entered the dealership through the broken glass front alone and without backup, where he encountered Taylor who was agitated and began to approach Officer Miller. Officer Miller indicated he was in fear for his life and thought Taylor might have a weapon and fired several shots killing Taylor.[5]

On August 11, 2015, Police Chief Will Johnson gave a press conference wherein he provided details regarding the investigation, admitted that he had concerns regarding the judgment of the officer, apologized to the family, promised a thorough criminal investigation and announced that Officer Miller had been terminated. Chief Johnson also advised the department was sharing information and facts of the case with the FBI as they become available.[6] As with any incident, there were criticisms as to the outcomes, but by and large the consensus from the community and the media was that the process was handled correctly. The *Dallas Morning News* stated, "mistrust only grows when police brass circle the wagons. Chief Johnson has made a good start as Arlington finds itself in the spotlight in the national debate over police tactics."[7]

Although these incidents can be differentiated in many ways, the facts are that two young men were killed at the hands of an officer while engaging in criminal activity related to property damage. In Chicago, even though the incident was on video, the many versions of the facts that seemed to blame the deceased in the days and weeks following the incident led to extensive community outrage and a conclusion that distrust is warranted. Further, in Chicago, the failure to release the video for thirteen months based upon advice of counsel and others within the city management even after the litigation with the McDonald family was settled, further eroded community trust.[8] In Arlington, the quick review and singular version of events and accountability by the department for the officer's conduct openly communicated to the public and the family allowed a measured reaction and legitimacy. The incident in Arlington is a textbook example of not only embracing procedural justice from the police chief down but what procedural justice looks like when it is incorporated as a way of doing business in law enforcement. Chicago is an example of a city where legitimacy was compromised. Chicago's Police Accountability Task Force report drew the following conclusions when asking itself, "How did we reach this point":

- We arrived at this point in part because of racism.
- We arrived at this point because of a mentality in CPD that the ends justify the means.
- We arrived at this point because of a failure to make accountability a core value and imperative within CPD.
- We arrived at this point because of a significant underinvestment in human capital.[9]

In sum, Chicago PD's problems were seen as symptoms of an outcome-driven departmental culture that did not embrace procedural justice and thus its actions did not represent the principles and tenets that value the sanctity of human life.

Because of the national dialogue with regard to law enforcement and municipal courts, cities are being encouraged to review their processes and procedures to ensure fairness to the diverse populations they serve. In 2015, U.S. Attorney General Holder stated, "[t]he Department of Justice is committed to using innovative strategies to enhance procedural justice, reduce bias and support reconciliation in communities where trust has been eroded." The initiative is a $4.75 million partnership between the Department of Justice and criminal justice experts which includes investment in training, police development and research to combat distrust between law enforcement agencies and the communities they serve.[10] Holder's announcement came hours after two police officers were shot in Ferguson, Mo., during a protest sparked by a DOJ report that accused the Ferguson Police Department of making discriminatory traffic stops, creating years of racial animosity.[11] The DOJ's focus on procedural justice is not limited to officers on the streets. Municipal court systems that sometimes create "a life sentence served in 30-day installments" are also under scrutiny.[12] Also, police chiefs across the country are applying concepts of internal procedural justice to performance management and discipline of the employees. Procedural justice, although not a new concept, is being embraced as a practice to help municipalities move forward and navigate public scrutiny. In doing so, cities will not only improve legitimacy and thus ultimately the functions of employee management, law enforcement and municipal courts but may also prevent outcomes wherein litigation seems the only recourse.

What is Procedural Justice?

Procedural Justice is a theory that has long been professed by the Department of Justice and policing community as having benefits that presumably would prevent the types of demonstrations and riots that occurred in Ferguson. Although the development of practices and policies consistent with procedural justice in urban policing date back to the 1970s, trust and confidence in police has not increased.

Continued on page 8



Melinda H. Barlow is Senior Counsel at the law firm of Kelly, Hart and Hallman LLP in Fort Worth, Texas where she represents a variety of governmental entities in litigation and employment matters. Prior to Kelly Hart, Ms. Barlow was the head of the Litigation and Employment section at the City of Arlington, Texas for over a decade. She has been designated as a Local Government Fellow by IMLA and is board certified in Personal Injury Trial Law by the state bar of Texas. She obtained a Master of Public Administration in 2011, graduated from Baylor Law School in 1992 and Texas Tech University in 1988.

Procedural Justice Cont'd from page 7

Recent data confirms that confidence in police is the lowest it has been in 22 years.[13] The lack of confidence persists even though violent crime rates have dropped 48% nationwide since 1993.[14] In 2014, researchers saw improvement in the perceptions of the courts but noted that while gains were encouraging, respondents did not have deeply rooted beliefs. Further, the survey was conducted prior to high profile events such as the grand jury decisions in Ferguson and Staten Island, causing researchers to caution that only time would reveal how deep of an impact those events have on perceptions.[15]

Procedural justice research and theory attempts to explain how individuals perceive the justice system and particularly the fairness of the process. Tom Tyler, the father of procedural justice, began with the question of why do people obey the law and cooperate with legal authorities. Tyler's research debunks the common myth that people obey the law and cooperate because they want to minimize personal costs and maximize attainment of rewards. In other words, under traditional theories, society controls individuals through a system of deterrence and sanctions of certain behaviors. Although risk of punishment and severity of punishment have some influence on deterrence of crime, the level of manpower needed to effectively impact risk and severity enough to alter behavior and significantly deter crime is often cost prohibitive.[16] In contrast, experiencing procedural justice changes people's values concerning the law and thus increases feelings of responsibility and obligation to the law.[17] Procedural justice creates a paradigm wherein belief in the system fosters legitimacy, encouraging cooperation and voluntary compliance.

Procedural justice embodies the notion that the criminal justice system must demonstrate its legitimacy to the public it serves. When the police are perceived as legitimate, they will have the public trust, citizens will defer to the law and police authority and police actions will be perceived as morally just and appropriate.[18] Thus, procedural justice is a means by which to obtain legitimacy. The critical components of procedural justice are voice, respect, neutrality, understanding and helpfulness.[19] In practical terms, when an officer stops a person for speeding, whether that act is perceived as legitimate and how that person reacts to the action is based upon the way the officer conducts the traffic stop, not the outcome. Similarly, in municipal court, the importance of a favorable outcome may be outweighed by the impact of an unfair process. It is the difference between a person looking back on their court experience thinking "Yes, I won but I don't know if it was worth it. It cost too much, the judge wouldn't let me speak, I didn't understand what the attorneys were saying, I was treated like dirt. I never want to go through that again" versus "I lost my case but I had my day in court, I was treated fairly, I can move on." Research supports that the process is more important than the outcome of the encounter in shaping the community's assessment of the interaction with its local government.[20]

The four pillars of procedural justice are: (1) fairness and consistency of rule application, (2) voice and representation in the process, (3) transparency and openness of process and (4) impartiality and unbiased decision making.[21] This seemingly common sense approach provides the parameters for mutually respectful engagement focusing primarily on the conduct of those in power. Officers and judges are in control on the streets or in the court room. The natural tendency for both is to focus on the rule of law. Procedural justice does not ignore the law but rather recognizes that laws, to be effective, require buy-in from those that will be impacted. Persons who enforce the law are in positions of authority granted to them by the citizens they serve. Respectful discourse with those you serve is more important to the perception of legitimacy than being right about the law.

Why Do I Need to Know About Procedural Justice?

If you represent municipalities then in all likelihood you represent the police force as well as have some involvement with a municipal court. As with representing any client, an attorney should be aware of industry standards as they pertain to the conduct giving rise to potential liability. It is fair to conclude that procedural justice has become the standard for the criminal justice system. Procedural justice has long ago left the ivory towers of academia and made its way to the streets of our cities. Procedural justice is also a cornerstone of the legal system that is more than legal theory focused on outcomes but also scrutinizes the process.[22] In the policing community, procedural justice may not be the panacea for all that ails a police department but it provides a method to change perception and shift reality for officers on the street and the relationship with the community. Maurice Classen of the MacArthur Foundation discusses why and how Chicago began to see the value of shifting paradigms:

> In the last couple years, we have funded programs with the Chicago Police Department to help with the John Jay College supported Violence Reduction Strategy as well as the Police Executive Research Forum reform efforts or managing the reform efforts for Superintendent Gary McCarthy a lot which is related to procedural justice. And over the last few years what we've learned from that is how much a little investment can actually have in terms of reducing violence and also helping it improve the health of a community and to know we've begun to look at policing on a broader, national scale which brings into play a lot of the issues the COPS office deals with related to violence deterrents and procedural justice. [23]

Ironically, as stated by Mr. Classen, Chicago PD was implementing and adhering to principles of procedural justice at the time of the McDonald shooting. However, the lack of a complete paradigm shift not only in the police department but among the attorneys, the management and the elected officials resulted in not only a large settlement but erosion of community trust, national negative publicity and continued scrutiny long after the initial incident. As evidenced in Chicago, procedural justice must be embraced as city policy not just police policy.

Adherence to the tenets of procedural

justice to create legitimacy is not just anecdotal but rather is supported by research. More importantly, the DOJ has embraced procedural justice and recommended a robust system of community policing as a priority to restore community relations in Ferguson as well as other communities. Focusing on procedural justice, the DOJ specifically instructed Ferguson police department to fundamentally change the way it conducted stops and searches, issuance of citations and summonses, and arrests. Enforcement efforts were to be reoriented so that officers take enforcement action because it promotes public safety, not simply because they have legal authority to act.[24] Again, the focus is not the rule of law but rather the implementation of the legal system. More recently, the DOJ's Community Oriented Policing Services Office (COPS Office) released a report produced in partnership with PERF, the Police Executive Research Forum, which clearly defined a roadmap for any police chief to implement procedural justice programs in their community.[25]

Whether a city's police department adheres to a procedural justice model should be apparent on its face. The police department will model behavior that provides dignity to all citizens in all interactions. Supervisors will treat both their officers and the community members with respect. Supervisors lead by example. Starting with the police chief, mentoring and evaluating appropriate behaviors will be apparent. The police department's mission statement will reflect the core belief regarding the value and sanctity of human life. If it is obvious that the department defines, models, mentors, evaluates and instills the behavior consistent with procedural justice then it is on the right track. Procedural justice is the recommended methodology to obtain achievable goals for lasting changes in police agency culture, attitudes and interactions with the communities whom they serve. Moreover, it is a logical conclusion that if implementing procedural justice increases voluntary compliance with law enforcement, then presumably use of force incidents decrease, which in turn increases officer safety while lowering the risk of civil rights lawsuits. Additionally, any negative citizen encounter with law enforcement is not only a potential lawsuit or claim but also can create political havoc in a community. With body cameras, cell phone cameras, video and recording devices and all other kinds of private recording devices, the actions of police officers and all public officials who interact with the public are more and more apt to be published and scrutinized from a post-incident perspective. The more that cities implement procedural justice in dealing with citizens, the more opportunity to avoid negative publicity and litigation.

A Deeper Look at Municipal Courts

Procedural justice in the municipal court system is not a post-Ferguson concept. In 2000, the Center for Court Innovation established a community court in Red Hook, a neighborhood in Brooklyn, New York once dubbed "the crack capital of America." In 2006, the concept was replicated in Newark, New Jersey.[26] The purpose of the courts was to end the cycle of people in poor communities being jailed and released dozens of times for petty crimes. The fundamental precept of the community courts was that people are more likely to obey the law if the justice system does not humiliate them. The Judge is tough but does not talk over or down to the defendants but rather encourages engagement and questions. Instead of jail time and additional fines that are unlikely to be paid, sentences consist of writing essays, community service, social services such as anger management and signing up for school. After all, the goal of the judicial system is to reduce crime not create criminals.

The DOJ's focus on Ferguson's municipal court has brought to the forefront an issue that was previously outside of the mainstream awareness. Unacceptable practices noted in Ferguson municipal courts by the DOJ include:

- Arrest warrants not on the basis of public safety but rather as a routine response to missed court appearances and required fine payments.
- 9,000 warrants on cases stemming in large part from minor violations such as parking infractions, traffic tickets, or housing code violations.
- Warrants for arrest and incarceration for violations that would not receive jail time alone or for failing to timely pay related fines and fees.
- Severe penalties for missed appearances and payments even as several of the court's practices created unnecessary barriers to resolving a municipal violation.
- Failure to provide clear and accurate information regarding a person's charges or court obligations.
- Fine assessment procedures that do not adequately provide for a defendant to seek a fine reduction on account of financial incapacity or to seek alternatives to payment such as community service.[27]

An example from the DOJ's report on Ferguson highlights these concerns:

> We spoke, for example, with an African-American woman who has a still-pending case stemming from 2007, when, on a single occasion, she parked her car illegally. She received two citations and a $151 fine, plus fees. The woman, who experienced financial difficulties and periods of homelessness over several years, was charged with seven Failure to Appear offenses for missing court dates or fine payments on her parking tickets between 2007 and 2010. For each Failure to Appear, the court issued an arrest warrant and imposed new fines and fees. From 2007 to 2014, the woman was arrested twice, spent six days in jail, and paid $550 to the court for the events stemming from this single instance of illegal parking. Court records show that she twice attempted to make partial payments of $25 and $50, but the court returned those payments, refusing to accept anything less than payment in full. One of those payments was later accepted, but only after the court's letter rejecting payment by money order was returned as undeliverable. This woman is now making regular payments on the fine. As of December 2014, over seven years later, despite initially owing a $151 fine and having already paid $550, she still owed $541.[28]

As stated in the Ferguson report, city

Continued on page 10

Procedural Justice Cont'd from page 9

and court officials adhered to court practices despite acknowledging their needlessly harmful consequences. In August 2013, for example, one Ferguson Councilmember wrote to the City Manager, the Mayor, and other city officials lamenting the lack of a community service option and noted the benefits of such a program, including that it would "keep those people that simply don't have the money to pay their fines from constantly being arrested and going to jail, only to be released and do it all over again."[29] An obvious consequence for the warrant system is the disparate impact on the poor which results in increased negative interactions with police resulting in potential use of force and jail time. This unnecessarily increases the probability of a negative outcome where the impetus was a parking ticket. Further, legitimacy is decreased which decreases cooperation and impacts perceptions of fairness and overall effectiveness of the justice system for both police and the courts.

Municipal Lawyers' Takeaway

A reasonable conclusion is that if the city's police department is not embracing the tenets of procedural justice, it should. If the city's police department does not know what procedural justice is, then the problem is even bigger. The DOJ advocates the application of the principles of procedural justice in law enforcement and thus any negative event will be reviewed with those tenets in mind. Of particular concern is if an event occurs wherein DOJ becomes involved or investigates, most assuredly those departments who do not have a strong community policing program will be critiqued. Further, the inquiry does not end with the police department. The municipal courts cannot operate in isolation. If a city has a police department that implements procedural justice, the impact is nullified if the court system does not. Post- Ferguson it is patently clear that if the DOJ investigates for any reason, the expectation is that a city's judicial system will also comport with the ideas of procedural justice. If a city's municipal court is considered a revenue source, that is a problem. The DOJ blasted Ferguson for allowing the focus on revenue generation to fundamentally compromise the role of the municipal court. The municipal court stopped being a check on unlawful conduct but rather became a means, through use of judicial authority, to compel the payment of fines and fees advancing the city's financial interests. Importantly to municipal lawyers, the DOJ identified these practices as violations of the Fourteenth Amendment's Due Process and Equal Protection requirements.

Beyond the legal implications of failing to understand and comply with principles of procedural justice, the operational impact may be significant. Municipalities tend to be service oriented, but even with the best of intentions, bureaucratic tendencies and automated systems that provide outcomes without regard to the impact of the process can produce unintended consequences of disparate impact and disconnect between the organization and its constituents and employees. Tenets of procedural justice applied beyond the criminal justice arena would presumably have the same positive outcomes: increased compliance with rules, increased organizational legitimacy and decreased negative outcomes. At the end of the day, the simple premise that sometimes people just want to hear that you are sorry goes a long way when it is part of an open, transparent process of engagement and not as a last resort to defuse an adversarial situation.

