September/October 2017

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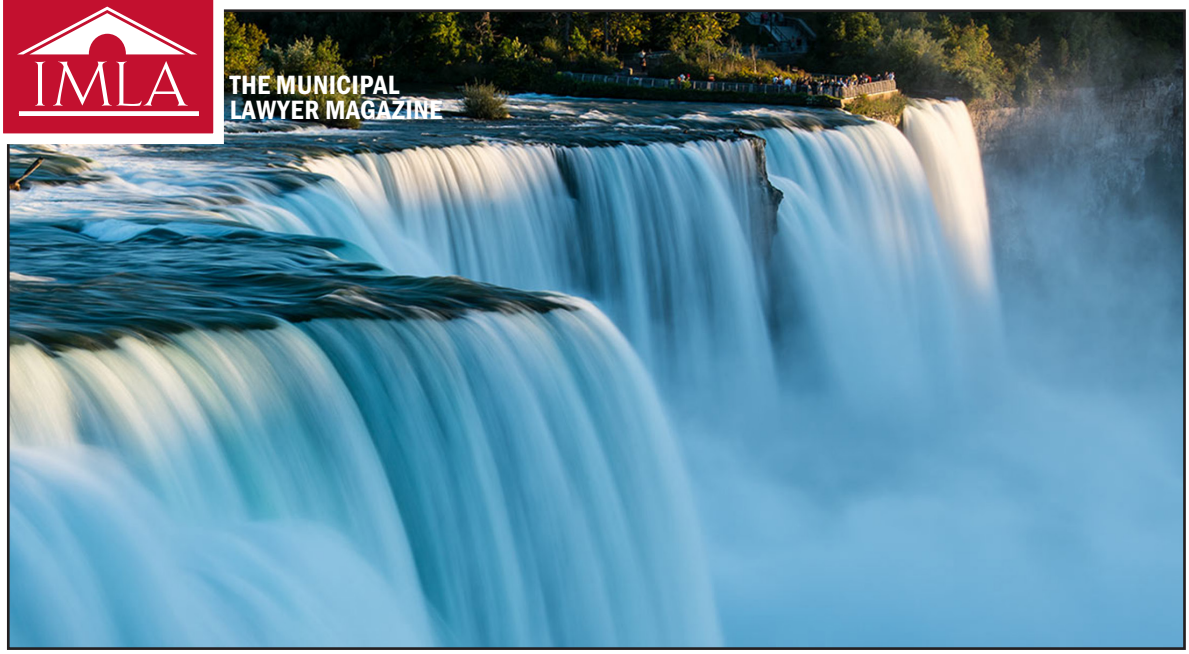

AN ANNOTATED PANHANDLING ORDINANCE: PREVENTING HARRASSMENT WHILE PROTECTING FREE SPEECH

By: Judith Wegner, Burton Craige Professor of Law Emerita and Dean Emerita, University of North Carolina School of Law, Chapel Hill, North Carolina

The Court's handcuffs on speech regulation have placed municipalities in a bind. Dean Wegner offers a potential solution to the challenges of controlling panhandling, post-*Reed*.

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The Paradox of Water

Next month, we will convene within sight of one of the earth's most mesmerizing gifts, a massive aquatic highway more than 1,000 feet across thundering down 17 stories of Silurian stone. Every second, more than 700,000 gallons of the Niagara River are driven over the rocky precipice, producing a spectacle that draws millions from around the world each year.

The basic elements which animate the deafening surge and photogenic columns--water and gravity--meet here in a benevolent choreography. They generate millions of kilowatt-hours of clean, inexpensive energy, enriching communities across the region. They induce expressions of awe and form the backdrop for proposals of marital bonding. And they are one of most powerful symbols of the steadfast mutuality shared by the United States of America and the Dominion of Canada.

But the irony cannot escape us that these same ingredients, arranged otherwise, are capable of wreaking misery. In the last week of August, a natural disaster bearing a harmless-sounding moniker spilled an estimated 30 trillion gallons of rain--*more than fifteen continuous days of Niagara's relentless output*--down on a defenseless city of six million people. While some may debate issues of urban sprawl and the conversion of wetlands to impervious surfaces, it is safe to say that there is no wisdom, plan or zoning scheme that could have averted the consequences of such an onslaught.

And as this issue goes to print, "Irma" bears down on Florida and its neighbors, having left a trail of devastation across the Caribbean and threatening millions more with wind, rainfall and tidal invasion.

We offer our support and encouragement to the governments and people of costal Texas and Louisiana as they begin to rebound—and to Florida and the Eastern Seaboard in the days ahead. IMLA is already convening teleconference calls to discuss disaster relief and rebuilding processes with affected municipalities and we will continue to assist.

Against this stark reminder of just how impermanent and vulnerable our lives are, we move ahead. In this *ML* we anticipate the time when water has returned to its more normal aspect, and endeavor to provide a range of useful insights. We begin with a model panhandling ordinance intended to survive post-*Reed* scrutiny and fill a legislative void. We offer a refresher on Section 1983, practical input for defining ethical duties when representing local government and clarity on overtime pay for police and firefighters. We also discuss urban agriculture, what to expect from the upcoming Supreme Court, election law issues and cases of interest, both stateside and Canadian. Our Listserv writer challenges a persistent assumption that "the government" transcends personal responsibility. And we hear parting words from our President, Mary Ellen Bench, as she looks back on a year of leadership and hosts our big event in her own Ontario backyard.

Which brings us to a special passage for IMLA. As Chuck Thompson describes elsewhere in this issue, we pause here to recognize and thank retiring Deputy Executive Director Veronica Kleffner for her 32 years as an integral part of IMLA's story. The spectacular waters of Niagara will make a fitting backdrop for our celebration of your many contributions to our organization, Veronica, as we send you off to a more pastoral lifestyle--for the moment--at your farm in West Virginia. Please keep in touch.

Best regards-
Erich Eiselt

PRESIDENT'S LETTER

By: Mary Ellen Bench, IMLA President



I find it hard to believe that my term as President of IMLA is coming to an end so soon. Over the past year, I have had the honor to meet many of the people who make our organization so great. I have also learned a lot about how similar, and yet how different our systems of municipal government, Canadian and American, are.

This year I took on a dual role as President and as a member of the Host Organising Committee for the upcoming Conference, so got to know IMLA staff very well. Their level of professionalism, enthusiasm and support is no surprise to any of us who have had contact with them. A lot of that comes from the leadership of Chuck Thompson, allowing the team to develop their skills and explore opportunities, knowing they have his support.

In preparing for the Niagara Conference, I have also been supported by a great team from the local municipalities of Niagara Falls, St. Catharines and the Region of Niagara. We have worked hard to make this a memorable experience for all of you who attend. We could not accomplish this goal without the generous support of our sponsors--our local sponsors and the network of sponsors who have supported IMLA for many years—and we sincerely thank each of them. Please take a moment to recognize them at our event.

I know you all share my respect and admiration for Veronica Kleffner, who is retiring after the Niagara Conference. Veronica is one of the most resourceful people I have ever met, and her guidance has helped me immensely over the years. I truly can't thank her enough. I know she has left us in good hands, and I look forward to see our young conference team place their mark on future IMLA events the way they have on the Niagara Conference.

I now have a much better appreciation for our members' ability to influence key areas of law in ways that individual lawyers or law firms cannot accomplish alone. Our Board and the extensive number of volunteers who support us--all of you who sit on committees and step up to be state or provincial chairs, regional VPs, speakers at our seminars and conferences, kitchen sink and other programs--all of us together ensure that IMLA organization is strong.

When it is strong so are we. It allows us to provide the best advice and service to our municipalities with confidence, knowing we have a trusted network to call upon when there is a challenge. Our strength truly is in our unity in numbers, our diversity, our advocacy, and most of all the engagement of each of us.

One group whose contributions I have been able observe is our International Committee, led by Ben Griffith and ably assisted by a significant number of practising and academic-minded municipal lawyers. In addition, Doug Haney has launched a very successful small and rural municipalities group this year; they will have a program at the Niagara Conference that I am looking forward to attending. And the work of Patrick Baker's Vision 20/20 committee has been extraordinary. He has cultivated some strong leaders on that team who will ensure we don't lose our focus on diversity of all kinds. While the general push for diversity continues to gain momentum, our legal community has long recognized the merits of diversity, and our work with Vision 20/20 ensures that we keep at the forefront, whether the issue is ageism, sexism, racism or other factor. Their next new challenge may well be technology itself.

My years in IMLA have taught me how important our Amicus program is, but as IMLA President I have really come to understand the significance and value of the contributions by the lawyers and firms that write our briefs. Considering the number of controversial issues we have been called upon to support this year, the dedication of this group has certainly been outstanding.

What has surprised me? I set aside time to sit in on and attend many events I traditionally had not attended. The result is that I now see just how many young attorneys, as well as guiding figures and mentors, are actively participating in IMLA and other organizations to make our communities better places. When I started my term as IMLA President, I expressed hope that we would become stronger by passing the baton to the up-and-coming leaders in our law offices. Now, at the end of my term, I can say that I am seeing that transition happen. The future looks strong.

I want to thank all of you for your support this past year. You have helped me to learn a lot, not only about being a better lawyer but about being a better leader.

To those attending the Conference next month, welcome to my hometown of Niagara Falls. And to Art Pertile, my IMLA successor, you are in for an amazing experience! ML

The Secrets to IMLA's Success

By: Chuck Thompson, IMLA Executive Director



IMLA has much to celebrate as we convene in Niagara, Ontario for our 82nd Annual Conference. The organization envisioned by Charles Rhyne continues today as a source of learning, advocacy and commentary in support of the common purpose honored by municipal lawyers on both sides of our border—to serve the public interest. Whether we salute the maple leaf or the stars and stripes, we are all engaged in a mission to help our local governments to function—more effectively, more completely and more fairly.

Sometimes that objective requires that we speak loudly, taking a stand in opposition to national, state or provincial authority and fighting for the rights of our constituents against overreaching policies and mandates that undermine local autonomy. We are justifiably proud of that tradition, which has often placed IMLA and its members squarely within the weightiest debates challenging our countries. We have had the honor of adding our voice to the discourse at our nations' highest courts, drawing upon the skills of our own members--and those of many of the most talented appellate practitioners in the private sector, who feel compelled to support our cause. We are grateful for the opportunity to participate in such foundational issues, and to make a difference in their disposition.

But it is in a much more modest setting that IMLA and its members arguably make our greatest contribution. While the pronouncements from above--whether relating to free speech, gender-based rights, voting, firearms, privacy, search and seizure and many equally seminal principles--will no doubt influence our lives, there is important work to be done at ground level. Far from the high-profile questions debated within marble and granite at the High Court are myriad day-to-day issues which will never merit bolded headlines. These are the less-esoteric subjects—schools, zoning, code enforcement, traffic, public safety, and the like—for which our constituents most require rapid and effective solutions.

In that regard, IMLA and its members, through a remarkable spirit of cooperation and shared purpose, make available to one another our own best thinking, however obscure the subject. Through a vibrant listserv, through superlative webinars, articles and conference presentations, it is collaboration that, like a rising tide, lifts all boats. It is perhaps the best-kept secret about our organization: a genuine desire by each of us to see our colleagues succeed in providing for the citizens they serve.

This leads me to an inflection point of particular personal interest. Just as IMLA's best contribution to its members may be unheralded, that same dichotomy exists within IMLA itself. While I, and other Executive Directors before me, have had the privilege to be the public face of our organization, it is without doubt that much of the continuing success of IMLA is attributable to one singular individual. I am of course referring to Veronica Kleffner, our Deputy Executive Director, who has tirelessly worked for over 32 years to help IMLA function. After many thousands of hours devoted to us, Veronica's last appearance with IMLA will be at the upcoming Niagara Conference.

Every organization is merely a reflection of the attitudes of the people within, and Veronica's dedication, efficiency, humor, fairness and basic good nature have always shown through. None of our stability amidst changing environments would have been possible without Veronica. None of our seminars and conferences would have run as smoothly without her. I doubt that our current team, who is already taking up the reins and will move IMLA forward, would have joined IMLA to begin with, would have learned their roles so well and would have remained committed to IMLA throughout this transition without Veronica's efforts.

So she too has been part of the rising tide. She has helped all of us look better than we are. For most, she is as much a friend as a colleague. And although we share in her sadness on the recent passing of her father, Joseph Henneberry—a tremendously caring and dedicated healthcare professional from whom Veronica undoubtedly inherited some of her best traits—we take this opportunity to celebrate in the good fortune that befell IMLA on that day in 1985 when she decided to join our organization. Above all, we salute her for being a big part, understated and often unrecognized, of IMLA's success over the past four decades.

Sometimes the simplest words are the right ones:

Thank you, Veronica, for everything you have contributed to IMLA. We will miss you and we wish you the very best. ML


2018: MID-YEAR SEMINAR WASHINGTON, D.C.

An Annotated Model Panhandling Ordinance: Preventing Harassment While Protecting Free Speech

By: Judith Wegner, Burton Craige Professor of Law Emerita, and Dean Emerita, University of North Carolina School of Law, Chapel Hill, North Carolina



Editor's Note: This Model Panhandling Ordinance is part of Dean Wegner's paper to be presented to attendees of IMLA's Annual Conference in Niagara Falls, Ontario, Canada on October 16, 2017. The regulation of panhandling has become a more challenging proposition since the United States Supreme Court's very splintered decision in Reed v. Town of Gilbert, 576 U.S. ___ (2015), which altered First Amendment analysis of "content-based" and "content-neutral" regulation of signs in significant ways. Dean Wegner's presentation will cover the substantial analyses behind each of the provisions in the Model and will allow open discussion of the many nuances involved. Dean Wegner's complete presentation, co-authored with her student, Matthew Norchi, UNC Law J.D. 2018, will be published in the South Dakota Law Review in 2018. *Copyright © 2017 South Dakota Law Review and Judith Wegner; reprinted with permission.* *Dean Wegner and IMLA thank the South Dakota Law Review for granting permission for this early publication in hopes that the model may assist practitioners grappling with related issues.*

This annotated Model Ordinance was developed based on a review of case law through mid-August, 2017, ordinances adopted nationally, and consideration of "plain English" principles that endeavor to help readers understand public laws and policies. Commentary is provided in italics.

Preliminary Observations: Questions Worth Asking... and Answering

It may be helpful to readers to reflect carefully on some initial issues before trying to draft ordinances in this complex area involving confusing precedent and sophisticated First Amendment standards. Here are some preliminary considerations worth careful attention.

1. Why are you acting and what problem(s) are you trying to address?

A good summary of possible motives for regulation was provided in a recent American Bar Association CLE program, "Panhandling and Solicitation: Understanding the First Amendment Implications," June 14, 2016. Common motivations include: reducing homelessness, limiting public begging, maintaining clean and orderly view-scapes, protecting public and traffic safety. Specific problems that policymakers may wish to address include reducing adverse effects on business, addressing public concerns about disorder and safety, and assisting those who are homeless/ending homelessness.

One common justification for action against panhandling is tied to the "broken windows" theory of policing, articulated by George Kelling and James Q Wilson in "Broken Windows: The Police and Neighborhood Safety," THE ATLANTIC MONTHLY (March 1982). The basic idea behind this theory is that police interventions in small matters can curb urban disorder (such as broken windows) and can keep such disorder from becoming more accepted/acceptable. Zero-tolerance policies rely on similar thinking. It is important to bear in mind that the "broken windows" argument reflects a theory, not a confirmed fact. For an excellent compilation of research on the broken windows theory, see Center for Evidence-Based Crime Policy, George Mason University,http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/ (last visited March 16, 2017) (citing recent studies and need for additional targeted research to prove this theory).

There is also a risk that in our currently divided society, anti-panhandling ordinances are really aimed at pushing poor and homeless people out of sight of the public, or criminalizing the status of being poor or homeless. Dislike of panhandling and panhandlers is not the kind of justification courts will uphold as the undergirding of panhandling regulations.