Notes

1 Monica Davey & Mitch Smith, *Chicago Braces After Video of Police Shooting Is Released*, N.Y. Times, November 24, 2015.
2. Police Accountability Task Force, *Recommendations for Reform: Restoring Trust between Chicago Police and the Communities they Serve*, https://assets.documentcloud.org/documents/2801130/Chicago-Police-Accountability-Task-Force-Report.pdf. (april 13, 2016).
3. Kyung Lah, *Laquan McDonald shooting: Why did it take 13 months to release video?* CNN, http://www.cnn.com/2015/12/01/us/chicago-police-shooting-explainer/. (last updated December 2, 2015).
4. Monica Davey & Mitch Smith, *Chicago Police Dept. Plagued by Systematic Racism, Task Force Finds*, N.Y. Times, April 13, 2016.
5. Mitch Mitchell, *Arlington officer fired 4 shots during deadly altercation*, Fort Worth Star Telegram, August 8, 2015.
6. Mitch Mitchell, *Arlington chief fires officer who shot teen*, Fort Worth Star Telegram, (August 11, 2015).
7. Editor, *Editorial: After fatal shooting of Christian Taylor, Arlington PD sets right tone*, Dallas Morning News, August 10, 2015 at http://www.dallasnews.com/opinion/editorials/20150810-good-call-by-arlington-pd.ece.
8. Kyung Lah, *supra note 3.*
9. Police Accountability Task Force at 7.
10. *Attorney General Holder Announces First Six Pilot Sites for the National Initiative for Building Community Trust and Justice, Office of Public Affairs*, U.S. Dept. of Justice (March 12, 2015), *available at* https://www.justice.gov/opa/pr/attorney-general-holder-announces-first-six-pilot-sites-national-initiative-building-0.
11. Jason Anderson, *DOJ names Stockton for police-community pilot program*, Record-Net.com (March 12, 2015, 8:00 PM), http://www.courtinnovation.org/sites/default/files/DOJnamesStockton.pdf.
12. Tina Rosenberg, *The simple idea that could transform US criminal justice*, The Guardian (June 23, 2015), http://www.theguardian.com/us-news/2015/jun/23/procedural-justice-transform-us-criminal-courts.
13. Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup.com (June 19, 2015), http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx.
14. Jennifer Truman, Lynn Langton & Michael Planty, *Criminal Victimization, 2012*, Bureau of Justice Statistics, 3, http://www.bjs.gov/content/pub/pdf/cv12.pdf (October 2013).
15. Gerstein Bocian Agne Strategies, *Analysis of National Survey of Registered Voters*, National Center for State Courts (2014), http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx.
16. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 301-4 (2003).
17. *Id.* at 307.
18. Craig Fischer, Ed. *Legitimacy and Procedural Justice: A New Element of Police Leadership*, 9, U.S. Department of Justice, Bureau of Justice Assistance: Police Executive Research Forum, (March

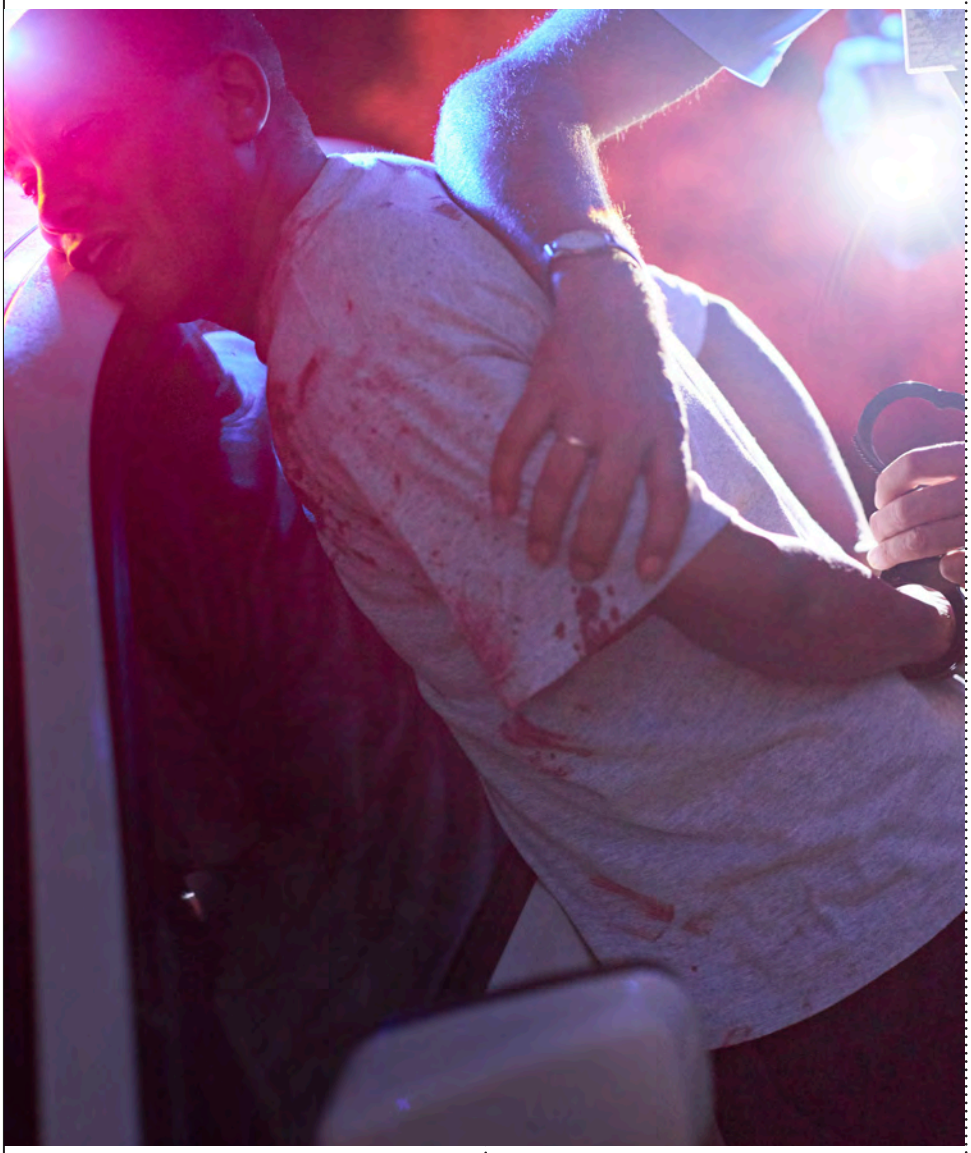
2014), http://www.policeforum.org/assets/docs/Free_Online_Documents/Leadership/legitimacy%20and%20procedural%20justice%20-%20a%20new%20element%20of%20police%20leadership.pdf.
19. Tom R. Tyler, *Why People Obey the Law*, (1991).
20. Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 Swiss J. Econ. & Statistics, 219: (1997).
21. Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy*, Chicago: Center for Public Safety and Justice, (2015), *available at* http://ric-zai-inc.com/Publications/cops-p333-pub.pdf.
22. Lawrence B. Solum, *Procedural Justice*, University of San Diego Public Law and Legal Theory Research, Paper Series, Paper 2, (2004), *available at* http://digital.sandiego.edu/lwps_public/art2.
23. U.S. Dept. of Justice, COPS (Community Oriented Policing Services), (January 2015), http://cops.usdoj.gov/html/podcasts/the_beat/03-2015/The-Beat-032015_Classen.txt.
24. United States Department of Justice – Civil Rights Division, *Investigation of Ferguson Police Department*, 92 (March 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.
25. Shannon Branly, Andrea Luna, Sarah Mostyn, Sunny Schnitzer, & Mary Ann Wycoff, *Implementing a Comprehensive Performance Management Approach in Community Policing Organizations: An Executive Guidebook*, Office of Community Oriented Policing Services, (2015), http://ric-zai-inc.com/Publications/cops-p331-pub.pdf.
26. Rosenberg, *supra* note 12.
27. United States Department of Justice – Civil Rights Division, *supra* note 24 at 55-61.
28. *Id.* at 4.
29. *Id.*

Author's Note: This article was written before the tragic events of July 2016–the killings of citizens by law enforcement in Baton Rouge and St. Paul and the murder of five police officers in Dallas. The issue of race relations and police-public interaction-and the need for dialogue and procedural justice–is clearly even more pressing today. ML



Police Use of Lethal Force: Does Anyone Trust Prosecutors to Get It Right?

By Philip Bogdanoff



The recent ambush of law enforcement officers in Dallas and Baton Rouge sparked by police shootings of African American detainees underscores the urgent need for public confidence in our justice system. As a former assistant prosecutor who now provides training to law enforcement personnel, I frequently assess the complex questions surrounding police use of force. The first question I typically ask my classes is "What is the most important duty of a police officer?" After several participants officers respond, "protect the public," invariably one of the senior officers will give, in my opinion, an even more legitimate the correct answer:, "Make sure you come home safely after your shift has ended." Currently when I provide this training, officers seem more concerned about being indicted than being shot.

Police officers believe that they are being unfairly judged when they use lethal force.

Officers are on the horns of a dilemma-shoot too soon and you can be indicted, shoot too late and you can end up dead. Unfortunately, both of these fears are real and not imagined. On February 27, 2016, Ashley Guindon, 28, of the Prince William County (Va.) Police Department was fatally shot while answering a domestic violence call. It was her first day on the job as a police officer. In 2015, 124 officers lost their lives in the line of duty. From 2005 through 2014, a total of 539 law enforcement officers were shot and killed while on the job. Even though police officers put their lives on the line every day, there has been a surge of indictments against police for their use of deadly use of force when making an arrest. In the past decade, an average of five officers per year have been indicted on felony charges. However, in 2015 there were 17 officers charged with felonies including murder and manslaughter.[1]

These cases place stress on the relationship police officers have with prosecutors. Officers may not cooperate with investigators or prosecutors after a police shooting, knowing that they or a fellow patrolman may face homicide charges. A prosecutor relies on the police to conduct thorough investigations in order to obtain successful prosecutions. Similarly, police officers seek a prosecutor's advice on search warrants, interrogations, and whether they had probable cause to arrest a suspect. I have done training for newly elected prosecutors and my primary advice is to maintain a good working relationship with your law enforcement personnel, from the patrol officer on the street to the chief of police. But when a prosecutor brings charges against a police officer for using excessive force, that relationship can be strained or permanently damaged.

In Cleveland, Ohio, the police union was openly critical of Cuyahoga County Prosecutor Timothy McGinty when his office indicted a white officer, Michael Brelo, for voluntary manslaughter in the deaths of a black couple, Melissa Williams and Timothy Russell after

a prolonged car chase involving 62 police cars where 13 officers fired 144 shots.[2] A police union official painted Prosecutor McGinty as a bad guy for prosecuting Officer Brelo, and indicated he had little trust in McGinty's decisions when determining if police shootings are justified, stating, "We don't trust him as far as we can throw him not to prosecute us."[3] Similarly, Prosecutor McGinty was critical of the union for advising their officers to take the Fifth Amendment during the prosecution of Officer Brelo and for being critical of a United States Department of Justice review of the Cleveland police department. He indicated the union leader "plays to a small constituency not known for winning chess matches."[4] Officer Brelo was subsequently acquitted of these charges.

Some members of the public do not trust the criminal justice system and believe that police officers are getting away with murder.

Fast forward six months from the acquittal of Officer Brelo and Prosecutor McGinty had to determine whether to charge a white officer who fatally shot a 12 year-old black youth, Tamir Rice, who was playing with a toy gun and pointing it at passing pedestrians. Two police officers responded to a 911 call describing a "man with a gun" outside a recreation center. The 911 dispatcher did not tell the responding officers that the caller indicated it was probably a juvenile and that the gun could be fake. The responding officer fatally shot Tamir when he pulled the airsoft gun out of his pants as the officer opened the door of his cruiser. Prosecutor McGinty advised the grand jury not to indict the officer because in his opinion the police reasonably believed the boy was an adult and was armed with a real gun. After the grand jury voted against returning an indictment, many in the community expressed outrage at the prosecutor. In March 2016, several months after this decision, McGinty lost a primary election for prosecutor and will be out of office next year.

The public suspects collusion between prosecutor and the police when prosecutors do not pursue murder charges against police officers for murder in high profile cases. The argument is that the prosecutor is not seeking justice but covering up wrongful conduct by the police. "Fewer than one in five African Americans told a YouGov poll last year that they trusted the justice system to 'properly investigate' police-involved deaths. Less than half of white people said they had trust in the system."[5] Critics of the system allege that there is an inherent conflict of interest when police departments investigate their own officers and local prosecutors determine whether officers they work with should be prosecuted.[6] There is a movement to have police shootings investigated by independent police agencies and to have a special prosecutor appointed to determine whether a police officer should be charged with homicide. Fifteen states have introduced legislation mandating that these cases be assigned to a special prosecutor.[7]

The *Houston Chronicle* published a three-part investigative series on police use of lethal force noting that Houston police officers fired their weapons 100 times in the last 5 years but not one officer was charged with a criminal offense even though a quarter of the civilians shot by the police had no weapon. The paper noted that "Houston police officers have been cleared by Harris County grand juries 288 consecutive times for shootings."[8] The last time a Harris County grand jury charged a Houston police officer in a shooting was in 2004. The newspaper implied that the prosecutor's office was biased in favor of the police because the assistant prosecutor who reviewed these shootings had been a licensed law enforcement officer for 20 years. *The Chronicle* also questioned whether the District Attorney had indoctrinated the grand jury members not to indict police officers by having the grand jury use a police firearm training simulator during their orientation so that they would experience the type of split-second decisions police officers must make when considering the use of lethal force.

Prosecutors have difficulty obtaining convictions against police officers when they are indicted for homicide offenses.

The *Washington Post* did a year-long study of police shootings and found that the police shot 965 persons in 2015 and that 90 were unarmed.[9] *The Post* profiled the shooting death of David Kassick, who fled from the police in Hummelstown, Pennsylvania after not displaying a valid inspection on his car. Officer Lisa Mearkle chased Kassick, first by car, then on foot and then used her Taser to arrest him, activating the camera on the Taser. The video footage shows that while Kassick is lying on the ground in obvious pain, Officer Mearkle repeatedly yells for him to show his hands. When Kassick does not comply, she shoots him two times, killing him. He was unarmed.[10]

Officer Mearkle was indicted for third-degree murder, manslaughter and involuntary manslaughter and faced up to 40 years in prison. At a jury trial she testified that she believed Kassick was a danger to the community when he ran from the police and that he was reaching for a weapon when she shot him. A jury acquitted her of all charges. Les Neri, president of the Pennsylvania Fraternal Order of Police commented on this case "We now microscopically evaluate for days

Continued on page 14



Philip Bogdanoff began working in the Summit County Prosecutor's Office in Akron, Ohio in 1979, retiring in 2008. He argued 20 cases before the Ohio Supreme Court including six death penalty cases. Philip frequently teaches continuing legal education courses, including ethics, search and seizure, police use of force and others. He has lectured at seminars sponsored by the Ohio Prosecuting Attorneys Association, Ohio Municipal Attorneys Association, Idaho Prosecuting Attorneys Association, Arizona Prosecuting Attorneys' Advisory Council, among others. He has also consulted for the Cuyahoga County Prosecutors Office in Cleveland, Ohio on an excessive force and police shooting case involving thirteen officers. For additional information, please visit www.philipbogdanoff.com.

Police Use of Lethal Force Cont'd from page 13

and weeks what they only had a few seconds to act on." "People always say, 'They shot an unarmed man,' but we know that only after the fact. We are criminalizing judgment errors."[11]

Are prosecutors criminalizing judgment errors by police officers? State legislatures define "criminal conduct" and the United States Supreme Court defines the test to determine whether a police officer used "excessive force." The Supreme Court has indicated that police use of force to make an arrest is a seizure under the Fourth Amendment.[12] The police can only use deadly force in making an arrest if they have probable cause to believe the suspect poses a threat of death or great bodily harm to the police or to the public.[13] In making this determination, the required perspective is that of the "reasonable officer on the scene," standing in the officer's shoes, perceiving what he then perceived and acting within the limits of his knowledge or information as it then existed.[14]

When prosecutors charge a police officer with a homicide, prosecutors are carrying out the duties of their office to protect the constitutional rights of every citizen against unreasonable seizures under the Fourth Amendment.