2. What burden of proof will you need to carry?

Jurisdictions updating their panhandling ordinances should be alert, from the start, to the importance of statements of purpose, the need for securing evidence and making findings, and the application of burdens of proof. Although Reynolds v. Middletown, 779 F.3d 222 (4th Cir. 2015), was decided prior to Reed, its guidance is helpful in this regard because it addresses the burden of proof and requisite evidence in some detail. The court initially observed that the plaintiff (in this case the panhandler) "has the burden of showing that speech was restricted by the governmental action in question." Once plaintiff had met the initial requirement, the government was required to prove that its panhandling ordinance was "narrowly tailored to further a significant government interest and that it [left] open ample alternative channels of communication." Most significantly, the court held that the government needed to make "some evidentiary showing that the recited harms are real, not merely conjectural, and that the [challenged regulation] alleviates such harms in a direct and material

A Model Panhandling Ordinance Cont'd from page 8

way," even if not offering a "panoply of empirical evidence."

In reaching this conclusion the court relied upon the Supreme Court's decision in McCullen v. Coakley, 134 S.Ct. 2518 (2014), applying intermediate scrutiny to an abortion clinic buffer requirement applicable to protesters on public sidewalks. The Reynolds court emphasized that the government must show that it had actually tried other means to address problems associated with panhandling on medians, and that these other means had been unsuccessful. Since the county in Reynolds had relied only on the opinion of law enforcement officials and had not actually tried to implement alternative methods for addressing perceived problems, it had failed to meet intermediate scrutiny requirements. Bear in mind that both these cases were applying an intermediate scrutiny standard, rather than the higher strict scrutiny standard adopted in Reed to apply to content-based regulation.

Courts other than the Fourth Circuit have expressed similar views. For example, in Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013), the Sixth Circuit struck down, on overbreadth grounds, Michigan's "anti-begging" statute and a Grand Rapids, Michigan ordinance that had resulted in hundreds of arrests of those simply holding signs asking for help or verbally soliciting charity. The court also rejected an argument that the Michigan statute could be construed more narrowly to meet constitutional requirements in reaching its ultimate conclusion. An earlier Sixth Circuit opinion is also relevant in this context: See Satawa v. Macomb County Road Commission, 689 F.3d 506 (6th Cir. 2012) (landscaped median with adequate space for multiple uses had history of being treated as traditional public forum; hypothetical traffic-safety justification was insufficient to justify denial of application for permit to display Nativity scene on road median).

3. How might you proceed in gathering evidence to guide proposed government action in this sensitive area meets stringent demands regarding purposes and tailoring of means?

The Center for Problem-Oriented Policing provides a helpful guide to creating community dialogues designed to adduce evidence needed in developing panhandling policies. See Michael S. Scott, Problem-Oriented Guides for Police Report 13: Panhandling (US Department of Justice, 2002), available for download at http://www.popcenter.org/problems/pdfs/Panhandling.pdf. The guide is particularly helpful regarding strategies for collecting useful evidence. Id. at 13-16. Although this guide on panhandling was published in 2002, and thus only considers case law to that date, it still has a great deal of insight to offer.

4. ***How can you frame the ordinance in a way that makes it understandable to the lay people who will be obliged to conform to its requirements?***

Policymakers and citizens sometimes are tempted to focus on the "people" who they believe are the source of the perceived "problem" they want government to address. That temptation may have been increased as a result of the current deeply acrimonious political climate. For good or ill, the courts and the First Amendment require a different approach: look at the adverse effects and address them with tailored solutions, don't just look at speakers whose messages some people may not like to hear. This approach should not be surprising, since it is already evident in well-known land use cases relating to such matters as adult uses and billboards. In some ways, it may be helpful to realize that some people view panhandlers much as they do various "nuisances" they dislike. The local government's approach should be designed to ameliorate well-grounded conflicts between diverse users of public spaces where possible, rather than picking "winners" and "losers."

That means that it is very important to sort out real interests, not just positions (as explained by the authors of "Getting to Yes"). That means that an initial focus needs to be on "what conduct" rather than "who." "What conduct" can include defining objectively determined danger, engagement in intimidation/threats, interference with reasonable expectations of privacy, interference with access by others who are navigating within congested public spaces, or creation objectively determined risk of traffic accidents or exacerbation of traffic congestion.

Once the "what" is clear, the decision about "who" must follow regulations may be more challenging. The courts have made it clear that content-based regulation must meet a high bar. Regulating only panhandlers (and not others engaged in comparable conduct) makes is likely that ordinances will be struck down under Reed and other precedent. Efforts to claim that ordinances are instead directed to regulate time, place, and manner of use of public forums (such as public squares, sidewalks and streets) must be content-neutral and must employ "narrow tailoring." As a result, it is inevitable that jurisdictions wanting to regulate the kind of conduct associated with panhandling should also regulate other forms of charitable solicitation (for example fire-fighters' one-day "fill the boot" campaigns), and electioneering that involves solicitation activities occurring in public streets. The latter types of activities have historically taken place on traffic medians in which many jurisdictions have recently wanted to regulate panhandling. It may be possible to justify distinctions (e.g. charitable or electioneering campaigns that are limited to a few days in duration might be allowed, but it would appear appropriate to allow panhandling in comparable locations during that same period and to take extra precautions regarding safety).

The model ordinance proposed here accordingly covers "panhandling, begging, charitable and political solicitation" rather than only panhandling.

5. How should you structure the ordinance so that it places clear policy choices before the City Council and interested citizens, and makes it likely to withstand potential judicial challenge?

The Center for Problem-Oriented Policing Report on Panhandling, referenced in Note 3 above, provides a very helpful template of possible options for regulating the kinds of problematic conduct that is sometimes associated with panhandling. See id. at pages 17-26. These responses are grouped in the following categories: enforcement responses, public education responses, situational responses, and social services/treatment responses. The following law enforcement responses are discussed: prohibiting aggressive panhandling, prohibiting panhandling in specified areas, prohibiting interference with pedestrians and vehicles, banning panhandlers on probation from certain areas with the best panhandling potential (in order to discourage panhandling), requiring panhandlers to engage in certain types of community service if found to have violated governing laws, and requiring panhandlers to obtain solicitation permits. The Center's

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Type of conduct	Where Regulations Apply	Penalty
Passive (written or oral) in non-designated areas	Non-designated areas (no showing of personal security/privacy or public safety/traffic	None
Passive in Sensitive Protected Areas (personal security/privacy) OR could create disincentive for aggressive panhandling in such areas by imposing a "most severe" penalty in such cases	Designated areas with higher personal security/privacy concerns (ATMs, bus stops, congested sidewalks, etc.)	Moderate (drafted in this fashion) Most severe if aggressive panhandling in such areas? (could revise accordingly if desired)
Passive in Dangerous Areas (relates to public safety/traffic congestion)	Traffic medians that are too small or designated high volume/high speed traffic area	Moderate
Aggressive	Everywhere in jurisdiction	Severe

Report correctly notes that ordinances prohibiting all panhandling are likely to be invalidated by the courts. Prohibitions of panhandling at night have also been struck down.

This Model Ordinance addresses the first three of these strategies–aggressive panhandling, panhandling in specified areas (where security or privacy is of particular concern), and prohibiting interference with pedestrians and vehicles– since these are the most common strategies used today. The ordinance is structured to address each of these areas specifically, clearly, and separately so that a reviewing court can clearly discern the links between governmental purpose, evidence, and actions. This approach also tries to reflect the relative severity of the regulated conduct in the view of regulators. It includes a clear "safe harbor" for passive solicitation (signs or speech alone) except in "sensitive protected areas and "dangerous areas" relating to highways, traffic and medians. Setting forth a rational framework of this sort should assist a court in upholding the ordinance, since it is clear that the jurisdiction is regulating solicitation in a nuanced fashion and not trying to criminalize all types of solicitation. Clear delineations among different types of solicitation will also make it possible to uphold major parts of the ordinance if some others were to be struck down.

6. How might communities and policymakers who believe that panhandling is closely related to homelessness proceed?

There are a number of important resources that can help communities and policymakers understand the connections between homelessness and panhandling. The following websites are particularly helpful: National Law Center on Homelessness and Poverty, https://www.nlchp.org/; American Bar Association Center on Homelessness and Poverty, http://www.americanbar.org/groups/public_services/homelessness_poverty.html .

7. How might communities and policymakers avoid wasting time on legally unsustainable ordinances?

There is good reason to avoid wasting time on overly broad ordinances that can't be sustained. In this context unsustainable ordinances include those that prohibit all panhandling, those that prohibit panhandling in the nighttime (without targeted restrictions), broad prohibitions on panhandling in certain public areas unless tied to concrete government justifications, and panhandling in traffic medians (unless justified by studies of danger and congestion and applied primarily to very busy streets and very small traffic medians that lack adequate footing for those standing in such spaces).

The Annotated Model Ordinance follows.

Title: Public Panhandling, Begging, Charitable and Political Solicitation Regulated

[Note that this ordinance does not attempt to cover activities of "itinerant performers" or "buskers" who typically perform and request contributions, and are thus regulated as "commercial," "cultural" activities. There is a separate body of case law and often separate ordinances governing such activities].

I. Purpose/Findings:

[This section should include statements of purpose and factual findings. Such provisions might include language such as that found in the Pittsburgh, PA panhandling ordinance, available at Municode.com; the Pittsburgh language has been revised to reflect the analysis used by the author]

§ XXX.01 – PURPOSE AND FINDINGS.

The City Council does hereby find that:

(a) It is the intent of Council in enacting this Ordinance to recognize free speech rights for all citizens while at the same time protecting the coexistent rights for all citizens to enjoy safe and convenient travel in public spaces free from intimidating conduct, threats, and harassment that stem from certain types of abusive solicitation, or that may give rise to interference with other's activities if they occur in particular settings and contexts; [*effectively documents Council's commitment to respect First Amendment concerns but also to address other significant governmental issues*] and

(b) Council finds that there are numerous forms of solicitation that are not in and of themselves inherently threatening or aggressive, including vocal requests for a donation; carrying or displaying a sign requesting donations; shaking or jingling a cup of change; and ringing a bell in compliance with

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any applicable noise ordinance; [*Again, reflects commitment to protect less intrusive First Amendment rights of solicitors*] and

(c) However, Council finds that there has been an increase in aggressive solicitation in the City, which threatens the security, privacy, and freedom of movement of both residents and visitors; [*should have actual evidence and data to back up that proposition*] and

(d) Council also finds that the presence of solicitors in certain specific areas (such as near to or adjacent to automatic teller machines, adjacent to sidewalk cafes, at public bus stops, and in public garages in the nighttime) create reasonable concerns by citizens objectively worried about their privacy, freedom of movement, and personal security [*this section was edited to remove reference to the "captive audience" doctrine that has as yet not been sufficiently developed by the courts*] and

(e) Council further finds that certain forms of solicitation impede the orderly flow of pedestrian and vehicular traffic and leads to concerns regarding traffic and public safety, particularly in congested roadways and sidewalks (as defined below to include highly traveled areas, lines to enter buildings, historic districts with narrow sidewalks or on small traffic medians of high-speed or high-volume streets and highways) *[need to have evidence of areas to be described and size of medians as problematic*] ; and

(f) This Ordinance is not intended impermissibly to limit an i dividual's right to exercise free speech associated with solicitation; rather it aims to impose specific time, place, and manner restrictions on solicitation and associated conduct in certain limited circumstances; namely, limiting aggressive panhandling, panhandling at locations or times deemed particularly threatening and dangerous, and panhandling in places where people are a "captive audience" and there is a wish to avoid or reduce a threat of inescapable confrontations; and

(g) In promulgating this Ordinance, Council seeks to impose regulations that are narrowly tailored to serve the aforementioned significant governmental interests.*[A shorter but also effective statement of purpose is found in the Hartford, CT panhandling ordinance, available on municode.com: Generally. The purpose of this section is to regulate certain behavior to preserve the public order, to protect the citizens of Hartford and to ensure the safe and uninterrupted passage of both pedestrian and vehicular traffic, without unconstitutionally impinging upon protected speech, expression or conduct.]*

II. Definitions

(a) "Aggressive begging, panhandling, or solicitation" includes the following forms of conduct:

i. Confronting someone in a way that would cause a reaso able person to fear bodily harm;

ii Accosting an individual by approaching or speaking to the individual or individuals in such a manner as would cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon his or her person, or upon property in his or her immediate possession;

iii. Touching someone without his or her consent;

iv. Using obscene or abusive language toward someone while attempting to panhandle or solicit him or her;

v. Forcing oneself upon the company of another by engaging in any of the following conduct:

(1) Continuing to solicit in close proximity to the individual addressed after the person to whom the solicitation is directed has made a negative response, either verbally, by physical sign, by attempting to leave the presence of the person soliciting, or by other negative indication;

(2) Blocking the passage of the individual solicited; or

(3) Otherwise engaging in conduct that could reasonably be construed as intending to compel or force a person to accede to a solicitation.

vi. Acting with the intent to intimidate someone into giving money, or

vii. Other conduct that a reasonable person being solicited would regard as threatening or intimidating in order to solicit a contribution or donation.

(b) "Areas with heightened personal security concerns" include the following locations:

i. Areas within, or within 20 feet of, a public parking g rage, between dusk and dawn, when a reasonable individual would have a justified, reasonable concern for his or her safety, security, and welfare;

ii. Areas within 20 feet of a public bus stop or public transit entrance where a reasonable individual would have a reasonable, justified concern for his or her personal security due to congestion and close proximity to others;

iii. Areas within 20 feet of access to building entrances, public events venues, public accommodations or commercial businesses where a reasonable individual would have a reasonable, justified concern for his or her personal security due to congestion and close proximity to others;

iv. Areas within a designated commercial or historic district in which a high volume of pedestrian traffic or narrow sidewalks and streets give a reasonable person a justified, reasonable concern about his or her personal security due to congestion and close proximity to others; or

v. Other areas in which congestion could give a reasonable person a reasonable, justified concern for his or her personal security due to congestion and close proximity to others.

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An Annotated Model Panhandling Ordinance Cont'd from page 11

(c) "Areas with heightened personal privacy concerns" include the following

i. Locations within 20 feet of an automated teller machine, or financial institution in which an automated teller machine is located, where "financial institution" means any bank, industrial bank, credit union, or savings and loan.

ii. Locations within 20 feet of a sidewalk café during operating hours unless the solicitor's presence is authorized by the proprietor;

iii. Other locations in which a reasonable person would have a reasonable and justified concern about whether congestion and close proximity to others could compromise his or her interests in privacy.

(d) "Areas with heightened public safety concerns" include the following:

i. Streets or highways;

ii. Traffic medians where such medians provide less than 8 square feet of flat space for standing;

iii. Traffic medians of whatever size within designated high traffic or high-speed roadways,

(e) "Begging, panhandling and charitable or political solicitation" includes the following activities: actions that are conducted in the furtherance of the purpose of immediately collecting contributions for the use of one's self or others. As used in this ordinance, the word, "solicit," and its forms, includes requests for funding arising from begging, panhandling, charitable, or political fundraising initiatives. "Begging, panhandling and charitable or political solicitation" includes both "aggressive" and "passive" forms of begging, panhandling and charitable or political solicitation, but these forms are regulated separately under this ordinance.

(f) High traffic roadways include the following [define based on local conditions]

(g) High speed roadways include the following [define based on local conditions]

(h) Regulated traffic medians include areas that meet the following definitions

i. Areas with "medians" situated between traffic lanes running in opposite directions where such medians have less than 8 square feet of flat area between traffic lanes; or

ii. Areas with "medians" that are otherwise designated as unsafe for activities by pedestrians, due to associated high-volume or high- speed traffic.

(1) Passive panhandling, begging, charitable or political solicitation. "Passive panhandling, begging, charitable or political solicitation" includes conduct that falls within the definition in part (e) of this section, but only such conduct that involves requests for contributions presented in writing without speaking, oral requests for contributions that do not constitute "aggressive panhandling, begging, charitable or political solicitation," or other activities that do not fall within the definition of "aggressive begging, panhandling or solicitation" as defined in subsection (a) of this section.

[Definitions are always central to clear thinking about regulatory regimes. This model ordinance draft was developed after consulting a myriad of ordinances in effect around the country and those that have been subject to litigation. Readers may observe that the definitions include several core provisions: defining panhandling, begging and charitable/political solicitation; defining aggressive solicitation; defining passive solicitation; defining particularly sensitive areas due to personal security and privacy concerns; and defining solicitation in streets or highways or where street medians in particular or high volume/high speed traffic corridors raise public safety and traffic congestion concerns. This approach seems advisable given the case law that has developed both before and after Reed, and will facilitate continuing regulation in the event of judicial invalidation of part of the ordinance (given the severability provision that follows). Penalty provisions are left undefined given likely differences between various jurisdictions.]

III. Passive Begging, Panhandling, Charitable and Political Solicitation: When Regulated

Passive panhandling, begging, charitable or political solicitation permitted except where expressly prohibited.

The City Council finds that "passive panhandling, begging, charitable or political solicitation," as defined in section II(i) of this ordinance should be treated as speech protected under the First Amendment unless other well- grounded governmental concerns are implicated. Accordingly, passive panhandling, begging, charitable or political solicitation is permitted throughout the jurisdiction except as prohibited in parts V and VI of this ordinance.

[Note that regulating passive solicitation in settings described in part V may raise judicial questions unless there is adequate evidence demonstrating grounded concerns for adverse impacts from passive solicitation in areas giving rise to particular concerns in the face of passive panhandling. At least arguably, there could be reasonable grounds for concern about privacy and security. The standards set out in part V ground the regulation in "a reasonable person" with "reasonable, justified concerns" so would require evidence on a case-by-case basis. Some jurisdictions might choose to regulative passive solicitation only as to traffic medians (small and/or in high-volume, high speed areas) where voice requested and signage might themselves arise due to traffic problems.]

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Navigating the Fair Labor Standards Act with Police and Fire Employees

By: Tim D. Norris, Collins, Loughran & Peloquin, Norwood, Massachusetts and Amber G. Eisenschenk, Staff Attorney, League of Minnesota Cities



Special issues arise when applying the Fair Labor Standards Act (FLSA) to police and fire employees, including the option to define an extended work period, the FLSA's application to small departments, different ceilings on accrual of compensatory time, and rules for volunteer versus paid on-call fighters.

I. Administrative and executive exemptions

As a general rule, employees who perform police and firefighter work will be considered non-exempt under the FLSA, and must receive overtime or compensatory time off unless they fall under the small police/fire department exemption discussed below. However, certain high-ranking police and fire department employees such as police or fire chiefs, deputy chiefs, captains, lieutenants, sergeants, and corporals may meet the requirements of the administrative or executive exemption. Each city should determine on a case-by-case basis whether these positions meet the requirements of those tests.

Some guidelines cities may look at to help determine whether a police or fire employee would meet those requirements include the following:

Police or firefighting work

Does the employee perform police or firefighting work (e.g. preventing, controlling, extinguishing fires, crime prevention, investigations, apprehending suspects, interviewing witnesses, etc.) on more than just an occasional basis? The more direct police and firefighting work performed, the less likely the employee will be considered exempt.

Discretion

Is the employee dispatched to calls, or does he or she have discretion to determine whether and where his or her assistance is needed? Employees who are not dispatched to calls but have discretion to determine their own involvement are more likely to be considered exempt.

Managerial tasks

Does the employee meet all of the requirements to be exempt under the executive or administrative exemption and primarily perform managerial tasks?

Managerial tasks include:

- Evaluating performance of employees under their supervision.
- Enforcing and imposing penalties for violations of rules/regulations.
- Making recommendations as to hiring, promotion, discipline or termination.
- Coordinating and implementing training programs.
- Maintaining payroll and personnel records.
- Handling community complaints, including decisions whether to refer them to internal affairs for further investigation.
- Preparing budgets and controlling expenditures.
- Ensuring operational readiness through supervision and inspection of personnel, equipment and quarters.
- Deciding how and where to allocate personnel.
- Managing the distribution of equipment.
- Maintaining inventory of property and supplies.
- Directing operations at a crime, fire or accident scene, including deciding whether additional personnel or equipment are needed.

Employees who spend the majority of their time performing duties such as those listed above are more likely to be considered exempt.

A police or fire supervisor who directs the work of assigned staff during his or her shift but is also expected to routinely respond to dispatch calls and primarily does work investigating crimes or fighting fires is probably not going to be considered exempt.

However, a police or fire supervisor who primarily manages the department and performs administrative and office work and seldom does any work "on the street" fighting fires or investigating crime is likely to meet the qualifications to be considered "exempt."

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Police and Fire Employees Cont'd from page 13

II. Small police/fire departments

The FLSA provides a complete overtime (but not minimum wage) exemption for any city employee who performs law enforcement work if the city has fewer than five employees who perform law enforcement work during the work period.[1] Part-time employees and employees on leave are counted. This exemption holds true for fire protection work as well. This exemption applies on a work period basis, so it is possible for a city to use the exemption some weeks and not others.

III. Extended work period exemption

A city can establish a work period for police and firefighters of anything between seven and 28 days.[2] The police or fire protection employee would then earn time and one-half overtime only for those hours that exceed the limits under their work period schedule.[3] (A table specifying the maximum hours worked before overtime is earned is attached as Appendix A at the end of this article).

The work period does not have to be the same as the pay period, but there must be a notation on the payroll records that shows the work period for each employee and indicates the length of the period and the starting time.[4] Different work periods may be established for different positions or groups of employees as long as each employee group is told what their work period is and it is documented.

The extended work period can help a city avoid FLSA liability, if it pays employees for overtime pursuant to a policy or collective bargaining agreement based on a more generous overtime threshold, but does not calculate the regular rate as required by the FLSA.[5]

The FLSA requires that for qualifying overtime, all stipends and differentials must be included in the regular rate.[6] However, non-FLSA premium pay can be offset against a claimed underpayment, which in many cases can avoid or substantially limit liability.

The overpayment can unquestionably be applied to the same work period in which it is earned, and some courts have extended this reasoning to allow offsets to prepay overtime obligations in subsequent work periods.

IV. Compensatory time

Police and firefighters may accrue up to 480 hours of compensatory time (as opposed to the 240 hour limit for other employees).[7] In most cases, cities should set much lower limits on compensatory time accrual.

Since cities need to have constant coverage in police and fire services, it is difficult to give employees time off without calling in another employee to cover the shift, often at overtime rates. Also, compensatory time earned in lieu of overtime must be paid when an employee leaves the city, which is usually at a higher rate of pay.

V. Volunteer and paid on-call firefighters

Cities are not required to pay minimum wage or overtime to true "volunteers."[8] However, in order to qualify as volunteers, individuals cannot receive anything but "expenses, reasonable benefits or a nominal fee" for the work they perform.[9] For example, a fire department might provide uniforms at no expense or reimburse volunteers for their uniform cleaning, meals, and transportation expenses. Generally, pension benefits provided to volunteer firefighters are also viewed by the Department of Labor (DOL) as "reasonable."

"Nominal fee" is not specifically defined in the law; however, the closer compensation is to minimum wage, the less likely it will be viewed as "nominal." Many fire protection employees in Minnesota cities would probably not meet this definition due to the level of compensation paid and are often referred to as "paid on-call" employees.

The regulations do provide some guidance on factors to examine to determine whether fees and stipends are nominal.[10] These include:

- The distance traveled and the time and effort expended by the volunteer;
- whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and
- whether the volunteer provides services as needed or throughout the year.

The DOL has stated that fees and stipends paid to volunteer firefighters that are less than 20 percent of what would be paid to a full time firefighter are likely to be found to be nominal. *"So long as the City's calculations are based on an approximation of the prevailing wages of a driver or firefighter within its area and the fee amount does not exceed 20 percent of that driver or firefighter's wages for the same services, the Department would find that such a fee would be nominal within the meaning of 29 C.F.R. § 553.106. Moreover, in evaluating whether a fee is nominal, the City should consider that, in addition to paying a nominal fee, as noted above the City may reimburse an individual for the approximate out-of- pocket expenses incurred."*[11]

Cities should also avoid paying employees on an hourly basis or on any basis tied to productivity. Per-call rates are, however, specifically allowed within the regulations.[12]

City employees cannot "volunteer" to perform the same or similar duties on their off –hours as they perform during their regular employment with city (e.g. a fire inspector probably cannot "volunteer" to perform fire protection duties after-hours).[13] Even if the work is different, employees who hold two jobs with the city are likely to qualify for overtime if they exceed 40 hours in one work period in either or both jobs.[14] With the agreement of the employee, the overtime wages can be paid at one and one-half times the regular rate for the actual work that is being performed during the overtime hours.

Otherwise, the city must determine a weighted average hourly rate earned for that work period and pay the overtime hours at one and one-half times that rate.

For example, a city has a street department maintenance worker who also serves as a paid on-call firefighter. The maintenance worker puts in 40 hours of work (Monday-Friday) in his regular job at $20/hour, then, in the same work period, puts in an additional six hours (on Saturday) as a firefighter at an hourly wage of $10/hour. The six hours

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over 40 can be paid at $15/hour ($10 x 1.5 times) if the employee agrees in advance. Or, they can be paid at the blended rate of $28.05/hour (40 hours x $20 plus six hours x $10 = $860/46 hours= $18.70/hour x 1.5 times = $28.05/hour).

VI. Hours worked

Time that is spent on pre-shift or post-shift activities is generally included when computing "hours worked." For example, the time a police officer spends at "roll call" before or after each shift generally counts as hours worked. Time spent writing reports at the end of the shift and time spent racking up fire hoses after a fire call are also counted.

Regular home-to-work travel, even if it is in a take-home patrol car, does not count toward "hours worked." Once an officer responds to a call, however, the time counts as "hours worked."[15]

Time spent caring for a police canine is generally considered "hours worked." However, some court and arbitration decisions have upheld agreements that are in place specifying a set amount of paid time or extra compensation that an officer will receive for caring for the dog.[16]

Shift swapping/time trading

The substitution of one employee to work hours (partial or full shifts) scheduled for another of the same rank or position is often referred to as "shift swapping" or "time trading," and is a common practice in many public safety departments. The FLSA provides guidance on how shift swapping/time trading should be administered.[17]

The FLSA permits, under certain circumstances, permits two employees of a public agency, with that agency's approval, to substitute for one another during scheduled work hours in the same capacity without those hours being subject to overtime. Even though a substitution has occurred, each employee will be considered to have worked his or her normal schedule, and the traded time will not be considered in calculating hours for overtime for the substituting employee. The arrangement for trading time and payback is left to the two employees involved.

Key points of a shift swap/time trade for hours that would not be overtime for the substituting employee include:

- The employee's decision to substitute must be freely made, and without coercion, direct or implied, so the request is exclusively for the scheduled employee's convenience. The regulations note that an employer may *suggest* an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be *free to refuse* to perform such work without sanction and without being required to explain or justify the decision.[18]

- The employer must be aware and approve of the substitution beforehand, thus the city must know what work is being done, by whom it is being done, and where and when it is being done.

- However, the employer is not required to keep a record of the hours of substituted work.

VII. Outside employment

There are special provisions for police and fire employees who perform special duty work in fire protection, law enforcement, or related activities for a separate and independent employer during their off-duty hours.[19] The hours of work for the separate and independent employer are not combined with the hours worked for the city for purposes of overtime compensation if both of the following guidelines are met:

- The special duty work is performed solely at the employee's option; and
- The two employers are, in fact, separate and independent.

The City may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may:

- Maintain a roster of officers who wish to perform special duty work during their off-duty hours;

- Select the officers from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses; or

- Require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special duty work through the police department's payroll system. For the purposes of calculating overtime, the officers would not be eligible for overtime pay since the employee opted to perform this special duty work and the work was performed for a separate and independent organization.

There may be times that a state law or local ordinance requires police or fire protection at an event and that only law enforcement or fire protection employees of a public agency in the same city perform the work. For example, a city ordinance may require the presence of city police officers at a convention center or during concerts or sporting events. If the officers perform such work at their own option, the hours of work do not need to be combined with the hours of work for the city in computing overtime compensation.

Editor's Note: The material in this article was presented by the authors in a paper delivered to attendees of IMLA's Mid-Year Conference in Washington D.C. in April 2017. It restates a publication of the League of Minnesota Cities (LMC) and is reprinted with authorization of LMC, which retains copyright thereto.

Notes

1. 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200(c).
2. 29 U.S.C. § 207(k).
3. 29 C.F.R. § 553.230(c).
4. 29 C.F.R. § 553.51; 29 C.F.R. § 553.224.
5. 29 C.F.R. § 778.200; Howard v. City of Springfield, 274 F.3d 1141

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(7th Cir. 2001).
6. Singer v. City of Waco, 324 F.3d 813 (5th Cir. 2003).
7. 29 U.S.C. § 207(o)(3)(A).
8. 29 U.S.C. § 203(e)(4)(A).
9. DOL Opinion Letter 2007-3NA, September 17, 2007.
10. 29 C.F.R. § 553.106(e).
11. DOL Opinion Letter 2007-3NA, September 17, 2007.
12. 29 C.F.R. § 553.106(e).
13. 29 C.F.R. § 553.103(a).
14. 29 C.F.R. § 778.419; 29 C.F.R. § 778.115.
15. 29 C.F.R. § 553.221(e).
16. 29 C.F.R. 785.12; Rudolph v. Metropolitan Airports Comm'n., 103 F.3d 677 (8th Cir. 1996); Brock v. City of Cincinnati, 236 F.3d 793 (6th Cir. 2001).
17. DOL Opinion Letter 2004-23, November 23, 2004.
18. 29 C.F.R. 553.31.
19. 29 C.F.R. 553.227.

APPENDIX A

No. of Days in Work Period	Hours of Fire Protection	Hours of Law Enforcement
7	53	43
8	61	49
9	68	55
10	76	61
11	83	67
12	91	73
13	98	79
14	106	86
15	114	92
16	121	98
17	129	104
18	136	110
19	144	116
20	151	122
21	159	128
22	167	134
23	174	141
24	182	147
25	189	153
26	197	159
27	204	165
28	212	171

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IMLA INTERNATIONAL COMMITTEE UPDATE

By: Ben Griffith, Griffith Law Firm, Oxford, Mississippi

The IMLA International Committee business meeting is scheduled for Monday, October 16, 2017 from 2:40 pm – 3:40 pm during the IMLA Annual Conference in Niagara Falls, Ontario.

Sven Kohlmeier, member of the Parliament of the City of Berlin, Germany, and Ben Griffith, Chair of the International Committee, will present a program on Cybersecurity Best Practices for Local Government during the business meeting. These IMLA members will identify best practices in cybersecurity risk management in combination with deterrence and international norm building efforts. They will highlight cybersecurity attacks on infrastructure and systems, including a cyberattack on the Wolf Creek Nuclear Operating Corporation.

In light of President Trump's tweet several months ago that "Putin & I discussed forming an impenetrable Cyber Security unit so that election hacking, & many other negative things, will be guarded," the speakers will address the susceptibility of state and local election systems to cyber-hacking. Their discussion will include an overview of Australia's successful efforts that have enabled it to prevent 85% of cyberattacks on its governmental networks using three common sense techniques – application whitelisting, regular patching applications and operating systems, and minimizing the number of users with administrative privileges.

A report will also be presented on a webinar that the International Committee agreed to cosponsor on September 28, 2017 with the International Committee of the ABA Section of State & Local Government Law on the new Cambodia Environmental Code. This webinar is a spectacular effort that entailed pulling together all types of environmental and natural resource protections in one document that has the support of the Cambodian Ministry. It includes discussion of substantive environmental issues plus issues of distribution of power among different levels of government.