However, applying this constitutional test, jurors have rarely convicted police officers of a homicide offense when they use lethal force. Only 11 of the 65 officers charged in fatal shootings over the past decade were convicted.[15] Prosecutors have an uphill battle to prove an officer committed a homicide. First, a prosecutor will have difficulty proving beyond a reasonable doubt that the officer had the criminal intent to commit murder or a homicide offense. Our criminal justice system generally requires a necessary criminal intent, mens rea, before a person may be found guilty of a serious criminal offense such as murder or manslaughter. Mens rea refers to a defendant's moral culpability or 'evil mind.'[16]

A police officer indicted for a homicide will assert that he did not have a criminal intent but had a reasonable albeit mistaken belief that the suspect was a danger to the officer or to the public.

Second, a juror will question whether an officer has a motive to commit a homicide. Although motive is generally not an element of the crime, jurors are looking to determine why the defendant shot the victim. A police officer has a sworn duty to protect the public and keep the peace. The officer is not at the scene voluntarily but as part of his duties. A police officer does not profit or benefit whatsoever from the death of a detainee. The State is challenged to prove that the officer had a motive to commit a homicide beyond self-preservation.

Third, the trier of fact may find it difficult to view police officers as criminals. As first responders, officers are placing their lives on the line to protect the public. Unless the police officer has a history of excessive force, racism, or incompetence, a juror will be more likely to identify with a police officer instead of a suspect who may be running from the police.

Both the police and the public must have confidence in our criminal justice system.

Both the police and the public seem to share a common trait. Neither side seems to trust their local prosecutor to make a fair determination of whether a police officer should be indicted for a homicide offense. In high profile cases the public often believes the prosecutor is manipulating the grand jury to prevent an indictment of a police officer. Conversely, the police believe the prosecutor is abusing the grand jury process to secure an indictment against a police officer. As prosecutor McGinty learned in Cleveland, the prosecutor is in a no-win situation.

Law enforcement needs to trust that the prosecutor will fairly review the evidence in determining whether a police officer should be charged with a homicide offense. The public needs to understand that the prosecutor must follow the legal standards set forth by the United States Supreme Court in determining whether to charge a police officer with a crime. The Fourth Amendment is the pillar that supports our judicial system. All stakeholders need to trust prosecutors to carry out their oath of office to protect and defend these Constitutional principles.

Note

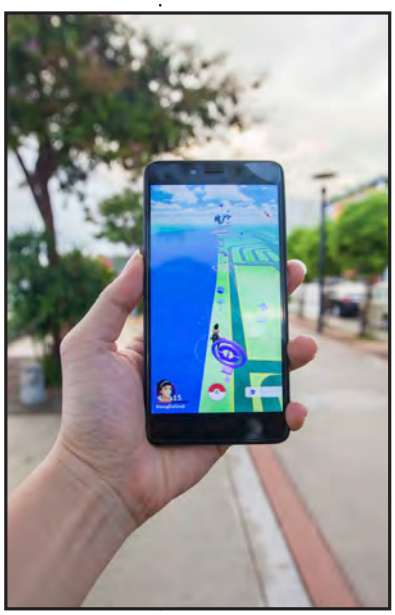
1. For a list of these officers and a brief summary of their charges, *see* http://www.motherjones.com/politics/2015/12/year-police-shootings
2. I was an independent consultant on this case for the Cuyahoga County Prosecutor along with Ken Katsaris, a police trainer and consultant. I submitted a report indicating that 12 of 13 police officers properly used lethal force. I could not find that Officer Brelo's use of force was reasonable when he fired his last shots from the hood of Timothy Russell's car.
3. Mark Navmik, "*Cleveland police union chief and Cuyahoga County prosecutor are a lot alike, even when they disagree on Tamir Rice*," Cleveland Plain Dealer, July 1, 2015.
4. *Id.*
5. Jon Swaine, Oliver Laughland, Jamiles Cartey, Ciara McCarthy, "*Ties that Bind*," The Guardian, Dec. 31, 2015.
6. *Id.*
7. *Id.*
8. James Pinkerton, "*Unarmed and Dangerous*," Houston Chronicle, Nov. 25, 2013.
9. Kimberly Kindy, Marc Fisher, Julie Tate, Jennifer Jenkins, "*A Day of Reckoning, Police Nearly Shoot 1000.*" Washington Post Dec. 29, 2015.
10. *Id.* The online article contains a video of this shooting.
11. *Id.*
12. Graham v. Connor, 490 U.S. 386, 395 (1989).
13. Tennessee v. Garner, 471 U.S.1, (1985).
14. Graham v. Connor, *supra* at 395.
15. Kimberly Kindy, Marc Fisher, Julie Tate, Jennifer Jenkins, "A Day of Reckoning, Police Nearly Shoot 1000." Washington Post, Dec. 29, 2015.
16. State v. Bethel, 66 P.3d 840, (Kan. 2003). ML

Op-Ed

The First Amendment and Augmented Reality Games—Can We Really Catch Em' All?

By: Caitlin Cutchin, IMLA Associate Counsel

A few weekends ago, I was waiting for my Uber in order to meet some friends for brunch near my home in Washington D.C. when I noticed a scene nearly straight out of a zombie apocalypse franchise (think: less *Game of Thrones* and more *Shaun of the Dead*). Dozens of fellow twentysomethings were swarming around my neighborhood's community garden, completely glued to their smartphones (not unusual) and standing motionless in the middle of the street (slightly more unusual). According to those present, there was a wild Charmander afoot that needed to be captured.



If you are wondering whether a Charmander is a type of rare Washington lizard, let me assure you it is not. It is a Pokémon.

Augmented reality games are the latest millennial craze to take smartphones and their young owners by storm. Much like brunch and Uber, augmented reality games represent a generational gravitation towards technology, digital experiences, and the sharing economy. (Side note: anybody who argues that brunch is not a shared digital experience has clearly never used Instagram —#brunchlife #squadgoals. They have probably also never tried to split a bill 15 ways without using Venmo.[1] (Seriously, how did people even do this before smartphones?)

Nintendo's latest offering, Pokémon Go, is a game based on the wildly popular Nineties videogame and franchise. Like other augmented reality games, it is a downloadable app that utilizes your phone's mapping software to integrate digitally animated animals, landscapes, and items into your phone's "street view." The company that designed the app, Niantic, has deep ties with Google and had previously helped develop the now commonplace location app, Google Maps.[2]

Pokémon Go incorporates real-time geographic data from your phone into your gaming experience, transporting you into a universe in which Squirtles live in the Dupont Circle fountain and you can renew your supply of Pokeballs by visiting the Lincoln Memorial (not that I'm admitting to have done either of these things). It also has the side effect of tricking youths into venturing out into the sunlight from the recesses of their videogame caves.

As a young attorney, I can't help but wonder… what are the legal considerations for this new type of game? Will it be necessary to regulate this activity in the future? What do municipalities need to know about this issue? The short answer right now is that we're not sure.[3] I have been told by my elders that similar discussions occurred when Sony released the portable Walkman cassette tape player in 1979 and, clearly, humanity has learned to adapt to that breakthrough.

To find gaming success, players are required to seek out specific geographic areas at different times of the day. This means that you may find young people in unusual locations at odd hours, walking about while completely preoccupied with their phones—and almost certainly generating all manner of tort issues. I think it's worth mentioning here that, according to Pokémon Go's "Official Trainer Guidelines," players are, among other things, advised to respect their communities and adhere to the rules of the human world.[4]

The goal of Pokémon Go is to catch mythical Japanese creatures and train them to do battle against other players.[5] There are a total of 142 Pokémon available for capture and, strategically, having captured a more diverse and well-trained portfolio of animals gives you an advantage over your opponents.[6] The way the game is designed, players must travel to different geographic areas at varying times of the day in order to find different animals. As you may expect, some of these locations are intuitive, with aquatic animals located near water features and nocturnal creatures only emerging at night.

Other features of the game, such as gyms, where you are instructed to train your Pokémon for battle and PokéStops, where you find free training accessories, are located near public facilities such as police stations, churches, and office buildings. You can even set up a "lure module" in order to attract both Pokémon and other players to your location—which, yes, sounds like the makings of an extremely nerdy dating app. While this "lure" feature has been used to perpetrate robberies and other criminal acts,[7] it is also worth noting that some of these features may be beneficial for local businesses or public landmarks looking to increase public awareness and interest.8

To complicate matters, not all gyms and stops are created equal, and certain locations are more or less desirable than others.9 Further, many players have noted that PokéStops will "refresh" after a five minute period, thus allowing you multiple bites at the apple to procure your animals and equipment. Pro tip: If you suddenly find your office building surrounded by men and women standing in large clusters, staring into their phones, it is likely that you are located near one of the game's more popular and fruitful features. While it is possible to purchase items that will enhance your level of competition, the overwhelming preference of most players is to simply find PokéStops where one can procure items for free.

Less intuitive than the game's setup and premise, however, is the question of whether and under which circumstances unsuspecting local governments will be liable for injuries[10] that have befallen players as a result of playing. As an example, who is responsible for Pokémon roaming around highways or other dangerous areas such as cliffs? Presumably there is an algorithm in place that determines when Pokémon emerge in front of a player to be captured, but should it be someone's responsibility to insure that players do not cause a car wreck? Is there a need for local regulations under such circumstances?

Do players have the right to play their game in public areas? An Australian police station was forced to post a message clarifying that players did not need to actually enter the station to capture Sandshrews.[11] Further, places such as the Holocaust Museum have expressly banned individuals from playing the game on their premises.[12]

Beyond the inconvenience and disruption of Pokemon-chasers in many municipal spaces, would allowing a Pokémon "lure" on city property open up a municipality to liability for attractive nuisance?

Continued on page 28

Recent FLSA Changes: Pay Now Or Pay More Later—What You Can Do To Minimize Your Risk

by Larry Lee and Adam Brown, Fisher & Phillips LLP



The U.S Labor Department (USDOL) has finally released the anxiously awaited revised regulations affecting certain kinds of employees who may be treated as exempt from the federal Fair Labor Standards Act's (FLSA) overtime and minimum-wage requirements. After nearly a year of uncertainty, the final rules were published on May 23, 2016. These rules apply to government employers, and they have an effective date of December 1, 2016.

Public employers who currently consider any employees to be exempt "white collar" employees might have to make some sweeping changes.

Exemption Overview

To understand why the new regulations will have such a large effect, it is worthwhile to engage in a quick refresher of the exemptions that will be affected by the new regulations.

The FLSA is the federal statute that mandates that all employees receive at least minimum wage for all hours worked, and they are to receive overtime payments at a rate of time and a half of their regular rate for all hours worked in excess of 40 in any workweek. The FLSA starts from a presumption that every employee is entitled to overtime for all hours worked in excess of 40 in a given week. However, there are exemptions or exceptions to this requirement. As relevant here, employees are exempt from overtime if they meet two tests: The duties test and the salary test.

Duties test: Many employers erroneously believe that any employee that is paid on a salary basis instead of an hourly basis is exempt from overtime. However, in order to be properly exempt from overtime under the FLSA under one of the "white collar" exemptions, the employee must work in an executive, administrative, professional, outside sales, or certain types of computer positions. Each of these duties categories has specific and lengthy definitions and regulations that explain how a particular employee qualifies for the exemption.

Salary test: In addition to the duties test, exempt employees must also meet a salary test. Under the old FLSA regulations, which remain in effect until December 1, 2016, the employee must be paid at least $455 per week, which annualizes to a yearly salary of $23,660. If an employee meets one of the duties tests and is paid at least $455 per week, the employee can be properly exempted from the overtime requirements of the FLSA.

Specific and Wide-Ranging Changes For This Year and Beyond

Under the new final rule published on May 23, 2016, the following changes have been made in the USDOL's definitions of executive, administrative, professional, computer-employee, and highly compensated exemptions under the FLSA's Section 13(a)(1):

The minimum salary threshold is increasing to $913 per week, which annualizes to $47,476 (up from $455 per week, or $23,660 per year). USDOL says that this figure is set at the 40th percentile of data representing what it calls "earnings of full-time salaried workers" in the lowest-wage Census region (currently the South). This more than doubling of the minimum salary threshold is sure to affect large numbers of exempt public sector employees, who currently earn more than $23,660, but less than $47,476 per year.

This minimum salary amount will now be "updated" every three years (meaning that it will likely increase with each "update"), beginning on January 1, 2020. USDOL will announce these changes 150 days in advance. The practical impact of this change is that public sector employers will now be forced to increase the compensation of exempt employees whose salaries are at the minimum level or below the new "updated" level every three years, regardless of employee performance, budgetary concerns, or other factors that affect the amount of money available for salary increases. The 150 day announcement period also presents issues for public sector employers, who often operate based on yearly budgets. These employers will

need to be aware of any impending increases when new budgets are in the process of being drafted and approved. Unfortunately, employers may be forced to estimate the updated amount, if it is not released in detail before the new budget is finalized.

Employers will be able to satisfy up to 10% of this new salary threshold through nondiscretionary bonuses and other incentive payments, including commissions, provided that the payments are made at least quarterly. This crediting will not be permitted as to the *salaries* paid to employees treated as exempt "highly compensated" ones. This change is less likely to impact public sector employers, but it is important to keep in mind in the event that it can be utilized to offset some of the burden associated with the mandated salary increases.

The total-annual-compensation threshold for the "highly compensated employee" exemption will increase from $100,000 to $134,004 (which will also be "updated" every three years). USDOL says that this figure is set at the 90th percentile of data representing what it calls "earnings of full-time salaried workers" nationally.

These rules will become effective on December 1, 2016, which is considerably later than had been proposed. Unless this is effective date is somehow postponed, by December 1 employers must have done what is necessary to continue to rely upon one or more of these exemptions (or another exemption) as to each affected employee, or they must forgo exemption status and begin paying overtime to any employee who no longer satisfies all of the requirements.

Considerations for the Public Employer

Essentially, USDOL is doubling the current salary threshold. This is likely intended to both reduce the proportion of exempt workers sharply and increase the compensation of many who will remain exempt, rather than engaging in the fundamentally definitional process called for under the FLSA. This represents a stark departure from past USDOL interpretations of the agency's power, when even the agency itself said that manipulating exemption requirements to "give employees a raise" or to establish a minimum wage for exempt employees was not, and never has been, an authorized or legitimate pursuit for USDOL to undertake.

Additionally, as discussed above, for the first time in the more-than-75-year history of the white collar exemption regulations, USDOL will publish what amounts to an automatic "update" to the minimum salary threshold. This departs from the prior USDOL practice of engaging in what should instead ultimately be a qualitative evaluation that also takes into account a variety of non-numerical considerations. This new imposition also creates a real hardship for public sector employers, which are often constrained by budgetary concerns.

Thankfully, USDOL did not change any of the exemptions' requirements as they relate to the kinds or amounts of work necessary to sustain exempt status. The USDOL had previously asked for comments directed to whether there should be a strict more-than-50% requirement for exempt work. The agency, however, apparently decided that this was not necessary in light of the fact that the number of workers for whom employers must apply the duties test is reduced by virtue of the salary increase alone.

What These Changes Mean for Public Employers

Many public sector employers do not closely track the hours worked by their exempt employees. Under these new regulations, tracking hours has become even more important than it ever has been. First, there is a good probability that some employees who were formerly classified as exempt and who received a salary will be reclassified as nonexempt because there simply is not money in the budget to increase their salaries to meet the new salary test.

Many public sector employees are not used to working strict 40 hour workweeks, and many of them in fact routinely work more than 40 hours per week. Public sector employers will need to begin closely tracking employees' work hours, to ensure employees are properly compensated for any hours worked in excess of 40 in a workweek, or employers risk increased liability in future lawsuits brought by nonexempt employees alleging unpaid or improperly paid overtime. Another reason to closely monitor hours worked is to avoid future risk from a disgruntled exempt employee who argues that he or she was improperly classified as exempt, and who claims to have worked a large amount of overtime hours. In the absence of a proper timekeeping system that generates contemporaneous records of hours worked, courts have held that an employee's recollection alone is sufficient to prove the amount of overtime hours worked. Proof of hours worked is the foundation for damages in FLSA cases. Thus, it is extremely important for employers to require all employees to record and track their time every week.