CODE ENFORCEMENT

Poultry on the Patio: Coexisting with Urban Agriculture

By: Frank M. Johnson, Assistant City Attorney, Gaithersburg, Maryland

Cities and towns need certain elements to thrive, such as water, climate and transportation. But anthropologists tell us that farms have had also much to do with allowing greater concentrations of people and more vibrant business centers. Removing the need for each individual or family to "grow their own" allows land area in towns and cities to develop and be used for residences and businesses. And the concentrated work of farmers, which isn't an easy life by any stretch of the imagination, allows the rest of us to live and focus on our careers.

Increasingly, however, cities and agriculture are interacting anew. While some communities have long encouraged community gardens, such as the cities of Toronto, Montreal and Vancouver in Canada, as well as Cleveland, Detroit and others in the United States, one of the most trendy new zoning developments is related to allowing urban farming or urban agriculture. Most consider that the urban farming movement started from the fact that many of us are focusing on organic options, with a special emphasis on fresh, locally grown foods. Today, we increasingly want to know where that food comes from and how it is grown, raised and prepared. That means we want to know what livestock is fed and how it's treated, and what treatments and sprays are given to crops. And the best way to assure how livestock and crops are growth is to grow it yourself!

Yet, we know that even as a "hot" topic, agricultural uses can pose conflicts with residential areas. The United Nations Food and Agriculture Organization's 2001 report, "Livestock Keeping in Urban Areas," notes that such urban agriculture can create a host of problems, including smell, risk of disease, waterway pollution and conflicts between neighbors when animals escape their fenced areas. Similarly, raising crops can create a separate set of conflicts – including noise from threshing machines, smell and dust from fertilizers, and waterway pollution concerns as well.

As farms have developed into suburbs and urban areas, these concerns have indeed led to conflict between the new residences and farms which were already in place. Indeed, all 50 states have enacted some version of a "Right to Farm" Act, which in general terms protects farmers from nuisance complaints from nearby residents. Some, such as in Wyoming and Michigan, provide that a farm or ranch operation confirming to generally accepted agricultural principles (also known as "GAAMPS") and which was in place first, before residential development took place, simply cannot be found to create a public or private nuisance through its agricultural operations. See WYO. STAT. ANN. §11-44-103(a); MICH. COMP. LAWS §286.473, Sec. 3(1). Others, such as Nevada, establish a rebuttable presumption favoring the farm operation, establishing that farming following "good agricultural practice," meaning it violates no federal, state or local law, does not constitute a nuisance unless public health or safety is impacted. See NEV. REV. STAT. §40.140.2.

It's clear that the intent and effect of many Right to Farm laws is to protect pre-existing farming operations by pre-empting the ability of local government to enforce their own nuisance laws. Thus, the traditional "right to farm" effort limits or entirely abrogates the local ability to restrict agricultural uses. But the thrust of urban agriculture has not been pre-emption. Instead, the urban farming effort has led to the creation of local zoning laws to accommodate both agriculture and residential uses, largely by putting a series of limitations in place under which some agricultural activities are permitted, even in residential areas.

As Right to Farm laws show, there is a potential conflict between agricultural uses and the quiet enjoyment of adjoining residential property. Such a conflict may be easy to expect when homes adjoin a large farm. But conflicts can also happen for urban farming on a small scale, even as the trend is to allow elements of urban farming. The magazine "Modern Farmer" focuses on the urban farming trend, and in its January 19, 2015 issue reported that those persons trying urban farming without careful review of local laws may "find out the hard way that the zoning regulations" simply do not allow any sort of agricultural activity in urban areas. Indeed, the article reported that some local regulations prohibit growing any vegetables, especially those offered for sale. And many municipal ordinances strictly limit residences to owning animals which are pets.

But the trend is not prohibition. Indeed, local governments, including big cities far from agricultural areas, have been amending local laws and zoning ordinances to allow some urban farming. Some allow crops to be raised, under specific limitations and in certain areas, normally based on lot size, and some also allow livestock to be raised – often with similar lot size restrictions as well as limits on the types and size of livestock. No county or municipality has been reported to allow unrestricted agriculture, or impose their own Right to Farm law protecting the right to farm against nuisance complaints. Instead, even the most permissive restrict the extent of the use, often based on the size of the lot.

Many local governments have taken steps to allow growing crops – plants, ornamentals, and native species, such as Baltimore, Maryland, see BALT. CITY CODE §2-101 et seq. The City of Winston-Salem, North Carolina has adopted an Urban Agriculture Ordi-

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nance applying to plant cultivation, and which at Winston-Salem, North Carolina Unified Development Ordinances, Section B-2.6.5(b), define urban agriculture as the processing of food through cultivation. Similarly, Cleveland, Ohio reports between 30 and 40 urban farmers have been enticed onto on otherwise empty lots by policies encouraging those lots to be used for crops. Such crops include tomatoes, peppers, a variety of herbs, fruits, and Swiss chard, among others. The City reports that many of the crops are sold to local restaurants, thus satisfying the desire for fresh, local produce – and turning otherwise empty lots into productive areas. Other local governments follow Cleveland, Ohio's lead in encouraging community gardening. The Michigan State University Extension Office notes that community gardens in otherwise vacant lots can not only promote economic development but improve neighborhood safety, encourage self-reliance and increase community well-being overall. The Extension Office indeed noted that Detroit's urban agriculture production, focused on allowing crops to be grown on otherwise vacant lots, was valued at an estimated $3.8 million in 2014.

When urban agriculture is permitted by a local government, enforcement of the limitations falls to the code enforcement process, and local government staff and attorneys all play a major role. The code enforcement challenges for crops will be based on the specific zoning allowances, often based on the size of the lot. But the local allowances are also often limited to certain types of crops. For example, the Lawrence, Kansas City Code, at §§ 20-1779 and 1780, specifically allow urban agriculture both for crops and animal husbandry, even as it does not allow livestock sales. Specific zoning regulations allow crop agriculture, but do not allow crops to be grown near sidewalks, nor allow crops over three (3) feet in height which are within eight (8) feet of a road or three (3) feet of a sidewalk – or within the site distance triangle of an intersection, which is twenty-five (25) feet. Any sales areas are limited by lot size, and signs are limited in size and location. All of these specific restrictions are enforced through code enforcement, but as to crops, violations are often based on such measurable units as size and distance, and thus can be enforced with some regularity.

Agriculture involves more than just plants and crops, but animals and livestock as well – including chickens, goats, cows and horses, among others. Baltimore City's Health Department, for example, allows the keeping of animals for urban agriculture under its September 2013 Regulations for Wild, Exotic and Hybrid Animals. These regulations specify that all zoning and State Department of Agriculture requirements must be satisfied, including lot sizes, and prohibit slaughtering of animals. In some instances, the urban farming trend for livestock is longstanding. Chicago, Illinois, is reported to be the only urban area in the United States which has never explicitly outlawed farm animals.

Even so, urban faming laws establish specific rules under which persons can so engage. Thus, local governments allowing farm animals generally restrict the type of animal and numbers based on the lot size. Thus, Modern Farmer's January 15, 2015 issue reports that Austin, Texas, allows residents to slaughter up to ten (10) chickens per week on an acre of land. Similarly, Seattle, Washington, allows residents to keep goats, sheep, cows and even horses – but under Section 23.42.052 of the City Code, only one animal is allowed for every quarter-acre of land. Pigs, other than as pets, are not allowed, and other rules ensuring proper treatment of the animals are also enforced. Boston, Massachusetts in 2013 passed Article 89 of the Zoning Code, which is an urban agriculture amendment allowing agricultural uses in the City, with lot size requirements for particular agricultural uses. And Lawrence, Kansas regulations restrict the number of animals to lot size as well as requiring appropriate coops and housing, and limiting slaughtering, noise and bad odors; thus allowing chickens but not roosters, requiring that male goats older than four weeks be neutered, and limiting breeds to a height of not more than 24 inches.

As with crops, enforcing the rules on animals falls, of course, to local code enforcement. While lot size limits and restrictions on the numbers of animals can be enforced based on measurements, complaints of excessive noise and odor are based on the strength of the evidence, and in many cases the credibility of the person testifying. Such complaints, to be successful, need to include evidence from nearby residents in order to show the violation – and to show it's a serious violation requiring a fine and a court order.

Complaints may also be related to additional traffic and parking, where produce or livestock is sold, as well as signs highlighting the area where agricultural products are for sale; and certainly fears of theft and related security concerns may also be voiced by nearby residents. Code enforcement staff responding to a complaint will turn to the limitations which are generally contained in the local government's zoning code, especially for crops, but limitations for livestock may also be reflected, both in zoning codes and in other Animal Control or nuisance ordinances limiting agricultural animals or crops. The local government will seek to show that the urban farmer's use violates one of these restrictions, thus leading both to a fine and, in many cases, a civil order requiring compliance with the local restrictions.

The interest in livestock has created at least some proposals to create an urban "Right to Farm" act. A 2015 report from Michigan's Urban Livestock Workgroup on proposed changes to the 1981 Right to Farm Act noted the increased interest from residents in "raising livestock in urban/suburban areas for home use and sale to local markets." The workgroup recommended passage of the Urban Agriculture Act which, along the lines of the Right to Farm law, would limit local authority and give authority to the Commission of Agriculture and Rural Development to establish guidelines, which would then, in turn, be enforced by the local government, even as nuisance complaints would have been largely pre-empted as long as the Act's limitations were followed. The bill has been introduced but not moved through the Senate's Committee on Agriculture.

This 2015 Report reflects the key concern that such Right to Farm Acts could limit local enforcement of laws allowing urban agriculture. A 2011 Michigan State Law Review article, "When Urban Agriculture Meets Michigan's Right to Farm Act: The Pig's in the Parlor," 2011 MICH. ST. L. REV. 365, 384-85, reviewed the impact of the state's Right to Farm laws on local

enforcement. In fact, the chance of such pre-emption within an urban area seems slim. First, it may be difficult if not impossible to show that an individual urban farm operation complies with all of the generally-accepted agricultural protocols (GAAMPS). But the reality is that the urban farming operation was almost always not in place before surrounding residential development was built. Thus, in most cases, urban farming does not meet the requirements to win protection under any right-to-farm laws, and local code enforcement efforts are typically not limited by those laws.

Moreover, as the Michigan State Law Review article noted, urban farming laws are not focused on pre-empting any part of the community. Instead the article states, such laws are implemented at by the local government, and involve "local master plans, zoning ordinances, and land use regulations created by communities which "minimizes conflicts arising from incompatible land uses." As such, where urban agriculture can take place, the rules under which it can do so are at some level agreed upon by the community.

A key aspect of local government is that no part of the community can be ignored. Thus, while urban farming continues to attract interest, and the trend continues in which local governments work with residents and those interested in urban farming to allow some limited crops and livestock, neither part of the community has been pre-empted. And that involvement continues even after the laws are in place, as those laws have to be enforced. The code enforcement challenges can be straightforward or, in some cases, daunting. But even for urban agriculture, local laws restricting agriculture to limit conflict with the surrounding community are only effective to the extent they can be enforced. And that can depend on the facts. When persons work with local code enforcement staff to address problems, as happens in most cases, enforcement through the court system can be avoided. But when those laws have to be enforced, the limits and rules in place, including limits on noise and odors, are only as effective, in a specific complaint, as the evidence supporting the charges! ML

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IV. Aggressive Panhandling, Begging, Charitable and Political Solicitation Prohibited

(a) Aggressive panhandling, begging, charitable and political solicitation prohibited. No person shall engage in aggressive panhandling, begging, charitable or political solicitation as defined in section II(a) of this ordinance at anytime, anywhere in this jurisdiction.

(b) Penalties [link to penalties provision to be developed below.]

[Note: Aggressive panhandling might warrant more serious penalties than those imposed for other offenses, and might warrant more severe penalties in some contexts or settings].

[Comment: This section was drafted based on conceptual considerations, after reviewing a variety of ordinances from jurisdictions around the country. Many such ordinances unfortunately seem to conflate regulation of aggressive panhandling and solicitation, with panhandling and solicitation in particular areas. This model ordinance seeks to separate these issues so they can be considered straightforwardly by policymakers and by any reviewing court. Note, too, that this model ordinance explicitly states that aggressive panhandling is regulated separately from "passive panhandling" to make the point that the city is attentive to various sorts of governmental interests and how they should be balanced. In a sense, the draft model ordinance endeavors to take to heart the "balancing test" suggested in Justice Breyer's concurring judgment in Reed, and to strike appropriate balances between the freedom of solicitors/panhandlers and the implications of their activities on others.]

V. Regulation of Panhandling, Begging, Charitable and Political Solicitation in Areas with Specific Personal Safety and Privacy Concerns

(a) *Regulated locations*. Both "passive" and "aggressive" panhandling, begging, charitable and political solicitation activities are regulated in the following areas that give rise to specific personal safety and privacy concerns as defined in part II of this ordinance:

i) Areas with heightened personal security concerns as previously defined in subsection II (b); and

ii) Areas with heightened privacy considerations as previously defined in subsection II(c).

(b) Prohibition. Neither "aggressive" nor "passive" panhandling, begging, charitable and political solicitation shall be conducted in areas defined as involving heightened personal security or heightened privacy considerations.

(c) Penalties. [It may be appropriate to create heightened penalties for aggressive panhandling in these sensitive areas. The current draft prohibits both passive and aggressive panhandling in these areas and does not differentiate in terms of penalties as between the two types. Jurisdictions might wish to prohibit only aggressive panhandling in these sensitive areas and might impose more serious penalties than in other areas where aggressive panhandling is prohibited.]

VI. Panhandling, Begging, Charitable Protection of Public Access and Vehicular Safety in Public Streets and Highways and on Traffic Medians and on High Volume and High Speed Highways.

(a) Areas regulated.

i) Areas regulated by this section include those defined as "areas with heightened public safety concerns" as defined in section II (d) of this Ordinance.

(b) Findings. The City Council finds as follows:

1. Public Safety. Both aggressive and passive begging, panhandling, charitable or politicals licitation within streets and highway rights of way, or on small traffic medians (under 8 square feet in size), or on traffic medians located on high speed and high-volume traffic corridors as

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PRACTICE TIPS

Navigating Dangerous Waters: Defending a Governmental Entity

By: Wynetta Massey, City Attorney, Colorado Springs, Colorado

I. Summary

At one time or another, every municipal lawyer has asked, "Who is the client?" When the City of Colorado Springs Charter was amended to abandon the council-manager form of government (FOG) in favor of a council-mayor FOG, the city attorney was no longer appointed by the city council, but rather by the mayor with the consent of the city council. Using the Model Rules, this article discusses ethical considerations when representing a municipal entity in the context of a change in the FOG and also highlights the need for a clear understanding of the municipal attorney's role. This article outlines the circumstances leading to the promulgation of the "Office of the City Attorney Legal Ethics Guidelines,"[1] and provides suggestions for the development of jurisdiction-specific ethics guidelines.

II. Council-Manager FOG

When the citizens first approved a City Charter in 1909, Colorado Springs, Colorado was organized as a council-manager FOG. The city manager was appointed by a majority of the city council, as were the city attorney, city auditor, city clerk, and city treasurer, and each served at the pleasure of the city council.

In addition to four district councilmembers, four at-large councilmembers and a mayor were elected to four-year terms. The mayor was the chair of the city council, and the official head of the government for certain purposes (signing intergovernmental agreements, executing official documents, etc.).

The city manager had full City Charter authority to run the operations of the municipal government, including:

- Holding and exercising all executive and administrative powers.
- Enforcing laws and ordinances.
- Hiring, firing, and supervising all city employees.
- Organizing departments.
- Delegating certain authorities, but regardless of delegation, "responsibility for the proper and effective administration of the city remains always with the city manager and none other."
- Negotiating, executing, administering, and enforcing contracts.
- Attending and being heard at council meetings and participating in discussions without having a vote.
- Recommending legislative measures the Manager deemed "necessary or expedient."
- Preparing and submitting an annual budget.

This system worked well for 100 years – with the occasional political, social, economic, or moral hiccup. The Great Recession, however, presented a challenge that the council-manager FOG could not overcome.