Unfortunately, there is likely no way to avoid feeling the impact of these changes in some fashion. Municipal employer funding is usually defined by taxes, federal or state contributions, and creative budgeting. Public entities are unlikely to see a sufficient funding increase to help place all salaries at the necessary new levels, because tax increases are unpopular, and even if they are passed, they likely will not make up the gap between the old salary basis amount and the newly doubled amount. This very real possibility has the potential to harm both the local government themselves and the public in general. If public entities are forced to raise some salaries large amounts to meet the new minimum requirements in the regulations, they will be forced to cut other services or programs. The extent of these cuts depend on how many employees are affected in each entity.

By that same token, if public sector employers choose not to raise salaries and to begin classifying affected formerly exempt employees as non-exempt employees, they will still have difficulty making up the necessary funds, because they will likely be paying overtime premiums to employees whose job duties and work habits have evolved to necessitate more than 40 hours per week under the old regulations. Employers who elect to prohibit employees from working overtime will find it difficult to adjust to the decline in productivity associated with key employees reducing their work hours each week.

While granting comp time in lieu of overtime is permissible under the FLSA for public sector employers, the budgetary and decreased productivity issues discussed above will not be improved if employers elect to give comp time in lieu of overtime. This practice usually results in municipal employers paying affected employees to not

Continued on page 18

Recent FLSA Changes Cont'd from page 17

work, which could further exacerbate the existing issues. Under any scenario, government employers may likely see less work being done and/or more money being paid out. This conclusion is particularly difficult for public sector employers with limited funding, many of whom will be unable to hire additional employees to make up for any productivity gaps that arise. To make up for the monetary gap necessary to maintain exemptions, more funds will be shifted from programs and services that benefit the public over to increased employee salaries. The extent of these issues is unknown at this time, and will vary between different public employers, but what is clear is that these new regulations will have a profound impact on public sector payroll practices, as well as programs and services offered to the communities as a whole.

These changes also carry the significant administrative burden of figuring out how to implement them, and deciding which of the multiple unpleasant options is the least unpleasant for each affected employee within a particular municipal employer. These tasks will likely include a full compensation review for any exempt employees, as well as an analysis of any needed changes for each employee. For any employee whose salary is not increased to the new minimum $47,500, there will be significant work to decide whether to convert them to hourly or to pay overtime with a salary. The latter could be a problem if such employees are regularly working overtime, but might work well if employees generally work 40 hours or less and only occasionally have overtime spikes.

Finally, although most governmental employers do not have many employees who meet the "highly compensated employee" exemption, the change to that exemption may force some employers to reevaluate whether a few of their people who presently fall under that designation will be raised to meet the new amount or not. This is likely to be minimal for most public sector employers, but some government entities have employees who qualified for this exemption under the old salary test, who would not qualify under the new test.

How Can Public Sector Employers Comply with the New Rules?

The new rules have left many employers puzzled about how to ensure compliance. While the practical impact of the solutions proposed by this article may be somewhat harsh, fortunately the concepts and methods necessary to ensure compliance are not complex.

First, the simplest, yet perhaps least plausible, way to ensure compliance is to make sure all employees who are exempt under one of the exemptions discussed in this article are paid a salary of at least $913 per week, and that their job duties qualify them for one of the relevant exemptions. However, this option may not be available to cash strapped municipal employers. Fortunately, there are other solutions available.

Public sector employers can also convert exempt employees who will no longer meet the salary basis test to nonexempt employees. These employees can lawfully receive their wages either as a salary, or as hourly pay, but they must be paid overtime at time and a half of their regular rate of pay for any hours worked in excess of 40 in a week. For this reason, employers should always track the hours worked by these employees, and should consider implementing strict "no overtime" policies that require prior managerial approval for any overtime hours. These policies will not completely protect against liability for future claims of unpaid overtime, but they will likely dissuade employees from working overtime.

If nonexempt employees do work overtime, the FLSA allows public sector employers to grant employees compensatory time off, or comp time, in lieu of cash overtime. This comp time must be granted at a rate not less than one and one half hours of comp time for every overtime hour worked, and employees must be free to use comp time within a reasonable period of time after it is earned. Additionally, employers may not permit employees to accrue more than 240 hours of comp time (except for certain safety-related positions), and employers must compensate employees for all banked comp time hours upon separation from employment for any reason.

Why is this Important?

Compliance with the FLSA is mandatory for all employers, and there are multiple avenues of risk associated with noncompliance. First, the employer may face a lawsuit from one or more employees alleging violations. Its application is very mechanical, and damages in these cases are ordinarily very easy for employees to prove by using simple math. Employers that violate the statute, even unintentionally, face harsh consequences. FLSA lawsuits are difficult for employers to win, and prevailing plaintiffs under the FLSA are presumptively entitled to their entire amount of unpaid wages, plus an additional equal amount as liquidated damages designed to compensate the employee for the period where they were forced to live without wages they were owed under the FLSA, plus full payment of their attorneys' fees by the employer. This last point is important, because it is not uncommon for FLSA plaintiffs to have a relatively small amount of damages, and for their attorneys to spend far more litigating the case than the amount to which the plaintiff is entitled, since the attorneys know that the employer will ultimately be on the hook for their fees if they win. Additionally, the FLSA has a separate statutory provision that allows employees to join together in a "collective action" which is easier to maintain than a traditional class action. Obviously, the larger a collective action against an employer becomes, the more potential exposure there is to increased damages and attorneys' fees.

Employers also face potential risk if FLSA violations are discovered during a USDOL audit. USDOL has the power to audit any business at any time, but audits



Lawrence Lee is a partner in the Denver office of Fisher Phillips. He has 20+ years representing the public sector in trial, federal circuit court of appeals, and administrative employment hearings. Lawrence also has extensive experience advising employers in all sectors on avoiding future claims under federal and state wage and hour laws, Sections 1981 and 1983, federal and state Constitutions, and federal and state anti-discrimination and anti-retaliation laws. He has been named to Super Lawyers in Employment Litigation the last two years.



Adam Brown is an associate in the Denver office of Fisher Phillips. He counsels and represents employers on a wide range of matters, including employment and traditional labor matters. Adam regularly counsels client on wage and hour compliance under federal and state laws. He has successfully represented employers in labor arbitrations, in front of administrative agencies, and in both federal and state court. Adam is a graduate of the University of Colorado Law School.

come about most frequently in response to employee complaints. If violations are found, the USDOL has the power to recover back wages and liquidated damages for employees either administratively, or through its own lawsuit. Additionally the USDOL may assess civil money penalties of up to $1,100 per violation against noncompliant employers. Finally, USDOL can recommend felony criminal charges under the FLSA against any person if violations are egregious enough.

Put simply, it is critical that all employers ensure full compliance with the FLSA at all times.

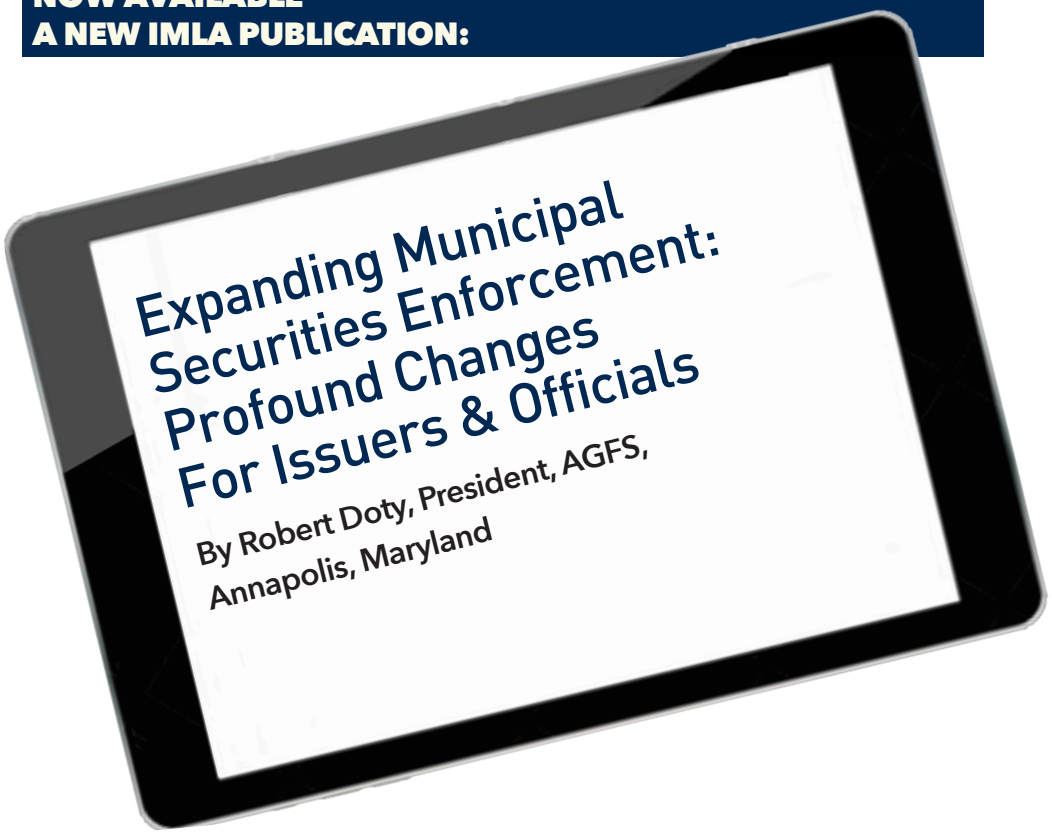
What Should You Do Now?

Some members of Congress are still considering action aimed at stopping these changes, and it is possible that lawsuits will be filed with the same goal. The Obama Administration intends to make the new rules a key piece of its legacy, and thus the President is extremely likely to veto any such legislation that makes it to his desk. Additionally, only time will tell whether any lawsuits will be filed, and how successful they may be if ultimately filed. While one or more of these challenges may be successful, municipal employers should assume for the time being that the new requirements will take effect as scheduled. Employers would be wise to immediately begin analyzing and addressing any issues presented by the new rules, in light of the bureaucratic process inherent in making such changes, and the lengthy timeline that often accompanies such changes.

Right now, public sector employers should be:

- Analyzing whether the requirements for the "white collar" exemptions they have been relying upon will continue to be met under the new rules;
- Evaluating what might be changed about one or more jobs so that the incumbents may be treated as exempt in the future;
- Considering the possible application of alternative FLSA exemptions;
- Developing FLSA-compliant pay plans for employees who have been treated as exempt but who will be reclassified as non-exempt after December 1, 2016; and
- Contacting your internal personnel attorney or a reputable and knowledgeable private employment attorney that is well-versed in wage and hour law. ML

NOW AVAILABLE–
A NEW IMLA PUBLICATION:



On August 24, 2016, The SEC announced actions against another 71 issuers. What does it mean for your municipality?

Robert Doty is well-known to securities law practitioners and a frequent lecturer at IMLA events. A Harvard Law School graduate and veteran of more than 40 years in the municipal securities market as bond counsel, underwriter counsel, investor counsel, and advisor to issuers and underwriters, he is the author of two books on municipal securities law. He has now written the dispositive account of the SEC's decisive foray into local government securities and the new environment for municipal issuers.

As **Expanding Municipal Securities Enforcement** details, since 2013, federal scrutiny of municipal bonds has dramatically accelerated. Fines and other sanctions are now being imposed by the SEC against a wide swathe of local governments. And city and county officials now have unavoidable responsibility to read and stand behind bond disclosures.

Mr. Doty details the rapid proliferation of SEC complaints against local governments, with specifics of each case -- including recent actions where the Department of Justice has joined the enforcement process, bringing criminal charges against mayors and municipal attorneys. He also explains the SEC's Municipal Continuing Disclosure Cooperation (MCDC) initiative, which allows municipalities to reduce sanctions based on voluntary disclosure of past violations. His book includes a comprehensive series of hypotheticals designed for self-study.

Expanding Municipal Securities Enforcement (185 pages) is available for $99 and to IMLA members for $39. Please contact info@imla.org for more information.

Endangered Fish v. Humans: The Fight Over Competing Water Needs

By Gene Tanaka, Best Best & Krieger



Introduction

The struggle to allocate scarce water resources between humans and endangered fish is not new. But droughts in the Southwest which lower stream flows, and population increase which raise demand, have diminished the available water. These factors have exacerbated existing threats to protected fish species, such as greater variability in stream flows, increased water temperatures, fertilizers and overfishing. The consequences are playing out before federal and state administrative agencies and courts and will be felt by communities, which depend on surface water supplies.

This article discusses the threat posed by reduced stream water levels, examines the response by the United States Environmental Protection Agency, California State Water Resources Control Board and other regulatory agencies to set numerical stream flow requirements, and analyzes the law regarding the regulators' response.

Nature in the Balance

In the American Southwest, temperatures are rising. According to the EPA, "[e]very part of the Southwest experienced higher average temperatures between 2000 and 2014 than the long-term average (1895 and 2014). Some areas were nearly 2° F warmer than average."[1]

The higher temperatures have exacerbated droughts in the Southwest. A. Park Williams, a climate scientist at the Lamont-Doherty Earth Observatory of Columbia University, noted that the California drought "would be a drought no matter what," and "would be a fairly bad drought no matter what," but "it is definitely made worse by global warming." Richard Seager, another climate scientist at Columbia, explained: "When the atmosphere is as warm as it is, the air is capable of holding far more water. So more of the precipitation that falls on the ground is evaporated, and less is in the soil, and less gets into streams."[2] In their study, Williams and Seager calculated that human-caused warming "accounted for 8-27 percent of the observed drought anomaly in 2012-2014 and 5-18 percent in 2014."[3]

Drought measurements show that the number of droughts have increased in the Southwest. The Palmer Drought Severity Index uses the Palmer Index, which is calculated from precipitation and temperature measurements, and the Drought Monitor, which uses "several indices (including Palmer), along with additional factors such as snow water content, groundwater levels, reservoir storage, pasture/range conditions and other impacts."[4] Averaged over the six states in the Southwest, the following figure shows "the last decade has seen the most persistent droughts on record."[5]

Not surprisingly, stream flows in California and the American Southwest have declined. "Streamflow totals in the Sacramento-San Joaquin, the Colorado, the Rio-Grande, and in the Great Basin were 5 percent to 37 percent lower between 2001 and 2010 than the 20th Century average flows."[6] The United States Geologic Society, California Water Science Center map below shows current streamflow conditions as a percentile of historical averages.[7]

At the same time, populations in California and the Southwestern United States are projected to increase. The California Department of Finance predicted that the population of California will increase by about 13 percent, or 5 million people, between 2015 and 2030.[8] Similarly, the U.S. Census Bureau predicted that from 2000 to 2030, the population in the Southwestern states would grow rapidly: Colorado 34.7 percent, New Mexico 15.4 percent, Arizona 108.8 percent, Utah 56.1 percent and Nevada 114.3 percent.[9]

Taken together, increased temperature, reduced stream flows and increasing populations threaten protected freshwater fish species and may reduce water supplies for people.

The Regulators' Response

The EPA and USGS suggest that regulators for U.S. Clean Water Act programs may develop numeric stream flow targets to protect aquatic life. Their Draft Technical Report strives to provide "a flexible, nonprescriptive framework to quantify flow targets to protect aquatic life from the effects associated with flow alteration."[10] Although EPA's top water official, Joel Beauvais, told energy industry stakeholders that the Report is not "guidance" or "encouragement" of specific practices, the

discussion of uses in the Report implies otherwise.[11] Specifically, the Report suggests incorporating flow criteria for water quality standards, National Pollutant Discharge Elimination System permits, such as storm sewer systems and certain federal licenses or permits such as dams.[12]

The EPA and USGS say that the Report "was developed to serve as a source of information for states, tribes, and territories. . . ."[13] Coincidentally or not, the California State Water Board and Department of Fish and Wildlife have embarked on an administrative effort to set flow criteria for at least five stream systems in the State. In its California Water Action Plan 2016 Update, the State says it is "implementing a suite of actions to enhance flows statewide in at least five stream systems that support critical habitat for anadromous fish [fish that are born in freshwater, live most of their lives in the sea and return to freshwater to spawn]."[14] These actions include "developing defensible, cost-effective, and time-sensitive approaches to establish instream flows. . . ."[15]

These are but two examples of the responses by different regulatory agencies.

Is it Legal?