In light of the worsening economic conditions, the city manager recommended broad cost-savings measures. By 2010, the city had cut 550 jobs, closed swimming pools and restroom facilities, turned off streetlights and fountains, removed trash cans from parks, cut 100,000 hours of transit services, and sold its police helicopter. The public's dissatisfaction with government's response to the economic downturn took root in an effort to restore political accountability for management decisions. In November 2010, the voters approved comprehensive amendments to the City Charter to implement a council-mayor FOG and to separate legislative and executive functions more clearly.

III. Council-Mayor FOG

To accommodate a change in the FOG, several Charter amendments were necessary.[2] Since the new "strong mayor" would no longer be a voting member of the city council, it was necessary to add a fifth at-large councilmember.[3] City council's authority was limited to legislative matters unless otherwise set forth in the Charter,[4] and the mayor's authority and responsibilities were delineated. In addition to all the executive and administrative functions formerly exercised by the city manager listed above, the FOG Charter amendments contained additional powers and duties for the mayor:

- Veto authority over certain city council ordinances.[5]
- Appointing a chief of staff.[6]
- Appointing, subject to city council confirmation, the city clerk, city attorney and municipal court judges, chief financial officer, police chief, fire chief, and certain department heads.[7]
- Preparing and submitting a strategic plan to the citizens.[8]
- Receiving an annual salary.[9]
- Being an *ex officio* non-voting member of the Utilities Board.[10]
- Having "direct control over city revenue."[11]
- Being succeeded by the president of council, as acting mayor, until an election could be called to fill a vacancy in the office of mayor should he or she be unable to perform the duties of office for more than a temporary or short-term absence.[12]

The city attorney's office (CAO) set about analyzing the Charter amendments, reviewed the City Code, and set about helping the elected officials understand the significance of the change in the FOG and navigate a course forward. The CAO recommended several City Code amendments to implement the new FOG that city council approved prior to the April 2011 municipal election.[13]

IV. Balancing the Separated Powers

The fast-paced implementation of the new FOG left little time for elected and administrative officials to adapt. Relations between the branches of government were initially respectful and optimistic. All seemed eager to fulfill the voters' intent and make the new FOG work. Tensions started to rise, however, when the new mayor embraced the "strong" descriptor. Elected just seven months after the voters approved the FOG Charter amendments, the new mayor had no previous government experience and believed the city should be run like a private business. The council, not content with being limited to legislative affairs, differed with the mayor on most questions of governance. Both sides engaged in less than cordial rhetoric.

Over the course of his four-year term, the mayor replaced the city clerk, the city attorney (2x), the chief financial officer, the public works director (2x), parks director (2x), planning director (2x), and the aviation director, along with other non-confirmation department senior management.[14] The mayor drew key personnel from the private sector—the first chief of staff was from the hospitality industry, and the new city attorney had most recently served as general counsel for a private liberal arts college. Like the mayor, the new city attorney approached his government service with reliance on his private practice experience.

As the mayor's term progressed, open conflict between the council and mayor escalated. When their differences rose to the level of a dispute, the council or mayor would call upon the new city attorney for an opinion. On questions specifically addressed by the Charter, such as those related to the separation of legislative and administrative or executive powers, both branches would acknowledge the plain language of the Charter. For those questions not specifically addressed in the Charter, often pertaining to the balance of power, there was a perception that the city attorney advocated and argued for expanded mayoral authority.

Perhaps the most contentious issue arose over a matter not specifically addressed in the City Charter or the City Code: The mayor broke with long-standing practice and identified five large "appropriating departments" in his annual budget.[15] The appropriating departments were:

- The Police Department,
- The Fire Department,
- The Parks, Planning & Public Works Department (P3),
- The City Council Department, and
- The Administration Department.[16]

The City Charter provided that "the city council *may* establish departments, divisions, offices, or agencies" by ordinance.[17] By codified ordinance, the city council provided that the mayor "*shall* establish departments, divisions, offices, and agencies for municipal operations." [18] Neither the Charter nor the City Code defined what "departments" meant, or whether there was a difference between an "appropriating department," "operating department," or "administrative department."

The legal effect of identifying appropriating departments came into question during the fiscal year administration of the budget. The City Code permitted funds to be moved within a department at the mayor's direction, but required a city council resolution to transfer funds between departments.[19] Because the "appropriating departments" in the mayor's budget did not mirror the operational department organization of the city, city council became concerned that the mayor had free rein to move considerable funds between operational departments yet within one appropriating department. The council asked the new city attorney whether the appropriating departments were legal, and how the council could change them to ensure transparency.

As this and other balance/separation issues arose, the city attorney became more closely aligned with the mayor and the council began to question the new city attorney's loyalty. A little over two years after being appointed, the new city attorney resigned, and the mayor appointed his second city attorney (CA) from within the CAO. CA had been serving as the legislative counsel during the new city attorney's tenure and had drafted several of the separation/balance opinions. Because the council had doubts about CA's loyalty, they decided to conduct a "confirmation interview" before it acted on CA's appointment.

V. Office of the City Attorney Legal Ethics Guidelines

It became clear during the confirmation interview that councilmembers did not have an understanding of the ethical obligations borne by attorneys in general, or municipal attorneys in particular. Councilmembers believed that CA would be loyal to the mayor because CA was "hired and fired" by the mayor, and of course CA would do anything to keep a paycheck. Council renewed its belief that it needed separate, outside counsel who would be loyal to the council and advocate its position against the mayor.

CA set about to rebuild the relationship between council and the CAO after her confirmation. She formed a committee internal to the CAO to draft a document that would serve as a statement of purpose for the CAO while also educating the elected officials, administrative officers, staff, and the public on the role of a city attorney and the nature of the municipal attorney-client relationship. The committee brainstormed the elements of the relationship that needed to be addressed, researched the Code of Professional Responsibility, and used the Colorado Attorney General's 1998 "Legal Representation: Memorandum and Guidelines" as a model.

A draft document was circulated within the CAO and attorney comments, questions, and edits were reviewed and considered by the committee. CA retained a former solicitor general from the Colorado Attorney General's Office as ethics counsel to review the proposed

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Election Law in the Trump Supreme Court

By: Ben Griffith, Griffith Law Firm, Oxford, Mississippi

Several important election law cases have been decided during the term that ended June 30, 2017, and several more may be coming before the Court for oral argument during the October 2017 term. As we move forward with a nine-member Court, it might be helpful to step back and take a broad look at the judicial landscape as Justice Neil Gorsuch joins the Court as its long-awaited ninth Justice. In an article by Stephen E. Gottlieb published shortly before Justice Neil Gorsuch was confirmed, Gottlieb gave this ominous warning:

> President Lincoln famously told the country at Gettysburg that we had a government of, by and for the people. That conclusion hangs in the balance. Will the next justice and the Court that he will steer prove a partisan Court, determined to steer the country toward one-party dominance, or will it and he prove to be a Court anchored to the American democratic creed, in which voters determine who handles the reins of government and politicians do not get the right to organize the voting machinery for their own benefit. Given the extent of existing voter suppression, gerrymandering, and other legal trends affecting the resilience of democratic institutions, this may be the single most important issue before the current Court. Gerrymandering is not just about equality but fundamentally about democracy. From a democratic standpoint, the willingness of some of the justices to treat legislative control over districting for the purpose of protecting their own seats is completely illegitimate, a reversal of democratic rules and requirements. Democracy requires neutrality rather than favoritism or manipulation to protect specific people or parties – the techniques of dictators. Because our first-past-the-post electoral system is unusual worldwide, precise comparisons are unusual but it is worth noting that many constitutions insist on proportionality; the U.S. Supreme Court and the Voting Rights Act have taken the contrary position, that proportionality cannot be required. Symmetry does not require proportionality, only that whatever the seats bounce from winning a given proportion of votes, both sides get that reward. It doesn't matter whether this is described as a kind of equality, between parties, or a requirement in addition to equality – either way it is democracy demands a legal system that preserves the symmetry of rewards from elections.[1]

During the term that ended June 30, 2017, several critically important election law cases were decided, including *Bethune-Hill v. Virginia State Board of Elections*, decided March 1, 2017. Several other election law cases, including *Cooper v. Harris*, were decided this term, and several more were also on the docket of the U.S. Supreme Court at the time Justice Neil Gorsuch was confirmed on April 7, 2017. These may be heard and decided during the October 2017 term.

Bethune-Hill was a pre-Gorsuch racial gerrymandering case that may have a significant impact on state and local government elections and electoral processes at the municipal and county level. The Supreme Court reversed and remanded (7-1) a lower court decision that rejected racial gerrymandering challenges to a dozen voting districts in Virginia drawn after the 2010 census, each with at least a 55 percent population of black residents of voting age. The Court reasoned that race cannot be the predominant reason in creating legislative districts and that "the racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not post hoc justifications the legislature in theory could have used but in reality did not" and that "if race for its own sake is the overriding reason for choosing one map over others, race still may predominate." One district in which race played the dominant role in drawing it was nonetheless justified by an attempt to comply with the Voting Rights Act, which forbade the reduction of minority voters' ability to elect candidates of their choice, where the state legislature's 55 percent target "was necessary for black voters to have a functional working majority."

In *Cooper v. Harris*, the Court upheld (5-3) a lower court ruling that two North Carolina congressional districts were racially gerrymandered and intentionally drawn to dilute the power of black voters by packing them into two districts, referred to by one critic as "apartheid-type redistricting."

In *North Carolina v. N.C. Conference of the NAACP*, the Court denied certiorari and allowed to stand a Fourth Circuit ruling that North Carolina's election reforms enacted shortly after the Court's 2013 decision in *Shelby County v. Holder*, imposing a photo ID requirement, reducing early voting by seven days, and eliminating same day registration, were motivated by discriminatory intent to deny African-Americans the right to vote, despite the state's claim that the challenged reforms did not adversely affect minority voters. Denial of cert. in the

North Carolina case leaves open the question whether Voter ID violates Section 2 of the Voting Rights Act.

Other election law cases have planted issues squarely before the Court that may be decided during the October 2017 term. The issues include whether the NC Congressional Redistricting Plan violates the First Amendment right to freedom of association (*Common Cause v. Rucho*); whether the Wisconsin redistricting plan violates the First and Fourteenth Amendment (*Gill v. Whitford*); and whether removal of eligible voters from Ohio's voter-registration rolls violated the NVRA and deprived eligible citizens of the right to vote (*Ohio A. Philip Randolph Institute and NEOCH v. Husted*).

Near the end of the term on June 19, 2017, the Court agreed to hear *Gill v. Whitford*, a case that is focused on whether partisan gerrymandering in Wisconsin violated the Constitution and whether there is indeed a judicially discernable and manageable standard by which political gerrymander cases are to be decided. The case will be argued during the October 2017 term. One of the issues in this case will likely be whether evidence of an "efficiency gap" is relevant to such a claim.[2] A detailed analysis of these most recently minted (or soon-to-be decided) election law decisions will be provided at IMLA's April 2018 Annual Meeting in Washington, D.C.

Editor's Note: Ben Griffith, partner in the Griffith Law Firm, Oxford, Mississippi, is a longstanding IMLA member and Chair of the IMLA International Committee. He is an acknowledged expert on voting rights issues and is the Editor of America Votes: A Guide to Modern Election and Voting Laws, now in its second edition.

Notes

1. Stephen E. Gottlieb, *Democracy Essential to the Legitimacy of Constitutional Interpretation, Legitimacy in Constitutional Interpretation*, March 10, 2017 p. 1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931153

2. See Nicholas Stephanopoulos & Eric McGee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

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identified in this ordinance, give rise to an increased risk of injury to solicitors on medians, traffic congestion, and traffic accidents that may affect drivers or solicitors.

2. Alternative Sites. This ordinance provides ample alternative sites for passive begging, pa handling, charitable and political solicitation in areas that do not give rise to enhanced public safety concerns or personal privacy and security concerns.

3. Evidence, The City Council has undertaken and carefully reviewed studies designed to identify areas in which small traffic medians may put solicitors or motorists at risks, and high speed and high volume traffic corridors that likewise are especially dangerous, in order to assure that these regulations are grounded in appropriate governmental concerns, are narrowly tailored, and allow alternative avenues for communication.

(c) Prohibitions

1. Generally. Both passive and aggressive begging, panhandling, charitable and political solicitation shall be restricted in "areas with heightened public safety concerns" as defined in subsection II(d).

2. Exceptions. The City Council may identify limited periods each year in which these prohibitions should not be enforced as a result of particularly pressing governmental concerns related to such activities.

a. Charitable initiatives. The Council may designate up to two days a year as days on which these prohibitions shall not apply in order to allow effective solicitation for designated charities, provided that appropriate safety measures are implemented.

b. Election activities. The Council may designate up to 5 days a year as days on which these prohibitions shall not apply in order to allow effective political communications in connection with local, state, and federal elections, provided that appropriate safety measures are implemented.

c. Documented public safety plan. In the event that the City Council designates days as exceptions from this ordinance's requirements, it shall also adopt a documented public safety plan to reduce risks to public safety that might otherwise arise.

d. Comparable treatment. To the extent that the City Council adopts exceptions to the prohibitions set forth in section VI(c)(1), relating to charitable initiatives and election activities, such exceptions shall extend to all parties otherwise covered by the provisions of this ordinance relating to begging, panhandling, charitable and political solicitation.

VII. Penalties

[This model ordinance does not address penalties, since penalties would need to be integrated with those applicable under other local ordinances. Note that there are opportunities to specify differing penalties for different offenses under this ordinance. Note 5 above suggests, for example, the possibility of enhanced penalties for aggressive panhandling in sensitive areas. Enhanced penalties might also be appropriate for recidivists. Some public policy advisers have suggested that a possible penalty for solicitors on probation would be to prohibit them from soliciting in particularly desirable locations. Because of the importance of local judgments on such matters, this draft model ordinance does not attempt to set out options for penalties.]

VIII. Severability

[Include severability provision that would allow provisions not struck down to remain intact].

Questions or comments? Please contact Judith Wegner at Judith_wegner@unc.edu.



Section 1983: Understanding the Basics

By: Anne H. Turner, Senior Attorney, Colorado Springs, Colorado

Enacted by Congress in 1871 to ensure that, in the aftermath of the Civil War, state and local laws were not being used to obstruct the rights of newly-enfranchised Americans, "Section 1983" has increasingly become a principal mechanism of recourse against perceived wrongs committed by local government actors.

The Statute – 42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress ...."

1. Jurisdiction and Venue

Both federal and state courts have jurisdiction over claims under 42 U.S.C. § 1983.

In federal court, jurisdiction is conferred pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343(3) (federal laws providing for equal rights). State courts have concurrent jurisdiction with the federal courts to adjudicate Section 1983 claims. *See Howlett by and Through Howlett v. Rose*, 496 U.S. 356, 358 (1990); *Maine v. Thiboutot*, 448 U.S. 1, 6 (1980); *Redevelopment Agency of City of San Bernardino v. Alvarez*, 288 F. Supp. 2d 1112, 1115 (C.D. Cal. 2003); *Koziara v. City of Casselberry*, 239 F. Supp. 2d 1245, 1257 (M.D. Fla. 2002). Indeed, states cannot divest their state courts of general jurisdiction from hearing claims brought under 42 U.S.C § 1983. *See Haywood v. Drown*, 556 U.S. 729, 736–737 (2009).

If the plaintiff files suit in federal court, the district court has supplemental jurisdiction to address any additional state law claims related to the federal claims. *See Voyticky v. Village of Timberlake, Ohio*, 412 F.3d 669 (6th Cir. 2005). If the plaintiff files the § 1983 action in state court, the defendant may remove to federal district court. *See Dorsey v. City of Detroit*, 858 F.2d 338, 340–341 (6th Cir. 1988).

With regard to the issue of venue, a civil action may be brought in "(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred ...;" or (3) if neither of the above apply, "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C.A. § 1391(b). " 'For the purposes of venue, state officers 'reside' in the district where they perform their official duties.' " *Rush v. Fischer*, 923 F. Supp.2d 545, 556 (S.D.N.Y. 2013) (citation omitted). "[A] plaintiff's choice of forum 'should not be disturbed unless the balance of the factors tips heavily in favor of a transfer.' " *Id.* at 556–57.

2. Who can be a claimant?

A cause of action is available under § 1983 to "any citizen of the United States or other person within the jurisdiction thereof" who has suffered the deprivation of a federally protected right. Thus, in addition to citizens, aliens within the jurisdiction of the United States also may assert claims under § 1983. *See Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (aliens could challenge under § 1983 statute prohibiting aliens from engaging in the private practice of engineering); *Bolanos v. Kiley*, 509 F.2d 1023, 1025–1026 (2d Cir. 1975) (due process and equal protection rights apply even to aliens who are present illegally in the United States); *Simon v. Lovgren*, 368 F. Supp. 265 (D.V.I. 1973), *overruled on other grounds by Mathurin v. Government of the Virgin Islands*, 398 F. Supp. 110 (D.V.I. 1975).

Corporations also may sue under § 1983 to vindicate their federal rights. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *Levy v. Pappas*, 510 F.3d 755, 762 (7th Cir. 2007), *abrogated by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1305 (11th Cir. 2006); *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277, 282 (7th Cir. 2003), *cert. denied*, 540 U.S. 879, 124 S. Ct. 301, 157 L. Ed. 2d 144 (2003); *Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1323 (11th Cir. 2001).

A § 1983 claim is personal to the person(s) injured by the deprivation of a federally-protected right; other persons may bring suit in a representative capacity of the injured individual (e.g., a parent as a representative of a minor child, the estate of a person who is deceased), but not to vindicate the rights of others in their own name. *See Jamieson By and Through Jamieson v. Shaw*, 772 F.2d 1205 (5th Cir. 1985) (automobile passenger who was injured when car collided with roadblock was entitled to assert that she was "seized" with excessive force in violation of her Fourth Amendment rights, but she had no standing to challenge arrest of car's driver); *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987) (while representative of decedent's estate could assert Fourth Amendment claim on decedent's behalf for use of excessive force, decedent's surviving children could not maintain personal actions under Fourth Amendment since they

were not directly subjected to use of force), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Moats v. Village of Schaumburg*, 562 F. Supp. 624 (N.D. Ill. 1983) (union president could not maintain excessive force action based on arrest of two members of his union).

Although the sweep of § 1983 is broad, courts have found that the following entities may not assert claims under § 1983: the United States (*see United States v. City of Jackson, Miss.*, 318 F.2d 1 (5th Cir. 1963), *rehearing denied,* 320 F.2d 870 (5th Cir.1963); *United States v. Biloxi Municipal School Dist.*, 219 F. Supp. 691 (S.D. Miss. 1963), *aff'd*, 326 F.2d 237 (5th Cir. 1964)); an Indian tribe (*Inyo County, Cal. v. Paiute- Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 708 (2003)); and a state agency (*Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 573 F.3d 548, 551 (7th Cir. 2009), *reh'g on other grounds*, 603 F.3d 365 (7th Cir. 2010)).

3. Who is a "person" subject to liability?
Any individual person may be sued under Section 1983. A "person" subject to liability under Section 1983 also includes a municipality or other local governing body, such as a county government. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978); *Hampton Co. Nat. Sur., LLC v. Tunica County, Miss.*, 543 F.3d 221, 224 (5th Cir. 2008). The District of Columbia, as a municipal corporation, is a "person" against whom a Section 1983 may be asserted. *Jones v. Horne*, 634 F.3d 588, 600 (D.C. Cir. 2011).

The United States and federal agencies are not "persons" that can be sued under Section 1983. *See Fountain v. United States*, 605 F. Supp. 2d 608, 611 (D. Del. 2009).

Under the Eleventh Amendment to the United States Constitution, the State and its departments and subdivisions are not "persons" subject to suit under Section 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989); *Lapides v. Board of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613, 617 (2002). A Territory of the United States also may not be sued under Section 1983. *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990).

However, individual State and Territory employees can be sued under Section 1983 in their personal capacity. *Hafer v. Melo*, 502 U.S. 21 (1991); *Damron v. North Dakota Comm'r of Corrections*, 299 F. Supp. 2d 970, 979-80 (D. N.D. 2004), *aff'd* 127 Fed. Appx. 909 (8th Cir. 2005).

4. Personal Capacity Liability
A plaintiff who sues a "person" in their personal or individual capacity seeks to impose liability against the individual. There are two elements to such a claim: (1) the defendant deprived the plaintiff of a right "secured by an appropriate federal law" and (2) the defendant was acting "'under color of'" state law when depriving the plaintiff of this right. Section 1983 Actions—Scope of Action: Elements of Claim, Remedies, 13D Fed. Prac. & Proc. Juris. § 3573.2 (3d ed.).

Violation of Federal Law. Section 1983 provides a remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...." Section 1983 itself "is not a source of substantive rights; it provides only a remedy." Section 1983 Actions—Scope of Action: Elements of Claim, Remedies, 13D Fed. Prac. & Proc. Juris. § 3573.2 (3d ed.). Purely state-created rights cannot be vindicated under Section 1983. *See J.H. ex rel. Higgin v. Johnson*, 346 F.3d 788, 793 (7th Cir. 2003), *cert. denied*, 541 U.S. 975 (2004); *Jones v. City & County of Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988) ("Section 1983 does not ... provide a basis for redressing violations of *state* law, but only for those violations of *federal* law done under color of state law.") The source of the right to be vindicated must be found in federal law.

"Not all federal laws—indeed, not even all constitutional provisions—confer rights that can be enforced through § 1983." Section 1983 Actions—Scope of Action: Elements of Claim, Remedies, 13D Fed. Prac. & Proc. Juris. § 3573.2 (3d ed.). *See id.* for a discussion of federal laws that do and do not confer rights enforceable under Section 1983.

Under Color of State Law. When depriving plaintiff of a federally-protected right, the defendant must have acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia ...."—in short, under color of state law. This element is not usually an issue where the actor is a state or local officer in exercise of their authority or apparent exercise of their authority. *See* Section 1983 Actions—Scope of Action: Elements of Claim, Remedies, 13D Fed. Prac. Proc. Juris. § 3573.2 (3d ed.); *Stack v. Perez,* 248 F. Supp. 2d 106 (D. Conn. 2003). However, the Court has clearly stated "an action can be under color of state law even though it has not been authorized – and indeed is prohibited – by the state." Section 1983 Actions—Scope of Action: Elements of Claim, Remedies, 13D Fed. Prac. & Proc. Juris. § 3573.2 (3d ed.). *See Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978).

But note, a private party may also be sued in circumstances in which the action is "under color of state law" though not "state action." Section 1983 Actions—Scope of Action: Elements of Claim, Remedies, 13D Fed. Prac. & Proc. Juris. § 3573.2 (3d ed.); *see Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). See Section 1983 Actions—Scope of Action: Elements of Claim, Remedies, 13D Fed. Prac. & Proc. Juris. § 3573.2 (3d ed.) for a discussion of private party liability.

5. Supervisory Capacity Liability
A supervisory liability claim seeks to hold a supervisor of a constitutional tortfeasor liable not because the supervisor directly violated the plaintiff's constitutional rights but because the supervisor (through action or inaction) facilitated, encouraged, condoned or acquiesced in the subordinate's constitutional violation. The claim traditionally has consisted of the following elements: "(1) a subordinate's direct responsibility for a constitutional tort; (2) 'causation'; and (3) the supervisor's possession of a culpable mens rea." William N. Evans, *Supervisory Liability in the Fallout of Iqbal*, 65 SYRACUSE L. REV. 103, 114 & n.25 (2014). "Causation" was met by showing the supervisor's "personal involvement" in the plaintiff's injury—an "affirmative link" between the supervisor's action or inaction and the constitutional violation. *Id.* at 116. Causation often came in the form of a supervisor's failure adequately to train, supervise or discipline the subordinate. The mens rea element, regardless of the constitutional right allegedly violated by the subordinate, was deliberate indifference, *i.e.*, the supervisor had actual or constructive knowledge that the subordinate posed

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Section 1983 Cont'd from page 25

an unreasonable risk of constitutional harm to others and consciously disregarded such risk. *Id.* at 117.

In 2009, the United States Supreme Court issued *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), where the Court cast doubt on the continuing viability and contours of a supervisory liability claim. In *Iqbal*, a prisoner sued federal officials under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), alleging, *inter alia*, that FBI Director Robert Mueller and Attorney General John Ashcroft "condoned and agreed" to their subordinates' discriminatory actions. The Supreme Court dismissed the claims against Mueller and Ashcroft, suggesting that "supervisory liability"—liability based on one's seniority over a torfeasor—does not exist. According to the Court, § 1983 liability can only be predicated on one's own misconduct, committed with the requisite mens rea. The Court stated:

> [*Iqbal*] argues that, under a theory of "supervisory liability," [Mueller and Ashcroft] can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees."
>
> That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

Iqbal, 556 U.S. at 677 (citation omitted).

After *Iqbal*, the circuit courts went their separate ways, all but one continuing to recognize supervisory liability, but under varying standards. See William N. Evans, *Supervisory Liability in the Fallout of Iqbal*, 65 Syracuse L. Rev. 103 (2014), for a thorough analysis of pre- and post-*Iqbal* supervisory liability case law.

6. Official Capacity and Municipal Liability

Just as an individual can be liable under § 1983, so too may a municipality. But the municipality is not liable merely because it employs a tortfeasor; there is no vicarious or *respondeat superior* liability under § 1983. Like an individual, the municipality can be liable only for its own misconduct. *See Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

To establish § 1983 liability against a municipality, the plaintiff must prove that a municipal "policy or custom" is the "moving force" of a constitutional violation. *Monell*, 436 U.S. at 694. For direct municipal liability, the municipal policy or custom may take the form of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or for "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Id.* at 690-91. Where an employee acts inconsistently with municipal policy, municipal liability should not be imposed because municipal policy is not the "moving force" of the constitutional violation. *See Monell*, 436 U.S. at 694.

A municipality may also be held liable under § 1983 for a failure to train (like pre-*Iqbal* supervisory liability that is indirect). *See City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Municipal liability based on a failure to train theory, however, is actionable only when the failure "amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact. *Id.* at 388. Deliberate indifference in this context means that the "need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390.

A § 1983 claim asserted against an individual in his or her "official capacity" is synonymous with a § 1983 claim against the municipality that employs the individual. "[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent...." *Monell*, 436 U.S. at 690 n.55. If a plaintiff sues both an individual (i.e., the police chief) in his or her official capacity as well as the municipality itself, dismissal of the police chief may be obtained because the claims are duplicative. *See, e.g., Doe v. Douglas Cty. Sch. Dist.*, 775 F. Supp. 1414, 1416 (D. Colo. 1991) ("Where a suit contains both entity and official capacity claims, the only defendant is the entity.").

Leading cases on the subject of municipal liability include the following:

- *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978);
- *City of Canton v. Harris*, 489 U.S. 378, 390 (1989);
- *Board of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397 (1997); and
- *Connick v. Thompson*, 563 U.S. 51 (2011).

Conclusion. This brief summary is by no means a complete study of the many intricacies of Section 1983. Hopefully it is a useful introduction to a fundamental feature of the legal landscape that most municipal lawyers, whether newly-minted or seasoned, will repeatedly encounter during their careers.



Anne H. Turner is a Senior Attorney in the Colorado Springs City Attorney's Office. She represents the City and its employees in litigation involving constitutional, tort and contract claims. Her practice has included defending the City and its police officers against claims brought under 42 U.S.C. § 1983 alleging violations of the First and Fourth Amendments, and the Equal Protection and Due Process clauses of the Fourteenth Amendment. Before joining the Colorado Springs City Attorney's Office in 2010, Ms. Turner practiced as a general commercial litigator with private law firms in Chicago and Colorado Springs.



Searches, Sovereign Immunity and Funeral Protests

By: IMLA Editorial Board

Search and Seizure: Failure to Provide Jury with Clear Terry Instruction Requires Remand

***Doornbos v. City of Chicago*, No. 16-1770 (7th Cir. Aug. 18, 2017).**

Vacating a district court finding for the City, the Seventh Circuit has found that jury instructions were flawed because they did not explicitly state that law enforcement must reasonably believe that a civilian is armed and dangerous to justify a frisk.

Joseph Doornbos (Doornbos) was exiting a Chicago train station when two plainclothes Chicago police officers confronted him, threw him to the ground and ultimately arrested him for resisting arrest. Doornbos challenged the charge and won at trial. He then sued Chicago, alleging excessive force and malicious prosecution. This case also went to trial and Doornbos lost, prompting him to appeal to the Seventh Circuit, alleging the judge erred in his jury instruction regarding *Terry* stops.

The Seventh Circuit found the judge's instructions were inadequate. The court pointed out a *Terry* stop has two elements – first that the officer performing the initial stop reasonably suspects the person of committing or about to commit a crime and second, to *graduate from a stop to a frisk*, that the person is armed and dangerous. The judge's instruction, which was the defendant's version and which was objected to by Doornbos, was that "[a] police officer is allowed to conduct a brief investigatory stop of a citizen, not rising to the level of an arrest, if the officer performing the stop has a reasonable suspicion that criminal activity is afoot." Doornbos's request for an instruction on frisks to explain that an officer *must have reasonable suspicion that a civilian is armed and dangerous to justify a frisk*, was denied.

The court found this was erroneous because the officer's own testimony suggested the frisk was unjustified and thus unconstitutional – specifically because the testimony lacked a showing of reasonable suspicion that Doornbos was armed and dangerous, meaning the officer, arguably, could not legally grab him as he testified to having done. The lower court's election "not to include an instruction on frisks deprived the jury of the law it needed to reach a sound verdict." The Circuit vacated the judgment and remanded for a new trial.

Search and Seizure: Lack of Cooperation by Occupants Does Not Justify Further Police Searching of House after Making Arrest

***United States of America v. Nelson*, No. 16-3292 (10th Cir. Aug. 17, 2017).**

Reversing the district court, the Tenth Circuit has refused to find that, because officers were not immediately allowed entry into a residence and were initially mislead as to the location of a suspected probation violator, they were therefore justified in making a "protective sweep" for additional dangerous occupants which led to discovery of weapons.

A US Marshall was informed by a homeowner that Stephen Nelson (Nelson), wanted for probation violations, was hiding in the informant's residence in Kansas City, Kansas. The homeowner authorized the Marshals to search his home. When officers inquired at the front door as to Nelson's whereabouts, a resident initially tried to shut the door on them and then told them Nelson was upstairs. He was ultimately discovered in the lower level of the house and arrested. Officers continued searching the dwelling, resulting in the discovery of two firearms that were attributed to Nelson, for which he faced additional charges. He challenged the search, arguing that it violated the Fourth Amendment, but the district court found the post-arrest search was a valid protective sweep because the officers "could have reasonably believed that someone other than [Nelson] was hiding in the house." By means of a conditional plea, Nelson continued to fight the Fourth Amendment case.

The Tenth Circuit vacated. It identified the relevant exception for when police officers may search a residence without a warrant, specifying that officers may "conduct a protective sweep beyond areas immediately adjoining the arrest if there are articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The facts identified by the government to justify the sweep that netted the firearms at issue and that the lower court relied are were that: "(1) [the person that opened the door (not Nelson)] attempted to shut the front door on the deputies; (2) [this person] incorrectly informed the deputies that Nelson was upstairs, on the fourth level, when in fact he was on the first level; and (3) Nelson failed to immediately show himself to the deputies when they instructed him to do so."

The Circuit denied that these facts – individually or as a whole - created an inference that someone other than Nelson was hiding in the house. The Court rejected the government's reliance on the fallback position that the officers had no way of knowing whether someone else was in the house. This was plainly unacceptable to the Circuit; such an argument eviscerates the entire fact-based analysis that makes this an

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exception to the general rule that officers *may not search private homes at will*. The Circuit reversed the lower court on this issue. The appeal, however, did provide the government the chance to argue the scope of the consent that the homeowner had initially provided; the Circuit Court declined to decide this issue of first impression on appeal and remanded.