Yes and no. The Clean Water Act (CWA), Federal Endangered Species Act (ESA) and California law may be used to set numeric stream flows, but there are limitations. The balance turns on the regulatory context in which the requirements arise.

A. Clean Water Act

On the one hand, the United States Supreme Court held that the distinction between water quality and water quantity is "a false distinction." "[L]owering of the water quantity in a body of water could destroy all of its designated uses...."[16] In other words, CWA water quality standards may be enforced by ensuring that stream flows are sufficient to dilute pollutants to maintain those standards. On the other hand, the CWA itself provides that the states, not the United States, shall decide how to allocate quantities of water. "[T]he authority of each State to allocate quantities of water . . . shall not be superseded, abrogated or otherwise impaired."[17] These competing concerns have surfaced in several cases.

- Total Maximum Daily Loads - CWA Section 303(d) establishes a TMDL program to help water bodies to meet water quality standards.[18] A TMDL is a numerical calculation of the maximum quantity of a pollutant that may be added to the waterbody from all sources and still meet the water quality standard for that pollutant.[19] In Virginia, EPA set a numeric TMDL for stormwater flows because it believed too much stormwater caused sediments to exceed its water-quality standard. In an unpublished decision, a federal district court concluded that, while sediment is a pollutant, stormwater is not, and therefore, may not be subject to a TMDL.[20] Under this logic, stream flows, like stormwater flows, are not pollutants which may be regulated by TMDLs.
- Section 401 Certifications - CWA Section 401 requires states to provide a water quality certification before a federal license or permit can be issued for any activity that may result in a discharge into navigable waters. The certification must "set forth any effluent limitations or other limitations . . . necessary to assure that any applicant" will comply with, among other things, state water quality standards.[21] The State of Washington set minimum stream flow requirements as part of its Section 401 certification of a hydroelectric dam to protect salmon and steelhead runs. In upholding Washington's flow restrictions, the Supreme Court held that "diminishment of water quantity, can constitute water pollution." [22]

Section 404 Permits - CWA Section 404 authorizes the U.S. Army Corps of Engineers to issue permits for the discharge of dredged and fill materials into the waters of the United States, and allows the EPA to veto a permit if it will have an unacceptable adverse environmental effect.[23] After the Army Corps issued a permit to dredge and fill for construction of a dam and reservoir across a creek, the EPA vetoed the permit because the change in the quantities of water would, among other things, harm fish and wildlife species and destroy wetlands without adequate mitigation.[24] In upholding EPA's veto, the U.S. Fourth Circuit Court of Appeals held that the EPA had the authority to veto Section 404 permits because the lack of stream flow released from the dam would cause environmental harms.[25]

The above examples show courts have upheld and rejected flow restrictions under the CWA. The difference depends upon the statutory language of the CWA and case law.

B. Federal Endangered Species Act

Minimum flow restrictions have also been used under the ESA to protect threatened or endangered species and their habitat. Cases have delineated the parameters of their use.

- Section 7 Consultation – ESA Section 7 prohibits federal agencies from authorizing, funding or carrying out any action that is likely to jeopardize a protected species or adversely modify its habitat.[26] To accomplish this, federal agencies must consult with the U.S. Fish and Wildlife Service before taking a discretionary action which may affect a protected species, a process known as a Section 7 consultation.[27] Based on this process, the U.S. Ninth Circuit Court of Appeals concluded that the U.S. Forest Service properly conditioned its rights-of-way permits on maintaining minimum stream flows to prevent harm to endangered and threatened fish species in Washington State.[28]

Continued on page 22



Gene Tanaka is managing partner of Best Best & Krieger's Walnut Creek, California office and a member of the firm's executive committee. He focuses on toxic torts, land use and municipal litigation. He has represented Los Angeles County and many other municipal clients in cases for cleanup or damages under the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), nuisance and trespass law. For the past 20 years, Gene has taught trial advocacy and deposition skills. He holds a J.D. from Columbia Law School.

Endangered Fish v. Humans Cont'd from page 21

- Section 9 Take Prohibition – ESA Section 9 broadly prohibits any person from taking an endangered species.[29] Take means to kill or harm an endangered species or alter its habitat in a way that harms the species.[30] After reports that permits issued by the Texas Commission of Environmental Quality caused the deaths of endangered whooping cranes, a federal district court enjoined the approval of new permits.[31] However, the U.S. Fifth Circuit Court of Appeals reversed the district court judgment because there was no evidence that the whooping crane deaths were proximately and foreseeably caused by the Texas Commission's permits.[32]
- Fifth Amendment Takings Clause – the Fifth Amendment of the U.S. Constitution provides that private property shall not be "taken for public use, without just compensation."[33] In 1956, decades before the ESA became law, the U.S. and Casitas Municipal Water District entered into a contract in which the U.S. would build the Ventura River Project, and Casitas would pay for the construction costs.[34] The contract further provided that Casitas shall have the perpetual right to use all water that became available through the Project.[35] In 1997, almost 40 years later, the U.S. Bureau of Reclamation required Casitas to construct a fish ladder to protect endangered fish, and to divert water from the Project to the fish ladder.[36] The Ninth Circuit concluded that "[w]hen the government forces Casitas to divert water . . . to the fish ladder for the public purpose of protecting the West Coast Steelhead trout, this is a governmental use of the water," and that its actions must be "analyzed under a physical taking rubric."[37] This case provides a cautionary note to regulatory efforts to restrict water rights holders diversions with in-stream flow requirements.

Therefore, while the ESA may lead to minimum stream flows for a protected fish species, it may also expose the public agency to takings liability.

B. California Water Law

California water law requires the courts to strike a balance between the needs of the environment and the needs of people in allocating water.

- Public Trust Doctrine – in 1983, the California Supreme Court held that the public trust of environmental and recreational values in protecting Mono Lake and the City of Los Angeles' water rights to appropriate the flow of streams tributary to Mono Lake must both be accommodated.[38] Specifically, the Court recognized that "[t]he population and economy of this State depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values," and at the same time, "[t]he State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[39] This case set the framework for future conflicts over water allocation.
- Law of Reasonable Use – the California Constitution provides that the right to use water only extends to the reasonable use of that water.[40] Like the public trust doctrine, the reasonable use of water may require reductions in the diversions of water for environmental purposes. In Northern California on the Russian River, the State Board adopted a regulation that required diverters of river water for frost protection of crops to reduce diversions when the water levels dropped to a level that threatened endangered salmon species.[41] Under the rule of reasonableness, the court held that "[e]fficient regulation of the state's water resources in these circumstances demands that the Board have the authority to enact tailored regulations."[42]

Although the public trust doctrine and law of reasonable use developed independently, they have converged to require an accommodation of competing needs. This balancing goes to the heart of the dispute over stream flows for fish and diversions for humans and likely requires consideration of many factors in setting stream flow requirements.

Conclusion

Droughts and population growth have hastened the conflict over the allocation of water between endangered or threatened fish and humans, but they have only accelerated a longstanding tension. Court decisions interpreting the CWA, ESA and California water law suggest that the regulators' efforts to set numerical minimum stream flow requirements will generate disagreement among the competing stakeholders. Resolving these disputes will require creative legal work.

Notes

1. EPA, Climate Change Indicators in the United States, fig. 1, key points (NOAA, 2015), https://www3.epa.gov/climatechange/science/indicators/weather-climate/southwest.html.
2. Justin Gillis, California Drought is Made Worse by Global Warming, Scientists say, N.Y. Times, Aug. 20, 2015, http://www.nytimes.com/2015/08/21/science/climate-change-intensifies-california-drought-scientists-say.html?_r=0.
3. A. Park Williams, et al., Contribution of Anthropogenic Warming to California Drought During 2012-2014 6819 (American Geophysical Union Publications, pub. online Aug. 31, 2015), http://onlinelibrary.wiley.com/doi/10.1002/2015GL064924/full.
4. EPA, Climate Change Indicators, fig. 3, background (NOAA, 2015).
5. *Id.* at fig. 3.
6. Gregg Garfin et al., Climate Change Impacts in the United States: Third National Climate Assessment, Ch. 20: Southwest, 465 (U.S. Global Change Research Program, 2014), http://nca2014.globalchange.gov/report/regions/southwest.
7. USGS, California Water Science Center, fig. (current v. historical streamflow, http://ca.water.usgs.gov/data/drought/.
8. Cal. Dept. of Finance, Demographic Research Unit, State and Counties Total Population Projections, 2010 – 2015 (5-year increments) (Dec. 2014), http://www.dof.ca.gov/research/demographic/reports/projections/P-1/.
9. U.S. Census Bureau, Table 7: Population Division, Interim Projections: Change in Total Population for Regions, Divisions, and States: 2000 to 2030 (April 21, 2005), http://www.census.gov/population/projections/data/state/projectionsagesex.html.
10. Rachael Novak, et al, Draft EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration 13, https://www.epa.gov/sites/production/files/2016-03/documents/aquatic-life-hydrologic-alteration-report.pdf.

11. EPA Reiterates Water Flow Report Intended as 'White Paper" Not Guidance, InsideEPA.com, May 16, 2016.
12. EPA – USGS Technical Report at 8-9
13. *Id.* at 7.
14. Cal. Natural Resources Agency, et al., California Water Action Plan 2016 Update 13 (2016) (brackets added), http://resources.ca.gov/docs/california_water_action_plan/Final_California_Water_Action_Plan.pdf.
15. *Id.* at 13 (emphasis added).
16. PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 719 (1994).
17. 33 U.S.C. § 1251(g); see also, 33 U.S.C. § 1370(2) (CWA does not impair the States' jurisdiction over their waters).
18. 33 U.S.C. § 1313.
19. ABA, The Clean Water Act Handbook 207 (Mark A. Ryan, ed., 3rd ed., 2011).
20. Virginia Department of Transportation v. United State Environmental Protection Agency, Civ. Action No. 1:12-cv-775, 2013 U.S. Dist. LEXIS 981, at * 14-15 (E.D. Va., Jan. 3, 2013).
21. 33 U.S.C. § 1341.
22. *PUD No. 1 of Jefferson County*, 511 U.S. at 719.
23. 33 U.S.C. §§ 1344(b), (c).
24. James City County v. EPA, 12 F.3d 1330, 1336, 1339 (4th Cir. 1993).
25. *Id.* at 1336.
26. 16 U.S.C. § 1536(a)(2).
27. *Id.*; 50 C.F.R § 402.14(a).
28. County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081, 1085 (9th Cir. 2003).
29. 16 U.S.C. §§ 1532(13) ("person" includes individuals, private entities and public agencies); 1532(19) ("take" includes to harass, harm, wound or kill); 1538(a)(1)(B) (makes it unlawful for any person to take an endangered species).
30. 16 U.S.C. § 1532(19) ("take" includes "harm" to species); 50 C.F.R. § 17.3(c) ("harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife. . . .").
31. Aransas Project v. Shaw, 756 F.3d 801, 806, 807-808 (5th Cir. 2014).
32. *Id.* at 816-823.
33. U.S. Const. amend. V.
34. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1281 (Fed. Cir. 2008).
35. *Id.* at 1282.
36. *Id.*
37. *Id.* at 1292-1293, 1297 n. 17.
38. Nat'l Audubon Soc'y v. Superior Court, 33 Cal.3d 419, 424, 445 (1983).
39. *Id.* at 446.
40. Cal. Const. art. X, § 2.
41. Light v. State Water Resources Control Board, 226 Cal.App.4th 1463, 1482-1487 (2014).
42. *Id.* at 1487.

ML





IMLA-Good Company on Your Journey

By Brad Cunningham, Municipal Attorney, Lexington, South Carolina

There are many reasons to join the International Municipal Lawyer's Association. These include are the bi-monthly issues of *Municipal Lawyer* where you get to read cutting edge legal articles and columns, amicus assistance, Webinars, listserve advice, municode access to thousands of municipal codes, first rate CLE's, negotiated music licensing agreements, research assistance and wonderful Mid-year Seminars and Annual Meetings where the networking among other city attorneys is invaluable.

If you haven't already registered for the next IMLA Annual Meeting, you may still have time. This year it's in San Diego starting Sept. 28, and ending Oct. 2. The conference hotel is the beautiful Hilton Bayfront in San Diego. If you have the chance, you really should try to attend one of these meetings. Next fall, it will be in Niagara Falls!

I usually average around 12 hours of CLE credit which comes very close to fulfilling my state requirement in one week. The CLE's are excellent in quality, and are *always* pertinent to your business as a Municipal Lawyer. I have found the information invaluable in these presentations.

But, beyond the classroom these events become even more attracting as they provide an excellent chance for networking in some of our most wonderful cities. Within recent years, we've been to Washington, Portland, Chicago, San Antonio, San Francisco, Las Vegas, Anchorage, Austin, New Orleans, Baltimore, and Nashville to name a few. Each offers its own excitement and opportunities for adventure, as I can fully attest to.

I shared the following story about one of my adventures at the Anchorage Hilton, during the Mid-Year Seminar in 2014. I was moderating a session on Disaster Preparedness, and had to share the story as my own "disaster" had unfolded only a couple of days earlier. It drew great laughs at the Hilton, but had them rolling in the aisles during the Water Cooler Reunion at in Humpy's Great Alaskan Alehouse.

Ever since I had learned of the trip to Anchorage, I had wanted to schedule a Salmon Fishing Trip. I found May to be slightly early for King Salmon fishing, and the trips were scarce, but I finally found one and confirmed my plans.

On the long flight sector from Minneapolis to Anchorage, I had to sit beside a guy with garlic breath that loved to talk. The first thing he did was look right at me and say "HI" and about bowled me over. At one point, I started reading the vomit bag instructions so I didn't have to look at him or listen to him talk. Furthermore, he drank like a fish, adding alcohol to the prolific garlic stench. Five hours of that was torturous.

When we landed in Anchorage, Old Garlic Breath and his female companion had trouble "deplaning" due to intoxication. Mrs. Garlic Breath even fell on the jet way and we had to help her to a wheelchair. I found my baggage without a hitch, and reported to the rental car counter. They were out of the class car I reserved, so I received a pickup which proved to be a blessing.

The trip started at noon, but I got an early start just in case there were any issues. As expected, the weather held out. I went over my final checklist, and then I took off for the boat landing on the Little Susitna River, about a two hour drive. I got off the main highway at Wasilla, grabbed an Egg McMuffin and coffee, got back on the road and the fun soon began.

After about a half hour without seeing anyone, I was casually driving along at about 45 mph when I went around a curve and came virtually face to face with a huge moose in the middle of the road. I swerved drastically to avoid the moose, running up into the grass to go around him. Fortunately, Bullwinkle, the truck and I all survived. But, my cup of McDonalds coffee did not.

Soon I took a break at a scenic overlook to clean the coffee off the seat and snap a couple of pictures. When I got to the edge of the overlook, I saw a wolf ambling up the trail in my direction. I quickly jumped into the truck and left after snapping some insanely beautiful pictures.

My coffee-stained driving instructions left out the fact that soon the pavement was going to end. I had never been so far out into the middle of nowhere in my life. I looked at my cell phone and only had one bar left. I was amazed at even receiving that. But, I just kept driving for what seemed like forever. Then the gravel ended and the dirt roads began, and they got worse as I went along. I was off pavement for multiple miles, and off gravel for several more. Then the sign hit me – ROAD CLOSED – DETOUR.

I realized I was on my own now. The cell phone signal had vanished because it thought I was in Russia. Having already encountered a moose and a wolf, this beach bum from South Carolina was very intrigued

at what might arise next as I traveled further into the Alaskan Wilderness. Knowing I would have to retrace my route, I began to leave clues like Hansel and Gretel. One such clue was my now empty coffee cup, which I used as a route marker by sticking it to a tree branch.

To my great relief, I soon saw a sign for the Little Susitna boat landing. There was a truck there, so I wasn't the only one around - at least I thought. After about ten minutes of seeing and hearing absolutely nothing, I began to get an uneasy feeling that made me want to again make sure all systems were go. But, I had no cell signal to call the fishing guide, and the drive was too far to get a good signal. If I went that far back, I could miss the boat.

So, I walked back up to the top of the hill near the landing. It helped only slightly. I received one bar and placed the call. Of course, no sooner had the office answered than the signal dropped. No boat had arrived yet, and I began to wonder if something was up. But, I was having trouble keeping even the one bar of my cell signal. As the uneasy felling began to grow, I considered how I might get a stronger cell signal. I tried standing near the building, away from the building etc... and nothing. I could get a slight signal at the top of the hill, but it kept dropping as soon as I could make the call.

As I stood there trying to figure out whether the boat was coming, or whether I was even in the right place, I looked around and noticed a very sturdy, tall tree. Well, that is the best I can do I thought, so up the tree I went. I got about fifteen feet in the air when sure enough one bar popped back on my phone. With my left hand holding the phone, I began dialing with my right hand, as my right arm was wrapped around the tree trunk to keep from falling out. (This was better as a visual) Finally, I got a ring and connected with the office of the fishing guide.

A lady answered and after I explained the situation, she said "You didn't get the message?" "WHAT MESSAGE?" I exclaimed. It seems the guide had to change the location of the boat launch due to a local regulation, news of which had failed to make its way to South Carolina. The new location was about a two hour drive away, and the boat was already booked with paying customers who had gotten the news about the change.

The lady claimed I was left a message, and recited the correct phone number. However, I had no missed calls, no unknown calls, and no messages for the past 24 hours. She could not explain this, but it was clear there was no way I was going to get to the new location in time. I told her I really did not appreciate being left up a tree, and asked for the guide to give me a call that evening. After climbing down the tree, I got back in the truck and started the long disappointing ride back to Anchorage feeling like the kid in the stroller who had his candy stolen.

Later that evening, I was having a beer (and eating Salmon) in downtown Anchorage with Nick Spiropoulos, and my phone rang. The guide was calling me back. He apologized profusely, claiming he didn't know what happened, and said he would take me out the next day. So, again I set out the next morning after paying for another one day fishing license and King Salmon stamp, and filling the truck up with gas and adding an extra day to the truck rental.

This drive was not as adventurous as the first one, but it was a bit longer and filled with doubts about whether the fishing trip was ever really going to happen. I arrived early, and stopped in a small coffee shop that had no earthly business being located so far out in the middle of nowhere. I chatted with Shirley, the owner, who was long ago transplanted from the "Lower 48." She was intrigued enough by the way I talked to give me a couple of free cookies with my coffee.

I found the Deshka River to be gorgeous. The solitude was interrupted by a startling splash in the water nearby, and I turned to see a beaver swimming along that was twice the size of any beaver I had ever seen in South Carolina. I continued to wait, and then started the uneasy feeling again because of what had happened yesterday. But, very soon, I heard a noise in the distance. A flat bottom boat began motoring around a curve in the river and floated up to the landing. "You Brad?" the guy asked. To my "yep," he replied.... "Well, I'm Andy".... He apologized again for the previous day, and we headed out on the river for the long awaited six hour fishing trip during which.....{drumroll please}..... I DIDN'T CATCH A THING!

I returned to the landing with only a slight sunburn and some empty drink bottles to show for it. All the way home, I kept thinking how ironic for a beach bum from South Carolina to come all the way to Alaska to get a sunburn. I had traveled 4,376 miles to do something I could do in my back yard.

The rest of the Alaskan trip was fascinating. IMLA provided a dinner and glacier tour as well as tips for other things to do in the area. I found the Alaskan folks extremely friendly and helpful, and have vowed to someday return to that wonderful land. I urge all of you to take advantage of one of these conferences soon. It will be well worth your while... And you will get to meet your Listserve and Water Cooler friends face to face!

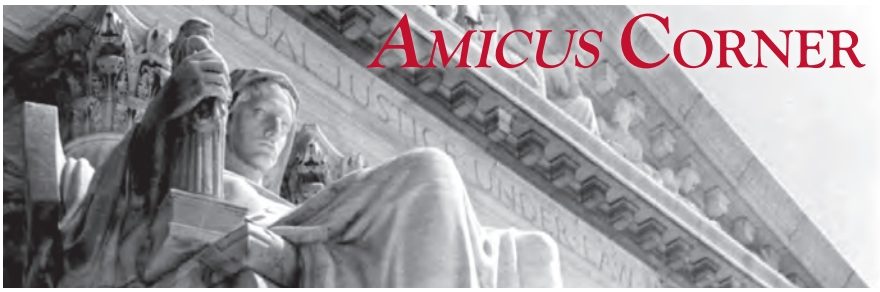
The prosecution rests, your honor.....





IMLA'S MID-YEAR SEMINAR
WASHINGTON, D.C.
APRIL 20-24, 2017
OMNI SHOREHAM HOTEL

Featuring IMLA's regular line-up of informative and wide-ranging experts and our Special Section 1983 Program



Looking Ahead to the Supreme Court's 2016 Term

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

The Supreme Court ended its 2015 term in June with major opinions clarifying affirmative action, executive authority and abortion rights and is now officially into its summer recess. While this past term resulted in numerous decisions that affected local government, the upcoming 2016 term already promises to consider a number of significant issues that will be equally important to IMLA members. Two of the cases that should have an impact on municipalities' bottom lines are discussed below.

Bank of America v. City of Miami

In *Bank of America v. City of Miami*, the Court will answer the following questions: (1) Whether, by limiting suit to "aggrieved person[s]," Congress required that a Fair Housing Act (FHA) plaintiff plead more than just Article III injury-in-fact; and (2) Whether proximate cause requires more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some theoretical chain of contingencies. While those questions may seem fairly academic, the Court's answer could mean the difference in billions of dollars for municipalities around the country.

In this case, the City of Miami brought a claim under the FHA against Bank of America (and a couple of separate suits against other financial institutions), alleging that its decade-long pattern of discriminatory lending in the residential housing market foreseeably caused the City economic harm. The City claims that the bank targeted black and Latino customers in Miami for predatory loans; specifically, that the loans offered to racial minorities carried more risk, steeper fees, and higher costs than those offered to identically situated white customers, and created internal incentive structures that encouraged the bank's employees to provide these types of loans.

The City also alleged that Bank of America's predatory loan practices caused minority-owned properties throughout Miami to fall into unnecessary or premature foreclosure. According to the City, those foreclosures deprived the City of tax revenue as property values decreased. The foreclosures also simultaneously forced the City to spend more on municipal services such as police, firefighters, trash and debris removal, and so on, to combat the resulting blight.

The City used statistical analyses in its complaint to allege that the bank's conduct violated the FHA in two ways. First, the City alleged that the bank intentionally discriminated against minority borrowers by targeting them for loans with more burdensome terms than similarly situated white borrowers. Second, the City claimed that the bank's conduct had a disparate impact on minority borrowers, resulting in a disproportionate number of foreclosures on minority-owned properties, and a disproportionate number of exploitative loans in minority neighborhoods.

The district court granted the bank's motion to dismiss the City's complaint based on a lack of standing. But on appeal, the Eleventh Circuit reversed, concluding that the City has constitutional standing to pursue its FHA claims. The circuit court determined that under controlling Supreme Court precedent, the "zone of interests" for the Fair Housing Act extend as broadly as permitted under Article III of the Constitution, and therefore encompasses the City's claim. The court also found that the FHA contains a proximate cause requirement, based on principles drawn from the law of tort, but that the City had adequately alleged proximate cause. Finally, the Eleventh Circuit concluded that the statute of limitations did not necessarily bar the City's claim because the "continuing violation doctrine" could apply to its claims (but remanded on this point for the district court to make a determination).

A number of cities instituted suits against mortgage banks in the aftermath of the 2008 housing crisis alleging discriminatory lending practices which harmed borrowers and undermined local economies. These include Baltimore and Memphis, whose complaints and evidence instigated Justice Department actions resulting in a $175 million settlement by Wells Fargo in 2012. The *City of Miami* litigation could open the door for municipalities to recover billions from banks that engaged in pervasive predatory lending practices discriminating against minorities.

Manuel v. City of Joliet

Another case the Supreme Court is set to hear this fall that will affect municipalities' pocketbooks is *Manuel v. City of Joliet*. *City of Joliet* involves whether a malicious prosecution claim can be brought under Section 1983 for a Fourth Amendment wrongful seizure violation. As any municipal attorney knows who has defended these suits, they can mean high-dollar jury verdicts against the government.

In this case, police found a bottle of pills in Elijah Manuel's pocket during a traffic stop. Officers tested the pills at the scene and, according to Manuel, falsified the results, finding that they were Ecstasy. A lab report concluded they were vitamins, not Ecstasy--but Manuel was detained for

Continued on page 28

Op - Ed Cont'd from page 15

These are all issues that will need to be further clarified. Indeed, questions about loitering and trespassing Pokémon players have started to crop up on IMLA's ListServ. We will no doubt see more discussions and news coverage of these developments as augmented reality games continue to grow in popularity.

In the private sector, litigation over the cyber-hunting spree has already started. In a complaint filed on July 29, 2016 in California (home of Niantic, Pokemon Go's creator), a New Jersey homeowner commenced a class action seeking unspecified damages for trespass and unjust enrichment. The plaintiff alleges that he and many other property owners have been harmed because Niantic knowingly or recklessly "placed" Pokemon creatures on their properties, instigating trespass by Pokemon Go players. He notes that the game has already generated $35 million for its owners).[13]

According to Avvo's Chief Legal Officer, Josh King, players have a right to play Pokémon Go anywhere they want.[14] In rebuttal to the arguments of aggrieved class action private property owners, he asserts that Niantic is protected under the First Amendment when it creates "gyms" and other Pokemon elements on private property. Does this mean that there could be successful challenges to restricting Pokémon Go on public land?

As a fledgling municipal lawyer, I find these questions engrossing. Once again, our regulatory scheme races to catch up with technology. James Madison could never have considered an individual's right to "catch em' all" when penning the Bill of Rights...

Notes

1. An app owned by PayPal that allows users to transfer money to one another without the use of cash.
2. Niantic was originally a startup incubated by Google; Niantic's vice president, John Hanke, had previously worked on location-based projects such as Google Earth and Google Maps. Jeff Elder, *Google-Incubated Niantic, Maker of Ingress, Stepping out on Its Own*, WALL ST. J. (August 13, 2015, 5:59 PM), http://blogs.wsj.com/digits/2015/08/13/google-incubated-niantic-maker-of-ingress-stepping-out-on-its-own/.
3. The White House has even weighed in on the issue, encouraging players to "not suspend common sense even as they turn to Pokémon for a little summer fun." Judy Kurtz, *White House Weighs in on Pokemon Go: Use Some Common Sense*, THE HILL (July 21, 2016, 11:51 AM), http://thehill.com/blogs/in-the-know/in-the-know/288682-white-house-weighs-in-on-pokemon-go-use-some-common-sense.
4. Niantic, *Pokemon Go Trainer Guidelines*, https://support.pokemongo.nianticlabs.com/hc/en-us/articles/221993967-Pok%C3%A9mon-GO-Trainer-guidelines (last accessed July 26, 2016).
5. Niantic has already begun to keep track of players who have managed to successfully "catch them all." *See* Alexandra Mosher, *We Found Out What Happens After You Catch Every Pokémon*, USA TODAY, (July 23, 2016, 3:11 PM), http://www.usatoday.com/story/tech/gaming/2016/07/23/we-found-out-what-happens-after-you-catch-every-pokmon/87462700/.
6. Dave Their, *How to Easily Win More Gym Fights in Pokémon Go*, FORBES (July 15, 2016), http://www.forbes.com/sites/davidthier/2016/07/15/how-to-win-more-gym-fights-in-pokemon-go/#5a532bab44bd.
7. Ryan W. Miller, *Teens Used Pokémon Go App to Lure Robbery Victims Police Say*, USA TODAY (8:05 AM EST July 11, 2016), http://www.usatoday.com/story/tech/2016/07/10/four-suspects-arrested-string-pokemon-go-related-armed-robberies/86922474/?siteID=je6NUbpObpQ-a5ZpAMExNs5HvlSCujMHpg.
8. Alicia Stice, *Denver Zoo Lures Guests with 'Pokemon Go' Special*, COLORADAN (7:05 PM MDT July 21, 2016), http://www.coloradoan.com/story/news/2016/07/21/denver-zoo-tries-lure-guests-pokemon-go-special/87409154/.
9. As the author notes, some gyms may be "friendlier" than others. This means that, strategically, it is wiser to train and familiarize yourself with your animals' fighting abilities in a "friendly" gym, before taking your menagerie on the road to hit up more competitive locations. *See* Their *supra* note 6.
10. Veronica Rocha, *2 California Men Fall off Edge of Ocean Bluff While Playing Pokemon Go*, LA TIMES (July 14, 2016, 3:45 PM), http://www.latimes.com/local/lanow/la-me-ln-pokemon-go-players-stabbed-fall-off-cliff-20160714-snap-story.html.
11. The author speculates that, perhaps, the police actually just want to keep all the Sandshrews for themselves. Chris Plante, *Pokemon Go Sends Players to Police Station, Police Say Don't Come In*, THE VERGE July 6, 2016, http://www.theverge.com/2016/7/6/12106892/pokemon-go-police-station-facebook-page.
12. http://thehill.com/policy/technology/287361-holocaust-museum-stop-playing-pokemon-go-here
13. The case is *Marder v. Niantic Inc.*, 16-cv-04300 (N.D. Cal. July 29, 2016).
14. Avvo is an online legal services provider. *See* Avvo, https://www.avvo.com/ (last accessed July 26, 2016). ML

Amicus Cont'd from page 27

seven weeks until charges against him were dropped.

Manuel brought a Section 1983 "malicious prosecution" action, alleging a violation under the Fourth Amendment. The Seventh Circuit upheld the district court's dismissal of Manuel's claim as that circuit had previously held that malicious prosecution claims are founded on the right to due process, not the Fourth Amendment. Thus, in the Seventh Circuit there is no malicious prosecution claim under federal law if state law provides a similar cause of action. The question presented to the Court is whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

This is an area of the law that has left a deep circuit split after the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994). *Albright* had six different decisions (including only a four Justice plurality opinion) and concluded that a claim for malicious prosecution does not exist under the Fourteenth Amendment, but that it *could* possibly exist under the Fourth Amendment. In *Albright*, the Court stated that it expressed "no view as to whether the petitioner's claim would succeed under the Fourth Amendment" since that question was not presented, thus leaving the lower courts with little guidance on the issue. The U.S. Circuit Courts of Appeals have since divided with many concluding that such a claim can be brought under the Fourth Amendment (and therefore via Section 1983) with others like the Seventh and Eighth Circuit barring these claims.

Local governments have a strong interest in eliminating the constitutionalization of a malicious prosecution tort. As with any Section 1983 claim, should the Court find that these claims do exist and may be brought as Constitutional violations, municipalities will face increased lawsuits and claims for damages and attorney's fees, and some plaintiffs would be able to resurrect actions that would otherwise be time-barred under state law, by styling the suit as a Section1983 claim.

For more information about these cases or IMLA's legal advocacy program, please contact Amanda Kellar at akellar@imla.org. ML



Impeaching An Entity "Witness" By Showing Prior Bad Acts And Criminal Convictions To Prove Untruthfulness

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

When a local government's litigation adversary or non-party hostile witness is an entity, as distinguished from a natural person, when if ever can the local government's lawyer inquire into the entity's prior bad acts and criminal convictions? I will refer to the Federal Rules of Evidence in attempting to answer that question, but state rules may differ.[1]

Sauce For The Goose

If I am correct that entities can be impeached, we must remember that this theory can be used against our client – it is not just a theory that we can use against our adversaries. We should be particularly wary of this possibility since our clients usually are organizations. I suggest some ways to deal with this issue in the final section of this article.