Sovereign Immunity: Sovereign Immunity Available Where State Offers Deaf Litigant the Opportunity for a Court-Provided Interpreter

***King v. Marion Circuit Court,* No. 16-3726 (7th Cir. August 18, 2017).**

Where a deaf plaintiff voluntarily chooses to use private arbitration in a domestic relations case and eschews litigation through the courts where he would have been provided an interpreter, he cannot claim that the state has impaired his constitutional rights—and the state can assert sovereign immunity.

Indiana allows its counties to subsidize private dispute resolution in domestic-relations cases and Marion County instituted such a subsidy. Dustin King (King) sought to take advantage of the program in order to defray mediation costs. His participation in the program was authorized, but when King, who is deaf, also asked to have the court provide an American Sign Language interpreter, the request was denied. He ultimately used his father as an interpreter and succeeded in obtaining dismissal of the domestic-relations case.

He promptly sued Marion Circuit Court in federal district court, arguing it violated the Americans with Disabilities Act by refusing to provide him with a free interpreter in mediation, thus, "by reason of [his] disability ... den[ying him] the benefits of the services, programs, or activities of a public entity." After a bench trial, King was awarded $10,380.00 in damages, prompting the Marion Circuit Court to appeal.

The Seventh Circuit did not address the merits of the appeal, instead finding the threshold issue of sovereign immunity controlled. The Circuit noted the Marion Circuit Court is a division of the State of Indiana, meaning King actually filed suit against Indiana itself. Indiana had asserted sovereign immunity in the district court, but that argument had been rejected on the basis of *Tennessee v. Lane*, 541 U.S. 509 (2004). In *Lane* – a disability case about a courthouse that had no wheelchair access at all to the second story courtrooms – the Supreme Court held the people have a broad "fundamental right of access to the courts."

The Circuit Court noted that Section 5 of the Fourteenth Amendment permits Congress to abrogate states' sovereign immunity 1) to protect substantive rights guaranteed by the Fourteenth Amendment's other provisions and 2) to authorize federal litigation to enforce rights guaranteed by the other Amendments that have been incorporated against the states via the Fourteenth Amendment--but that it *does not* permit Congress to authorize federal litigation against the states to enforce statutory rights.

In this case, the Circuit found the mediation program did not prevent King from accessing "judicial attention" because he was *not required* to participate in the mediation program and, especially, since the judge in the case offered him the option of going through the standard court process where a no-cost interpreter could be provided. King had rejected that offer however, instead choosing to go through the subsidized mediation program.

The Circuit reversed and remanded with instructions to dismiss without prejudice to King raising the Americans with Disabilities claim in state court – where Indiana is free to waive its sovereign immunity.

Speech: Nebraska's Two Hour/500-Foot Buffer Restriction against Picketing at Funerals is Valid

***Phelps-Roper v. Ricketts,* No. 16-1902 (8th Cir. Aug. 11, 2017).**

In the latest chapter of a continuing saga, the Eighth Circuit has upheld Nebraska's restriction against picketing within 500 feet of a funeral, between one hour before the service to two hours after, finding that a group of flag-bearing, silent bikers who were invited by the deceased soldier's family were not "picketing" under the Nebraska law, and that police failure to actively enable the protestors to display their signs did not constitute a "heckler's veto."

Caleb Nelson, a highly decorated Navy SEAL, died in Afghanistan when his vehicle struck an improvised explosive device. Days later, on a Nebraska street corner not far from where his church funeral would begin, a picketer wore a t-shirt announcing "GOD HATES FAGS" and held signs proclaiming in large font "THANK GOD FOR DEAD SOLDIERS," "SOLDIERS DIE 4 FAG MARRIAGE," "SHAME," and "DESTRUCTION IS IMMINENT."

Shirley Phelps-Roper and other Westboro Baptist Church (WBC) members consider military funerals to be "patriotic pep rallies" which suggest that God approves of national policies contrary to Biblical instruction. They picket to assert that God does not bless a nation that tolerates homosexuality and adultery. They coordinate with law enforcement and do not commit violence; their typical process is to begin picketing 45 minutes before the funeral and cease as soon as the service starts. Nebraska's Funeral Picketing Law (NFPL) as revised in 2011 prohibits picketing within 500 feet of a cemetery, mortuary, or church from one hour prior to the start of a funeral to two hours after it ends. Neb. Rev. Stat. §§ 28-1320.01 to .03.

Plaintiffs originally challenged the NFPL in December 2009, when the NFPL required a 300-foot margin; their motion to enjoin was denied at the district court. In 2011, a panel of the Eighth Circuit reversed—whereupon Nebraska filed for rehearing.

That petition was held in abeyance while the court considered a similar ordinance from Manchester, Missouri, which prohibited picketing within 300 feet of any funeral, from one hour before to one hour after the service. In a unanimous 2012 decision (*Phelps-Roper v. City of Manchester*) which reversed prior holdings on the issue, the Manchester ordinance survived, because "it serve[d] a significant government interest, it [was] narrowly tailored, and it [left] open ample alternative channels for communication."

Plaintiffs argued that Nebraska's larger buffer zone of 500 feet was unconstitutional--and also alleged that WBC had been unconstitutionally targeted by the Nebraska legislature, citing a newspaper article in

which a legislator stated that he wished WBC protestors could be banned from picketing funerals.

The Eighth Circuit disagreed. The increase of the buffer zone to 500 feet versus the 300-foot buffer in *Manchester* did not change the outcome—the Circuit found that the NFPL served a significant government interest by protecting citizens from disruption during a funeral and avoiding potential violence, was still narrowly tailored, and left open ample alternative channels for communication. Allegations of legislative motive--thinly supported by the evidence--had no bearing on the statute's validity as enacted. Plaintiffs' facial challenge failed.

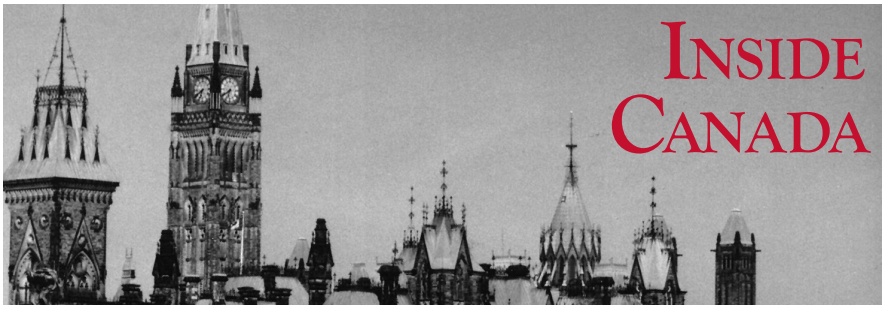
Their as-applied challenge also floundered. Plaintiffs attempted to demonstrate that opposing viewpoints had been allowed expression while their views were suppressed. They pointed to the fact that a motorcycle group, the Patriot Guard Riders (PGR) had been allowed inside the 500-foot perimeter and formed a flag line. But the PGR stood on different footing than the plaintiffs. First, their silent participation did not constitute "protest" under the Nebraska law. More importantly, they had been invited to Caleb Nelson's funeral by his close relatives. Those distinctions doomed plaintiffs:

> In short, Phelps-Roper requests that this court create a rule that, because the WBC chooses to protest a funeral, all others already participating in or attending that funeral must likewise be considered "protestors" under the NFPL. We decline Phelps-Roper's request.

Plaintiffs further argued that they had not been allowed to display their messages effectively because other members of the public blocked their signs and were not stopped by the police. They cited a recent Sixth Circuit case, *Bible Believers v. Wayne County*, 805 F.3d 228, 234 (6th Cir. 2015) (en banc) ("The scenario presented by this case, known as the 'heckler's veto' occurs when police silence a speaker to appease the crowd and stave off a potentially violent altercation.") The court disagreed that a heckler's veto had occurred in Nebraska—there was no evidence that police silenced WBC or selectively allowed the crowd to act in an unlawful manner at WBC's picket:

> The decedent's family and other private parties are under no obligation to listen to WBC's message and can take whatever lawful means they wish to avoid hearing or seeing Phelps-Roper. The First Amendment guarantees free speech, not forced listeners. ML





Cases of Interest

By Monica Ciriello, Ontario 2015

Warrantless Search and *Charter* Violation–but Evidence Still Admitted

***R. v. Orlandis-Habsburgo,* 2017 ONCA 649 (CanLII) http://canlii.ca/t/h59h9**

Horizon Utilities Corporation (Horizon) is an electronic energy provider wholly owned by the Cities of Hamilton (City) and St. Catherine's. Horizon provides electricity to the residents in the City, including the Appellants. An analyst at Horizon noticed an energy use pattern out of the Appellants' residence, which according to his training indicated the operation of a marijuana grow-op. Based on an informal relationship between Horizon and the Hamilton Police Service (HPS) the analyst forwarded the energy consumption pattern to the HPS. The HPS conducted further investigations at the residence, requested further data from Horizon and eventually sought and obtained a search warrant.

Relying on the search warrant the HPS entered the residence, found a marijuana grow-op, and arrested the Appellants. At trial the Appellants argued their s. 8 *Charter of Rights and Freedoms (Charter)* rights were violated by the HPS having obtained the Horizon data without their consent and using it in an investigation which led to the seizure of marijuana and ultimately their arrest. The trial judge rejected this argument finding no s. 8 violation and convicted the Appellants, which they appealed.

HELD: Appeal dismissed.

DISCUSSION: S. 8 protects individuals against unreasonable search and seizure, granting them a reasonable expectation of privacy. Relying on a plethora of case law, but in particular *R. v. Gomboc* 2010 SCC 55, the Crown argued there was no s.8 violation because there is a distinction between Horizon volunteering the data to the HPS as compared to HPS requesting the information. The Crown further argued that the energy consumption data received by HPS supplied very little information about the Appellants' activities or personal lifestyles, and therefore, that data did not violate a reasonable expectation of privacy.

The Court agreed in part, accepting the distinction as outlined in *Gomboc* – but held that the Appellants did have a reasonable expectation of privacy regarding their utility usage data. The Court noted that the energy consumption data allows inferences to be drawn about activities within the Appellants' home and case law has held that activities within a home are cloaked in a reasonable expectation of privacy. The Court held that without Horizon's data the HPS search warrant would never have been granted. Therefore the search of the residence must be treated as warrantless, and the warrantless search violated s. 8. Evidence obtained in a manner that infringes a *Charter* right must be excluded as per s. 24(2) if the Appellants established that "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".

The Court ultimately evaluated the issues from three parameters. The first was the police use of the data. The Court found it "difficult" to criticize police actions, given the state of the law at the time of the search. Under *Gomboc* and other precedents, the police understanding that they were entitled to use the data was reasonable. "The nature of the state conduct does not favour exclusion of the evidence. . ."

The second parameter was the impact on appellants' *Charter*-protected interests. "[A]lthough less serious than would have been the case had the examination and use of the data itself also constituted a serious intrusion on the appellants' s. 8 rights" that impact was significant and supported the appellants' contention that the evidence should be excluded.

The third factor – society's interests in an adjudication of the case on the merits – did not favour exclusion:

> The evidence obtained in the search was completely reliable, virtually determinative of culpability, and essential to the Crown's case. Without the evidence, there could be no trial on the merits. The appellants' conduct posed a significant and ongoing risk to those who lived around the appellants' residence. Society obviously has a strong interest in prosecuting those who, for money, choose to engage in a dangerous criminal activity that puts others around them at risk.

On balance, the Court was unpersuaded that the contraband and money seized from their residence should be excluded under s. 24(2) of the *Charter*. The evidence was admissible.

City's Application for Dismissal Granted in Accident that Occurred Twelve Years Prior

***Van Fossen v Edmonton (City)*, 2017 ABQB 503 (CanLII) http://canlii.ca/t/h5fhj**

The Plaintiff sustained injuries when her vehicle and a City of Edmonton (City) vehicle collided in 2005. Despite some discussions between the Plaintiff

and the City, there had not been significant advancement in the action. The Plaintiff served the Statement of Claim three years after the accident in 2008. Significant time passed until 2013 when the Plaintiff demanded and the City filed a Statement of Defence. Three years later, the Plaintiff served the Affidavit of Records on the City, the next month the City filed an application to dismiss for delay under rule 4.31 of the *Alberta Rules of Court.*

HELD: Application granted.

DISCUSSION: The Court outlined rule 4.3:

> 4.31(1) If delay occurs in an action, on application the Court may
> (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
> (b) make a procedural order or any other order provided for by these rules.
>
> (2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

The Court assessed 4.31(2) separately to determine if the delay was inordinate and inexcusable. There was no issue for the Court to determine that the matter was inordinate as 12 years had passed since the accident, ten years since the Statement of Claim was filed, four years since the Statement of Defence was demanded, and three years since the Affidavit of Records was served. The Court next assessed whether the delay was excusable. The Plaintiff failed to persuade the Court that significant efforts had been made to advance the action, alleging that obtaining physician and clinic records was the reason for the delay. The Court disagreed, and found that there was a lack of records and that the records that were passed along to the City did not distinguish between the Plaintiff's 2005 injuries and the injuries that the Plaintiff sustained at a later date.

Rule 4.31 makes the assumption that when inordinate and inexcusable delay is found there is significant prejudice to the party that brought the application. The Court agreed with that presumption, highlighting the challenges of fading memories, locating witnesses from the accident, and mentioning that the bus driver involved in the accident passed away in 2006. Due to the prejudice suffered by the City, the Court granted the City's request for dismissal.

Property Owner Acquitted When Tenant Did Renovations without a Permit

Mississauga (City) v. Ashley Developments Ltd., 2017 ONCJ 557 (CanLII) http://canlii.ca/t/h5c0n

Ashley Developments Ltd. (Respondent) leased a building to a tenant, who without the Respondent's knowledge or consent made in interior alterations to the building. A City of Mississauga (City) building inspector noticed the alterations, and following an inspection laid two charges against the Respondent for violating the *Building Code Act (Act)*: constructing interior alterations without a permit and failing to comply with an Order to Comply. The Respondent worked with the tenant to apply for a permit, which was obtained after a substantial period. At trial the Respondent was acquitted on both charges; the Justice of the Peace (JP) held that the tenants--not the Respondent—made the alterations to the building and once the Respondent was made aware, it exercised due diligence to comply with the City's order. The City appealed the second charge pertaining to the Order to Comply.

HELD: Appeal dismissed.

DISCUSSION: The Court began by laying out its legal jurisdiction on an appeal under s.135(1) of the *Provincial Offences Act (POA)* that allows an appeal from "an acquittal, conviction or sentence". From there the Court focused on the standard of review for the appeal outlining a broader standard for a Part I and a restricted standard for a Part III. The appeal before the Court was a Part III and as reported in *R v. Antoniak* [2007] O.J. No. 4816 "an appellate court is entitled to review the evidence, re-examining it and re-weighing it, but only for the limited purpose of determining if it is reasonably capable of supporting the trial judge's conclusion." The crux of the City's argument was that when the Respondent suggested that the Order to Comply did not apply to them, it was a collateral attack on the validity of the order itself. The Supreme Court described a collateral attack in *R. v. Wilson* 1993 CanLII 44 (SCC) as "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgement."

To flush out the City's collateral attack argument, the Court examined five factors: (1) the wording of the statute from which the power to issue derives; the Court found at the *Act* empowers the inspector to make an Order to Comply; (2) the purpose of the legislation; the Court found the purpose is to regulate and promote order, fairness and safety in buildings; (3) the availability of an appeal; the Court cited a variety of appeal options available through the *Act*; (4) the nature of collateral attack; the Court recognized that the inspector charged the wrong person, but highlighted that this was a legal argument and not a technical requirement of the inspector; and (5) the penalty on a conviction for failing to comply with the order; a fine and/or stop work order.