Summarizing The Rules For Impeachment Through Prior Bad Acts And Criminal Convictions

As relevant to impeachment by prior bad acts or criminal convictions in civil litigation,[2] and in a highly condensed form, the Federal Rules of Evidence provide that relevant evidence is generally admissible (Fed. R. Evid. 402); the trial court can exclude relevant evidence if its probative value is "substantially outweighed by a danger of . . . unfair prejudice" (Fed. R. Evid. 403); character evidence is inadmissible to prove that a person acted in conformity with that character trait (Fed. R. Evid. 404(a)) - but extrinsic evidence of a witness' character can be admitted to the extent permitted by rules 607-09 (Fed. R. Evid. 404(a)(3)). In addition, if a witness testifies to another person's reputation for truth, the vouching witness can be cross-examined about specific instances of that person's conduct (Fed. R. Evid. 405(a)). Any party may impeach any witness (Fed. R. Evid. 606). Extrinsic evidence of specific prior bad acts is inadmissible as to a witness' truthfulness, but a court may permit impeachment through cross-examination of a witness about prior bad acts (Fed. R. Evid. 608(b)). Evidence of a witness' conviction for a felony or other crime involving dishonesty or false statements is admissible as to truthfulness (Fed. R. Evid. 609(a)). However, if the conviction is over 10 years old, the court should exclude the evidence unless its probative value "supported by specific facts and circumstances" outweighs the prejudice (Fed. R. Evid. 609(b)(1)),[3] and the adverse party must receive advance notice of intent to use the old conviction (Fed. R. Evid. 609(b)(2)). Extrinsic evidence of a witness' prior bad acts is admissible, always subject to prejudice balancing under Rule 403, for purposes other than impeachment, "*such as* proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident." (Fed. R. Evid. 404(b)(2) (emphasis added).

When Is An Entity A "Witness" Within The Meaning Of The Rules Of Evidence?

Federal Rule of Evidence 406 distinguishes between a "person" and an "organization."[4] But this distinction arguably is merely grammatical – a "person" can have a "habit" but an "organization" has a "routine practice" instead of a "habit." Some of the rules with which we are concerned use the term "person" when addressing the admissibility of a witness' "character" or reputation." *See, e.g.,* Fed. R. Evid. 404(1), 405(a), (b). One might assume that this word choice reflected the drafters' conclusion that an entity could not have a "character trait" or a "reputation." However, Rules 607-609, which specifically address impeachment for truthfulness by prior bad acts and criminal convictions use the generic term "witness" rather than either the term "person" or "organization." This makes sense because of course an organization can have a reputation – corporations spend millions creating and protecting their reputation. And they can also be convicted of crimes and commit bad acts.

So we can now tackle the question, when can an organization be a "witness"?

This will not happen too often, but it does happen. When entities testify against our clients, we usually do not think of possible impeachment tactics the way we would research individual witnesses' backgrounds and plan for impeaching individuals whom we expect to testify adversely to our client.

Here are four scenarios I can envision--and I would appreciate hearing about others. These are situations in which I believe a court should in fairness permit impeachment of an entity as a "witness" but such impeachment should be limited by the same restrictions applicable to impeachment of individual witnesses under the relevant Rules of Evidence. I do not suggest allowing unfettered impeachment of entities, only equal opportunity to impeach entities to the same extent that individual witnesses can be impeached:

1. *The representative deponent who testifies under Fed. R. Civ. P. 30(b)(6).* It is the entity that is testifying to facts within the entity's knowledge through one or more individual witnesses who serve as the organization's representative(s).[5] Why in all fairness should the testifying entity be immune from the same impeachment tactics to which individual witnesses are subject? Thus it should be legitimate to list as a Rule 30(b)(6) topic

Continued on page 33



CODE ENFORCEMENT

Violation? I Didn't Notice...

By Jerrod Simpson, Assistant City Attorney, Tampa, Florida

As an attorney who handles administrative code enforcement proceedings for a large city, I can tell you that the most common phrase from an alleged violator is: "I didn't know!"

Whether it's "I didn't know that was a violation!" or "I didn't know about this hearing!" - it may be a case of playing dumb, but sometimes, it's a legitimate argument that a deprivation of due process has occurred based on inadequate notice.

So, how do you tell the difference? I typically start from a point of assuming good faith, and then I ask three general questions: 1) To whom was notice provided? 2) How was notice provided? And 3) Why was the notice given in the first place?

Let's look at the last question first: why did we issue Notice? It seems like a simple enough question to answer, but bringing clarity to what the actual violation is and how to properly fix it can sometimes be more difficult than advertised. I'm sad to say that I have had cases where the Notice of Violation had gone out before the inspector had a good, clear answer to the question of why. Of course, if we can't figure out the why, we withdraw it, and then take a closer a look at what the problem is. After all, we aren't henchmen working for angry neighbors! We're servants of the Public as a whole.

It's also important to note that in a typical, administrative code enforcement proceeding, there are two separate notices to account for: Notice of the Violation (NOV) and Notice of the Public Hearing (NPH). I see these documents confused quite often.

The NOV is essentially your charging document, and due process requires it to state in clear and precise language what the ordinance is that prohibits the alleged behavior. This can be especially difficult when it comes to zoning requirements that are not often succinctly phrased as, "it shall be unlawful to [insert rule here]..."

It would help to have zoning regulations written with the particular enforcement procedure in mind, understanding that clear prohibitionary language is helpful for notice and due process concerns. But even though such language would be ideal from an enforcement perspective, zoning regulations are often triggered by uses or classifications of the property and complex planning concerns; thus, they don't always lend themselves to nice and neat phrasing – or simple enforcement for that matter.

Sometimes the best I can do on a complex zoning violation case is to urge the person to meet with the department directly for a more in-depth explanation of what the problem is and how to correct it - before some type of action proceeds. While at the same time, I urge the department to be more empathetic to homeowners who may not understand our 900 page zoning code. Planners can be as esoteric as lawyers sometimes!

It's also important to keep in mind that the government actor always has the burden of proof, but I would go even further to say that we also have the burden of clarity. If we are alleging the violation of a zoning regulation, which is triggered by a certain use of property, then we have the burden of proving that use of the property is actually occurring. We also have the burden of explaining the precise remedy, so that there is not a constant back and forth between City and Citizen as to whether the violation is cured - or to put it into legal terms, so that we aren't undermining our case by creating some type of estoppel defense.

As for Notice of Public Hearing, it is sometimes disregarded by the Inspectors since it is usually handled by the clerk, but perhaps, there is an occasion when the inspectors should assist. The NPH may be even more important than the NOV since how can a person receive the due process hearing if they don't know when it is happening?

You should always make sure that the NPH is provided with enough advance time to give the person the reasonable ability to prepare, (minimum of 10 days by law here in Florida) and also that it is provided in a manner that complies with all of the due process requirements of how to provide notice, both statutory and constitutional.

So we consider the next question: how was notice provided? The Supreme Court, in *Jones v. Flowers*, put a burden on governments to make "additional reasonable steps" to ensure that notices are delivered when the government is aware that a previous notice attempt has affirmatively failed. In that case, the government was aware of the failed notice attempt through a certified mailing being returned as undelivered.

But the Court's ruling went broader since they also pointed out that other jurisprudence requires the government to "consider unique information about [the] intended recipient" - regardless of what a statutory notice scheme might say. That shouldn't be much of a surprise to attorneys because we all know: notice must be "reasonably calculated" to reach the intended recipient.

However, the fact is that our government clients demand efficiency and predictability in operations and "additional steps" and "reasonable calculations" are by no means efficient or predictable. The statutory schemes are designed to give us that protocol, but the Supreme Court has said that it is not enough to

Continued on page 35



Cases of Interest

By Monica Ciriello, Ontario 2015

Township's Duty To Enforce Licensing Bylaw Is a General Public Duty
Vlanich v. Typhair, 2016 ONCA 517 (CanLII) http://canlii.ca/t/gs9cr

Sheileena Mallette and Kaitland Vlanich ("Plaintiffs") were injured as a result of the collision between a taxi and their vehicle. The Plaintiffs commenced an action to recover damages from the taxi driver, from Aces Taxi, the taxi owner ("Aces Taxi") and the Township of North-Grenville ("Township"). The Plaintiffs alleged that the Township had been negligent for failing to enforce its taxi by-law that required taxis to carry a minimum amount of $1,000,000 in third party liability coverage. Aces Taxi provided the Township evidence of the required third party coverage when it first applied for and received its taxi licence from the Township. Over subsequent years, Aces Taxi renewed its licence, but did not maintain the minimum insurance as required by the by-law. The Township relied on pink slips (which did not indicate the insurance amount) and Aces Taxis' declarations on renewals, stating that nothing had changed, and that it was in compliance with the by-law. The accident in question occurred three years after the Township issued the original licence to Aces Taxi.

The trial court determined that the Township owed the Plaintiffs a duty of care, and that duty was met when it issued the original licence to Aces Taxi. The court found that it was reasonable for the Township not to obtain proof of sufficient insurance at each renewal time, and it was reasonable to enforce the bylaw through pink slips and signed declarations. The Plaintiffs and State Farm Insurance, their insurance company ("State Farm") appealed.

HELD: Appeal dismissed.

DISCUSSION: Relying on the two-part test found in *Anns v. Merton London Borough Council*, [1978] A.C. 728 and refined in the Supreme Court of Canada decision *Cooper v. Hobart*, 2001 SCC 79, the Court of Appeal found that the Township did not owe the Plaintiffs a private law duty of care. For the first part of the *Anns/Cooper* test the Court examined the proximity between the Plaintiffs and the Township. The proximity test "requires a sufficient nexus or connection between the alleged neglect of the public authority and the risk that caused the losses suffered by the [Plaintiffs]." State Farm argued that sufficient proximity between the Plaintiff and the Township was created through the taxi licensing by-law because the Plaintiffs "are in the very class of individuals the by-law intended to protect; namely, residents sharing the road with taxicabs." The Court disagreed, as it determined that proximity requires a much more immediate and direct nexus between a plaintiff and a defendant:

> A public authority administering a licensing scheme owes a general duty to the public at large to ensure compliance with the regulatory scheme. However, that general public duty is not equivalent to a private law duty of care. Without 'something more', licensing a third-party does not create a 'close and direct' relationship capable of giving rise to a duty of care between a public authority and an individual member of the public who may interact with a licensee.

The second part of the analysis looked to residual policy considerations. The considerations to be considered by a Court were described in *Cooper*:

> [D]oes the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

After examining the facts, the Court held that "there are residual policy considerations outside the relationship of the parties sufficient to negate the imposition of a duty of care."

Know the Limitation Period: Request to Quash Bylaw vs. Declaratory Relief
Foley v. St. Marys (Town), 2016 ONCA 528 (CanLII) http://canlii.ca/t/gsbjr

In 2007, the Town of St. Marys ("Town") sought a heritage designation for a commercial building built in 1884 as the unique interior and exterior aspects of the building had been preserved over the years. Originally the building was used as a family jewellery shop until it was sold to Lynn and Colleen Foley ("Appellants"). The Town contacted the Appellants about the possibility of a heritage designation on the commercial building, and they declined. The following year, the Town wrote to the Appellants and expressed its intent to pass a by-law designating the building as a heritage building. The Town received no objections and the bylaw passed in 2008. The Town informed the Appellants about the successful designation, and twice the Appellants applied for and received heritage funding from the Town. The Appellants had been successful in leasing the commercial building until 2010 and attributed the lack of interest to further leasing to the heritage designation. In 2013 the Appellants filed an application under s. 273(1) of the *Municipal Act, 2001 ("Act")* to quash the municipal by-law in whole or in the alternative in part. The application judge dismissed the application relying on the one year limitation period in s.273(5) of the *Act*. The Appellants appealed.

Continued on page 32

Inside Canada Cont'd from page 31

HELD: Appeal dismissed.

DISCUSSION: The Appellants relied on case law involving a request for declaratory relief, not for the statutory remedy of quashing the bylaw under the *Act* even though the application submitted was framed as one to quash under s.273 of the *Act*. The Court summarized the difference as follows:

> [A] party may commence proceedings to quash a bylaw under s.273 of the *Municipal Act, 2001* by way of application. Such a proceeding is captured by the statutory one year limitation period. Alternatively, a party may commence an application or an action for declaratory relief. Such a proceeding is distinct from the statutory remedy of quashing a bylaw under s. 273, and as such, is not captured by the one year limitation period.

The Court concentrated on s. 273 (1) and (5) of the *Act*. The Court found that the application judge was correct in dismissing the application based on the one year limitation period. The Court indicated that this outcome is not unique and was also held in *Re Clements & Toronto*, 1959 CanLII 163 (ON CA): "relying on the limitation period of the *Municipal Act*, this court overturned the decision due to the failure of the applicant to bring the notice of application within one year after the passing of the bylaw." The Appellants at a minimum became aware of the designating by-law in 2009, which was almost six years before filing an application.

What Constitutes A Reasonable Excuse?
Kazemi v. North Vancouver (City), 2016 BCSC 1240 (CanLII) http://canlii.ca/t/gsdqb

In August 2010 Ms. Kazemi ("Plaintiff") claims to have fallen in the City of North Vancouver ("City") due to an uneven sidewalk. The City received notice of the Plaintiff's fall in January 2011. The City responded that the Plaintiff had failed to provide written notice within two months from the date of the injury as required in s. 286 (as it was then) of the *Local Government Act*, R.S.B.C. 1996. The Plaintiff argued she had a reasonable excuse for failing to comply with the notice provision.
HELD: Claim dismissed.

DISCUSSION: The Court was able to determine what constitutes a "reasonable excuse" by examining *Teller v. Sunshine Coast*, 1990 CanLII 2131 (BC CA). *Teller* did not establish criteria or a test to follow but rather the decision endorsed an examination of all claims solely or taken together to arrive at a reasonable excuse. The Plaintiff argued that taken together the fact that she was elderly, a recent immigrant to Canada, spoke little to no English and had no knowledge of the statutory notice requirements, she had a reasonable excuse for failing to comply within the two month notice requirement. The Court disagreed. The Court found that there was no evidence to the Plaintiffs mental or physical capacity after the fall, by comparison in *Tom v. Burnaby (City)*, 1999 CanLII 6138 (BC SC) an elderly plaintiff provided evidence that she was too fearful to go outside after her fall. Therefore, absent more evidence by the Plaintiff, the age of 68 did not mean she was elderly or suffered a change in capacity. With regards to the Plaintiff's status as a recent immigrant to Canada and her language barrier, the Court noted that during discovery the Plaintiff stated she was told by many people to lodge a complaint with the City. Separately or taken together, the Court found these reasons did not amount to a reasonable excuse within the meaning of s. 286.

Clarifying the Procedure for the Service of Summons
R. v. Tenny, 2015 ONCA 841 (CanLII) http://canlii.ca/t/gmbxg

Alfred Tenny ("Appellant") was the sole officer and president of an Ontario corporation that owned property in Timiskaming. In 2012, the Appellant pleaded guilty to charges and was convicted for failing to comply with a provincial order to remove and dispose of chemical waste on the property. The Appellant failed to remediate the property, and was subsequently charged under s. 186(2) of the *Environmental Protection Act*. To compel the Appellant's attendance, a summons was issued under s.26(3) of the *Provincial Offences Act ("Act")* and delivered by registered mail to the Appellant's last known address in Hawaii. The Appellant appealed.

HELD: Appeal dismissed.

DISCUSSION: It is established law that in penal proceedings, service of a summons outside of Canada must be clearly authorized by statute. *R v. Shulman* (1975), 23 C.C.C. (2d) 242, found that in the absence of proper service, a court has no jurisdiction over the person, even though it may have jurisdiction over the subject matter at issue. The Appellant argued that s. 26(3) of the *Act* did not meet the threshold of clear statutory authority because s.26(4)(c)(iii) of the *Act*, which speaks to service on a corporation, expressly states "to an address outside Ontario, including outside Canada." The Appellant argued that in the absence of this language in s.26(3) service of a summons on an individual outside of the country is not permitted. The Court disagreed for two reasons. First, the Court analyzed the plain language of s.26(3): "where the person to whom a summons is directed does not reside in Ontario," finding that this language directly refers to those individuals living outside Ontario, and by extending this logic this would also capture those individuals living in the United States as they are outside Ontario. Second, s.26(4)(c)(iii) of the *Act* was enacted in response to *R v. RJ Reynolds Tobacco (Delaware)* 2007 ONCA 749, because the original did not provide clear authority to summons a corporation outside of Ontario. The Court held that s.26(3) was not amended "because it already provided for service on an individual resident outside Ontario" and that "minor differences in wording" between s.26(3) and s.26(4) did not warrant a separate interpretation of the section. The Court dismissed the appeal.

Constructive Expropriation: When Government Action Goes Too Far
Lynch v. St. John's (City), 2016 NLCA 35 (CanLII) http://canlii.ca/t/gscl0

The Lynches ("Appellants") own property located in the Board Core River Watershed ("BCR") in the City of St. John's ("City"). The City uses the groundwater located in the BCR as a municipal water supply. The City permits little development in this area to ensure that sufficient natural clean water is available for the City. The *City of St. John's Act*, R.S.N.L 1990, permits the City to prohibit building within the BCR: "a person shall not erect a building on land within the catchment area of the Broad Cove River

Continued on page 35

Second Look Cont'd from page 29

for which the entity should designate representative witnesses for all crimes involving moral turpitude or constituting felonies of which the entity was convicted during the previous ten years, and all adverse civil judgments against the entity for fraud, misrepresentation, and the like. It might even be argued that impeachment topics need not be listed, just as a party usually need not disclose impeachment witnesses and documentary evidence to be used solely for impeachment in advance of trial. *See, e.g.*, Fed. R. Civ. P. 26(a)(1)(A)(ii) and (iii), 26(a)(3)(A). The party deposing the Rule 30(b)(6) witness could ask the impeachment questions during the deposition and play or read back answers at a hearing or trial along with substantive portions of deposition testimony.

2. *Where a court permits representative witnesses to testify at trial,* the impeachment questions could be asked during the trial. This could happen in two ways. In the more common of the two situations, when a representative deposition witness also testifies at trial to the witness' personal knowledge, the witness can also be cross-examined about his or her prior deposition statements as a rule 30(b)(6) witness – and this should open the door for impeaching the organization as well as for impeaching the individual witness.[6] More rarely, a court might permit an organization to put on a representative witness to testify at trial.[7]
3. *The expert or proposed expert who testifies based on an entity's work-product.* When an individual expert's opinion is based on an entity's work-product, the adverse party should be allowed to impeach the trustworthiness of the entity's work by, among other things, adducing evidence of prior bad acts and criminal convictions going to the entity's truthfulness. This is an extension of the use of impeachment evidence against the "expert" entity at a *Daubert* hearing.[8] For example, a laboratory that was decertified for falsifying a report unrelated to the case should be subject to impeachment even if the testifying chemist is blameless, if the same laboratory's different report forms the basis for the expert's current testimony.
4. *Records of an entity that are admitted as hearsay exceptions.* In addition to challenging admissibility and business and public records for untrustworthiness[9] a party against which an entity's records are admitted for the truth of the matters stated should be allowed to impeach the entity for truthfulness (which in this context includes reliability and accuracy of recordkeeping) to minimize the weight of such evidence.

Distinctions:
Evidence of Bad Acts on the Merits Distinguished from Impeachment. Fed. R. Evid. 405(a).
There will be special situations in which a judge should permit proof of an entity's prior bad acts to prove material facts rather than demonstrating a witness' untruthfulness. For example, if a corporation sued for damage to its goodwill or business reputation, the opponent could argue that the claim opened the door to evidence of a poor reputation and that evidence of specific bad acts and criminal convictions of the corporation should be admissible to show poor reputation, or perhaps even that a good reputation was undeserved. *See* Fed. R. Evid. 404(b)(2). However, such evidence is not impeachment evidence. Evidence supporting or refuting a claim, defense, or damages is evidence on the merits – subject to limits or exclusions at the trial court's discretion on a determination that unfair prejudice outweighs probative value (Fed. R. Evid. 403), but otherwise relevant and therefore presumptively admissible (Fed. R. Evid. 402). Subject to Rule 403 considerations, "[w]hen a person's character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct." (Fed. R. Evid. 405(b)). A common example of this situation is proving "unclean hands" in defending against a claim for equitable relief such as an injunction. In a rare case involving proof of bad acts by corporate defendants the state equivalent of Fed. R. Evid. 404 was applied to the question of whether such evidence would be admissible to show that punitive damages were appropriate. The court had no difficulty applying Rule 404 to corporate parties but reversed because the lower court failed to apply the rule *properly. Stafford v. Rocky Hollow Coal Co.*, 482 S.E.2d 210, 216 (W. Va. 1996).

Impeachment by Bad Acts or Criminal Convictions Where the Rules of Evidence Do Not Apply. Fed. R. Evid. 104(a).
The Rules of Evidence other than privilege rules do not apply when a court is deciding preliminary questions such as the admissibility of evidence (Fed. R. Evid. 104(a)). So, subject to the court's discretion based on balancing probative value against unfair prejudice, impeachment might be permitted at a hearing to determine the admissibility of expert opinion under Fed. R. Evid. 702 where the proffered opinion is based on the work of an entity, such as an accounting firm, a laboratory, or other collaborative effort of an entity's agents.[10] The individual expert who testifies usually will support his or her opinions with an entity's report. The party opposing expert qualification should be allowed to impeach the truthfulness and, hence, the reliability, of the entity whose agents prepared the report – not just the individual expert witness.[11]

Other examples include litigating objections to the admissibility of business records or public records, or the absence of business records, as hearsay exceptions under Fed. R. Evid. 803(6), (7), or (8), where an objecting party is permitted to show "lack of trustworthiness." *See* Fed. R. Evid. 803(6)(E) (business records), 803(7)(C) (absence of business records), 803(8)(B) (public records).[12]

Defensive Considerations
We should prepare in advance for attempts to impeach our local government clients. Luckily, at least in those jurisdictions of which I am aware, local governments cannot be convicted of crimes. But we might still be vulnerable to impeachment by evidence of prior bad acts. One such instance could be evidence of spoliation sanctions where a jury is asked to determine the likelihood that missing evidence ever existed. Strategic decisions need to be made about how much emphasis to put on such issues – the more we stress it the more important it might seem to a jury. But as a tactical matter, if our client is sanctioned or subject to a verdict or judicial finding that includes an

Continued on page 34

Second Look Cont'd from page 33

element of untruthfulness, we should recommend prompt corrective actions, which should strengthen our Rule 403 argument that any probative value of prior sanctionable conduct as to current trustworthiness is outweighed by unfair prejudice. Prompt remedial action could be particularly important if any of our records are found inadmissible under the business records or public records hearsay exceptions, since the admissibility of our client's records is so crucial to the smooth functioning of our governments. In litigating Rule 403 balancing after taking remedial measures, it will be useful to stress that evidence of having taken corrective measures generally is inadmissible to prove that the pre-remedied status quo was defective (Fed. R. Evid. 407).

Notes

1. *E.g.*, Texas Rule of Evidence 608 bars cross-examining a witness about specific prior bad acts to prove the witness' untruthfulness while Federal Rule of Evidence 608(b) gives the trial court discretion to permit such cross-examination.
2. There are special impeachment rules for criminal cases. *See, e.g.*, FED. R. EVID. 404(a)(2), (b)(2)(A) and (B), 412(a), 413, 414. There also are special impeachment rules for civil cases arising from criminal acts, particularly though not exclusively from sex crimes. *See, e.g.*, FED. R. EVID. 412(b), 415. This article will not address those situations.
3. Admissibility of older criminal convictions is the one decision involving admissibility of prejudicial evidence to which the balancing standard of Rule 403 do not apply – Rule 609(b) provides its own standard. *See* Precision Piping & Instruments Co. v. E.I. Dupont de Nemours & Co., 951 F.2d 613, 620 (4th Cir. 1991). Note that the ten-year-old admissibility cut-off presumption under Rule 609(b) does not apply to limit cross-examination of a character opinion or reputation witness about specific instances of misconduct under Rule 405(a). *See, e.g.*, United States v. Tempesta, 587 F.2d 931, 936 (8th Cir. 1978).
4. "Evidence of a person's habit or an organization's routine practice may be admitted . . .." Fed. R. Evid. 406.
5. Sara Lee Corp. v. Kraft Foods Inc., 276 F.R.D. 500, 503 (N.D. Ill. 2011) ("Conceptually, courts have attempted to square Rule 30(b)(6) with the personal knowledge requirement by explaining that a Rule 30(b)(6) witness 'testifies 'vicariously,' for the corporation, as to its knowledge and perceptions.' Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 434 (5th Cir.2006). When it comes to using Rule 30(b)(6) depositions at trial, strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve. For example, a party might force a corporation to 'take a position' on multiple issues through a Rule 30(b)(6) deposition, only to be left with the daunting task of identifying which individual employees and former employees will have to be called at trial to establish the same facts"). Note that this problem is most serious when the organizational "witness" is not a party. If the organization is a party, then the Rule 30(b)(6) deposition testimony should be admissible against the organization as prior statements of a party regardless of the personal knowledge of the representative witness. *See* FED. R. EVID. 802(d)(2); FED. R. CIV. P. 32(a)(3). *See Sara Lee Corp.*, 276 F.R.D. at 503.
6. *See* Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 434 (5th Cir. 2006) ("Although there is no rule requiring that the corporate designee testify 'vicariously' at trial, as distinguished from at the rule 30(b)(6) deposition, if the corporation makes the witness available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge. This conclusion rests on the consideration that though Federal Rule of Civil Procedure 32(a)(2) 'permits a party to introduce the deposition of an adversary as part of his substantive proof regardless of the adversary's availability to testify at trial,' Coughlin v. Capitol Cement Co., 571 F.2d 290, 308 (5th Cir.1978), district courts are reluctant to allow the reading into evidence of the rule 30(b)(6) deposition if the witness is available to testify at trial, and such exclusion is usually deemed harmless error. Thus, if a rule 30(b)(6) witness is made available at trial, he should be allowed to testify as to matters within corporate knowledge to which he testified in deposition." (footnotes omitted)).
7. *See* Whitehouse Hotel Ltd. P'ship v. C.I.R., 615 F.3d 321, 342 (5th Cir. 2010) ("Under *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir.2006), where a witness 'acts as the agent for the corporation, he should be able to present [the corporation's] subjective beliefs ... as long as those beliefs are based on the collective knowledge of [the corporation's] personnel'"); Illinois Cent. R. Co. v. 16.032 Acres of Land in Jefferson Par., CIV. A. 98-3337, 1999 WL 1138497, at *3 (E.D. La. Dec. 13, 1999) (individual officer permitted to testify at trial to corporate owner's opinion of land value (the witness also was deposed before trial as an individual, but that was immaterial as I read the decision)).
8. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); FED. R. EVID. 703 (hearing to exclude expert testimony as unreliable). The Rules of Evidence do not apply at such hearings. *See* n. 10 and accompanying text.
9. *See infra* note 12 and accompanying text.
10. *See Daubert*, *supra* note 8 and accompanying text.
11. This discussion assumes that a court will decide that prior bad acts or convictions have some relevance to the truth of representations that the entity followed generally accepted protocols and truthfully applied facts. Only then would a court need even to consider weighing probative value against unfair prejudice. Once applying that balancing test at a judge-only preliminary proceeding, one would expect a judge to permit introduction of the impeachment evidence on the theory that the court would not succumb to improper prejudice. *See* Schultz v. Butcher, 24 F.3d 626, 632 (4th Cir. 1994), quoting Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. Unit A 1981) (". . . excluding relevant evidence on the basis of 'unfair' prejudice is a useless procedure [at a bench trial]. Rule 403 assumes a trial judge is able to discern and weigh the improper inferences, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision.").
12. Inexplicably there is no similar provision for opposing evidence of the absence of public records under Rule 803(10) for lack of trustworthiness, but I cannot imagine a judge refusing to consider evidence of untrustworthiness. ML

Inside Canada Cont'd from page 32

above an elevation of 131.92 metres above mean sea level…" The Appellants tried to obtain permission from the City to develop their property in the BCR; the City denied the Appellants' application stating it is the City's role to keep the land in an unused and natural state. The Appellants argued that due to the denied application their land had been constructively expropriated. The trial judge disagreed finding that "the City's regulation over the property did not amount to constructive expropriation." The Appellants appealed.

HELD: Appeal granted.

DISCUSSION: The crux of the Appellants' argument is based on the expropriation rule. This was described in *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 2002 ABCA 283: "the general principle that, in the absence of any expressly contrary statute, compensation must be paid when the state expropriates a subject's property."

The Court examined two Supreme Court cases: *Manitoba Fisheries Ltd. v. R*, 1978 CanLII 22 (SCC) and *British Columbia v. Tener*, 1985 CanLII 76 (SCC). These cases found, "compensation payable for a *de facto* or constructive expropriation, where the result of the governmental action went beyond drastically limiting use or reducing the value of the owner's property." To determine if there was *de facto* or constructive expropriation by the City, the Court used the two part test outlined in *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5. The first requirement examined whether anything had been taken away from the Appellants and gained by the City. The Court found that the City gained a beneficial interest in the Appellants property by taking away their "right to appropriate the groundwater on their land." The second requirement examined if all reasonable uses of the Appellants property had been removed. The Court found that by the City keeping the Appellants property in an unused natural state the Appellants were deprived of all reasonable uses of their property. The Court found that the actions taken by the City resulted in a *de facto* or constructive expropriation and the Appellants are entitled to compensation from the City. ML

Code Enforcement Cont'd from page 30

rely on them and operate like automatons. So, what does the constitution require of us by way of "additional reasonable steps"?

In typical lawyer fashion, SCOTUS tells us, "It depends…" What information do we have? And did we use that information to make a *real* effort to apprise the person?

Chief Justice Roberts lays out two basic options when certified mail fails: 1) send it again via regular mail, so that it will be left at the property, and the owner can pick it up when they get home or whenever they check the mail, or 2) post the notice on the front door, which the Supreme Court has stated is "singularly appropriate and effective" when related to property matters.

Lastly, don't just publish notice in the paper, and call it a day. The Supreme Court in the *Mullane* case (1950) held that "chance alone" would bring someone's attention to a legal notice published in small type in the back pages of a newspaper. Thus, notice by publication is adequate *only* where "it is not reasonably possible" to give a more adequate warning. In *Jones v. Flowers*, regular mail and posting were both considered as more adequate than publication.

Of course, none of this matters if you are noticing the wrong person, or even better - the person you are noticing is dead. So, consider lastly: to whom was notice provided? Questions of ownership and responsibility over the property can get hairy, but most often we begin by relying on the named owner of record in the County Property Appraiser or Tax Collector's records. One typical situation of confusion is with "The Estate of…" property.

In my jurisdiction, this information is updated automatically in the Property Appraiser's records when the Department of Vital Statistics sends out a death certificate to the County Clerk. So even though there has not been a title transfer or probate proceeding initiated yet, the owner of record is now "the Estate of…", and the associated address listed for that "owner" is the decedent's last place of domicile according to the death certificate. It can remain this way for quite some time if not somewhat indefinitely, when probate takes a while or the property is disclaimed or abandoned.

This presents a unique *Jones v. Flowers* problem, since it could be argued that the City is aware of the fact that mail is going to a deceased person when the owner of record is an estate, and the address for that estate is the same as the one where the code violation is. In such a case, it's debatable whether even a posting on the property could successfully notify the dead. But without a full blown investigation of potential heirs, how do we survive a notice challenge?

This is a situation, where I have recommended notice by publication, and upon advice from a probate attorney, I recommended the department follow the rules of publication for notices to creditors in probate proceedings. I do not believe that it is reasonably possible or feasible for the department to track down the many heirs to Blackacre. And they agree!

However, when code enforcement actions lead to fines on the property or expenditures by the City of a substantial amount, and there is question of title, it always makes sense to hire an outside professional to perform a title search, so that the City can recover.

Above all, consummating legal notice is really a simple question of common sense: did you try to get in touch with the property owners and make sure that they understand what's going on? If the answer is a resounding "yes!" then there's no way anyone can show up to municipal court and say, "I didn't know!" ML



International Municipal
Lawyers Association
7910 Woodmont Avenue
Suite 1440
Bethesda, MD 20814

Nonprofit Organization
U.S. Postage
PAID
WEST

Codification Services
powered by MunicodeNEXT
municode LEGAL

- Online hosting
- Supplementation
- Codification
- enCodePlus Zoning Solutions

Government Websites
powered by aHa! Consulting
municode WEB

- Stunning design
- Easy for citizens and staff
- Outstanding customer support
- Rich suite of features

Online Payments
powered by Revalocity
municode PAY

- Reduce costs
- Improve operational efficiency
- Streamline all payment processing
- Traditional bill printing



Municode has proudly served America's municipalities for over 65 years.

We've done so with a tradition of providing outstanding service and cutting edge solutions for the future. That's how we fulfill our committment to helping our country's towns, cities, and villages realize their full potential while serving their citizens proudly.

municode
Connecting you and your citizens

Talk to us today
800·262·2633
municode.com