The Court concluded that the JP erred, and the Respondent had engaged in a collateral attack on the Order to Comply. The collateral attack was not justified as the *Act* provides a variety of options for review and appeal, one of which the Respondent should have utilized. With regards to due diligence, the City argued that the JP erred in finding that the Respondent exercised due diligence, pointing to the sheer length of time it took the Respondent to obtain the

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building permit. The Court examined the approach taken by the JP, finding that because of the timing the Court may have arrived at a different conclusion. However, the Court could not find that the evidence was not 'reasonably capable' of supporting the conclusion of due diligence and ultimate acquittal reached by the JP.

Investigating Officers Did Not Owe Duty of Care to Victim

Allen v New Westminster (City), 2017 BCSC 1329 (CanLII) http://canlii.ca/t/h54pt

The Plaintiff alleges that Police Constables Zemlak and Pakosh (Police Constables) trespassed on his property and violated his *Charter of Rights* by responding to a dispute call at the home of the Plaintiff. The Plaintiff proceeded to file a complaint with Investigating Officers at the New Westminster Police Service. Afterwards, the Plaintiff filed a civil claim seeking damages by the Police Constables and a negligent investigation by the Investigating Officers. The City of New Westminster (City) brought an application under Rule 9-5(1)(a) of the Supreme Court Civil Rules arguing that the proceeding disclosed no reasonable claim.

HELD: Application granted.

DISCUSSION: The Court began by outlining Rule 9-5(1)(a)--particularly that no external evidence is admissible on the application, it must be based on facts alleged in the original claim. The City argued that the Plaintiff's claim could not succeed as the Investigating Officers did not owe a duty of care to the Plaintiff. The Plaintiff argued that a duty of care did exist, and it was reasonably foreseeable that the inadequate investigation by the Investigating Officers would cause him harm.

In assessing whether the Investigating Officers owed the Plaintiff a duty of care, the Court relied on the Supreme Court decision *Hill v. Hamilton Wentworth Regional Police Services Board*, 2007 SCC 41 (CanLII) that outlined the two-prong test for duty of care:

Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care;

If so, are there any residual policy considerations which ought to negate or limit that duty of care?

In *Hill* the Supreme Court found that in some circumstances when the police are conducting an investigation of a suspect, sufficient proximity may be established. However, in this case, the Plaintiff was not a suspect; he claimed to be the victim. Therefore, the Court had to examine whether the Investigating Officers owed a duty of care to an alleged victim. It relied on *Callan v. Cooke*, 2012 BCSC 1589 (CanLII) "the police do not owe a private law duty of care to victims or potential victims in relation to their investigation. The duty of the police to carry out proper investigations is a duty they owe to the public rather than to an individual victim or victim's family."

Absent a duty of care by the Investigating Officers, the Plaintiff's claim did not succeed.

Employment Discrimination Claim Dismissed Due to Missed Deadline

Bartraw v. Kingston (City), 2017 HRTO 1014 (CanLII) http://canlii.ca/t/h5bsq

The Applicant filed an application under the *Human Rights Code,* R.S.O.1990 (*Code*) alleging employment discrimination against the City of Kingston (City). He alleged that he was terminated for a minor violation in the workplace, while a co-worker merely received a suspension for committing a more serious workplace violation. After reviewing the application, the Human Rights Tribunal (Tribunal) concluded it was plain and obvious that the application was outside their jurisdiction; highlighting that the application failed to identify discrimination linked to a ground specified in part one of the *Code* and that the application was filed more than a year after the last incident of discrimination claimed by the Applicant. The Tribunal ultimately sent the Applicant a Notice of Intent to Dismiss (Notice). The Applicant responded but failed to address the causes for dismissal by the Tribunal and reiterated the argument in the original application.

HELD: Application dismissed.

DISCUSSION: The Adjudicator outlined that an application under the *Code* must be submitted within one year after the last incident of discrimination claimed by the Applicant on the application. Section 34(2) allows for an application to be submitted more than one year after the incident if the Applicant can demonstrate that the delay was sustained in good faith. Here, the application had been filed 18 months after the last incident of alleged discrimination. The Applicant argued that the delay was a result of his attempts to work with the City to resolve the issue through other means. The Adjudicator dismissed this argument. As outlined in prior Tribunal decisions, including *Richards v. Ryerson University,* 2015 HRTO 1210, it has been found that efforts to pursue other means, without more, does not justify delay. Applicant failed to provide a good faith reason for missing the one-year time limit, requiring dismissal.

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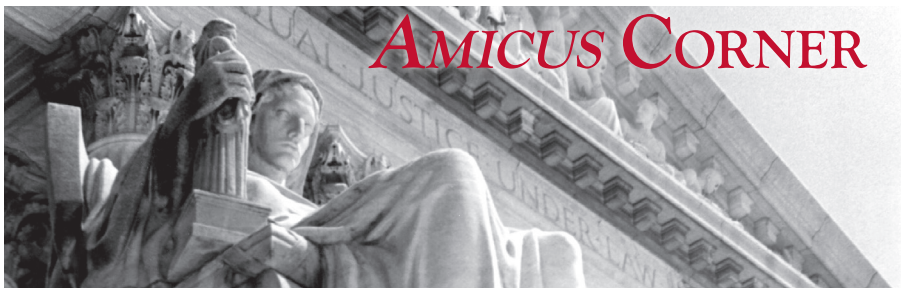

2017 Supreme Court Preview: Justice Kennedy's Last Blockbusters?

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

The thing that stood out the most about the Supreme Court's 2016 term is the fact that almost no cases really stood out. The term was characterized by fairly mundane, procedural issues and the vast majority of the Court's rulings were narrow, often resulting in remand to lower courts to decide questions that it arguably could have decided itself. While the fact that the Court was short one Justice likely led to some of these narrow rulings, in June, Chief Justice Roberts may have explained another reason when he addressed a conference for the D.C. Circuit, noting that he views the Court's opinions as speaking for the court versus expressing the views of an individual jurist. Thus, he urged his colleagues to consider the other Justices' views when drafting a majority opinion. It remains to be seen whether the Chief Justice will be able to continue to build consensus among his colleagues next term, when what can only be termed "blockbusters" are already filling the docket.

The 2017 docket is not even half full, but the Court has already accepted cases destined for history books. These include whether partisan gerrymandering violates the Constitution, whether President Trump's so-called "travel ban" is unconstitutional, and whether a state or local government can compel someone, through a public accommodation law, to provide goods or services to a gay couple if doing so violates that person's sincerely-held religious beliefs about marriage and violates the First Amendment's free speech and free exercise clauses. The Court is also going to decide whether the warrantless seizure and search of historical cell-phone records revealing the location and movements of the phone's user is permitted by the Fourth Amendment, and a number of other cases that will impact local governments--including a rare and potentially significant anti-commandeering case under the Tenth Amendment. IMLA will be filing amicus briefs in six cases next term, and perhaps more, depending on how the Court fills the remainder of its docket. These include *Gill v. Whitford* and *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, which are discussed more fully below.

Not only are the cases for the 2017 term shaping up to be exciting for Court watchers, but rumors of Justice Kennedy's possible retirement are already swirling around Washington DC, given that he informed applicants for his 2018 law clerk positions that he is considering stepping down. Perhaps Justice Kennedy will want to draft one more major opinion before he leaves the bench, and if so, this may just be the term to do that.

Masterpiece Cakeshop v. Colorado Civil Rights Commission

Having drafted the majority opinions in *Obergefell v. Hodges* and *United States v. Windsor*, Justice Kennedy may also write for the majority in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. At issue is whether someone who sells their goods to the public can be exempted from a public accommodation law of general applicability based on the seller's claim of religious liberty. The case thus pits two competing foundational principles against one another: religious liberty and anti-discrimination.

Masterpiece involves a bakery, but similar challenges have been brought elsewhere by photographers and other vendors--and as discussed below, the case could have broad implications. In this instance, a same-sex couple visited Masterpiece Cakeshop, a popular bakery on the western periphery of Denver, and requested that the owner create a cake for their wedding. The owner declined, explaining that he does not create wedding cakes for same-sex unions because of his religious beliefs. He offered to sell them other baked goods in his store but the couple left without purchasing anything.

They then filed a complaint alleging that Masterpiece had discriminated against them in a place of public accommodation based on their sexual orientation, in violation of Colorado's public accommodation law. Colorado's Anti-Discrimination Act, COLO. REV. STAT. § 24-34-601 prohibits businesses that sell goods to the public from discriminating based on race, creed, sex, and other protected characteristics. That law was amended in 2008 to prohibit discrimination based on sexual orientation as well.

Masterpiece argued that requiring it to create a wedding cake violates its rights to freedom of speech and the free exercise of religion. Masterpiece also argued that its refusal to create a wedding cake for the couple was not "because of" their sexual orientation, rather the refusal was "because of" its religiously-based opposition to same-sex marriage.

The Colorado Court of Appeals rejected Masterpiece's argument, concluding it was premised on a distinction without a difference. The court noted that distinguishing between a person's status and conduct closely correlated with that status is impermissible in the context of discrimination. Further, the court concluded that merely requiring Masterpiece not to discriminate against potential customers consistent with Colorado's Anti-Discrimination Act, even if compelled by the gov-

Continued on page 34

Amicus Cont'd from page 33

ernment, did not implicate expression sufficiently to warrant First Amendment speech protections. Regarding the bakery's religious liberty claim, the court concluded that the statute was a neutral law of general applicability: it was not requiring Masterpiece to support or endorse a particular religion, but merely prohibited Masterpiece from discriminating against a potential customer on account of a protected status. The Colorado Court of Appeals applied rational basis to Colorado's law, noting: "we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation."

The issue before the Supreme Court is whether applying Colorado's public accommodation law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

The Supreme Court took up a similar issue in *Bob Jones University v. United States*, 461 U.S. 574 (1983). In that case, a religious University had its tax-exempt status revoked by the IRS because of the school's religiously-based policy of prohibiting interracial dating and marriage. The question in *Bob Jones University* was whether the government could prohibit race discrimination at the expense of the First Amendment's Free Exercise Clauses. The Supreme Court held in favor of the government, declaring "[g]overnment has a fundamental, overriding interest in eradicating racial discrimination in education ... which substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." The Court noted that the government may justify a limitation on religious liberties by showing the limitation is necessary to accomplish an "overriding governmental interest." Prohibiting race discrimination was such a governmental interest.

The Court's holding may not be as sweeping in this case, and instead may simply conclude that state and local governments may enact measures to prevent discrimination in retail sales through public accommodation laws.

IMLA will join an amicus brief being filed by the SLLC in this case. According to the National Council of State Legislatures, 22 states have public accommodations laws that prohibit discrimination based on sexual orientation. Additionally, it is likely that many cities and counties have similar ordinances. If the Court holds in favor of Masterpiece, states and local governments may have to contend with challenges to public accommodation laws on the grounds that those statutes violate the First Amendment.

IMLA believes *Masterpiece Bakery* is important on its face, but what makes the case even more compelling are its implications. If the Court were to hold that providers of services to the public can use religion as an excuse to discriminate, it opens the door for discrimination based not merely on sexual orientation, but on a number of other protected statuses as well. For example, a business proprietor might refuse, on religious grounds, to serve a woman in public because she was not accompanied by a man. The case reprises themes that arose only a few generations ago, when religion was used as the rationale for many segregation laws, as some people believed their religion required different races to remain separate–particularly because integration might lead to interracial marriage, violating their religious precepts. (Long before *Bob Jones University*, for example, a Senator cited the Bible in opposition to the Civil Rights Act of 1964, and the lower court opinions in *Loving* affirmed Virginia's laws against interracial marriage on biblical grounds).

If religious motivation exempted businesses from anti-discrimination laws, government would be powerless to protect all Americans from the harms of invidious discrimination. Local governments have a strong interest in helping prevent discrimination against their citizens both because of the harm discrimination causes to the individual and the economic harms it can inflict on the local government itself. For example, in *City of Miami v. Bank of America*, heard last term, local governments argued that discrimination under the Fair Housing Act proximately caused harm to cities by decreasing property values and spurring foreclosures, which depressed tax revenues and increased costs to the municipalities, which were left having to combat the ensuing blight. While *Masterpiece Bakery* is perhaps an attenuated example, *Bank of America* demonstrates that discrimination against individuals can cause real economic harm to local governments.

Although we believe religious liberty is a principle of exceptional importance, this case portends a classic "slippery slope" if the court exempts a merchant engaged in retail sales to the public from anti-discrimination laws, based on the seller's religious beliefs. If the same-sex couple is to prevail in this case, it seems likely that we will see another Justice Kennedy opinion on the subject of same-sex marriage and anti-discrimination principles.

Gill v. Whitford

This soon-to-be-infamous partisan gerrymandering case is another opportunity for a Justice Kennedy opinion next term and another dispute that is sure to result in a sharply divided Court. The issues in *Gill v. Whitford* are whether partisan gerrymandering cases are justiciable and if so, by what standard should the constitutionality of partisan gerrymandering claims be measured? The reason Justice Kennedy is at the forefront of this case (aside from the fact that he typically is the deciding vote in controversial decisions), stems from *Vieth v. Jubelierer,* 541 U.S. 267 (2004), the last political gerrymandering case the Court decided. It resulted in a split, with Justice Kennedy merely concurring in the judgment.

In *Vieth*, a Pennsylvania redistricting plan was challenged as constituting unconstitutional political gerrymandering. Justice Scalia could only muster three other Justices for his majority opinion, which concluded that political gerrymandering claims were nonjusticiable and affirmed the dismissal of the complaint. Justice Kennedy concurred in the judgment only, agreeing that the complaint should be dismissed, but opining that he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." In other words, while the *Vieth* case did not provide an adequate vehicle to address the political gerrymandering ill, Justice Kennedy believed it was possible another case might provide "[s]uitable standards for measuring" burdens on representational rights, which in his mind, would be "critical" to the Court's inter-

vention. And while he noted that "[t]here are... weighty arguments for holding cases like these to be nonjusticiable..." he reasoned that they "are not so compelling that they require [the Court] now to bar all future claims of injury from a partisan gerrymander."

That brings us to *Gill v. Whitford*, the case pending before the Court for the coming term. In *Whitford*, Wisconsin legislators redrew state assembly districts in 2011 to reflect population changes recorded in the 2010 census. Map makers used a model designed to predict the likelihood that various proposed districts would elect a Republican. In the 2015 election, Republican candidates received less than 49% of the statewide vote and won seats in more than 60% of the state's assembly districts; and, in 2014, 52% of the vote yielded 63 seats for Republicans. In 2015, Wisconsin voters filed a lawsuit claiming that Wisconsin's election map was the result of partisan gerrymandering and violated their constitutional rights.

A divided panel of three federal judges ruled in favor of the challengers, finding that the map enacted by the Wisconsin legislature was a result of partisan gerrymandering and prohibited by the First and Fourteenth Amendments. The three-judge panel had ordered that new legislative districts be drawn by this November for the 2018 elections, but the Supreme Court stayed that order until it has a chance to rule on the case.

The challengers in *Whitford* propose a three-part test for determining whether a redistricting practice constitutes unconstitutional partisan gerrymandering. The first prong analyzes whether there is discriminatory intent. The next step assesses whether the practice has a discriminatory effect; specifically, whether the plan results in a partisan imbalance that is "sizeable" and likely "to persist throughout the decennial period." To measure a discriminatory effect, the challengers propose the court utilize "the efficiency gap." "The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast." *See Whitford v. Gill*, No. 3:15-cv-00421(W.D. Wis. Nov. 11, 2016). The challengers proposed that an efficiency gap of 7% would demonstrate a discriminatory effect in the second prong of their analysis.

The third prong in the proposed analysis examines whether the redistricting plan's "partisan effect can be explained by the legitimate state prerogatives and neutral factors that are implicated in the redistricting process." *See* Motion to Affirm.

IMLA will be filing an amicus brief in this case that will discuss the effects of partisan gerrymandering on local governments, specifically as it relates to preemption of local authority.

In reading the tea leaves of this case, the fact that the Court stayed the lower court's ruling may not bode well for the challengers. The Court needed five votes to stay the lower court's decision and whether the party requesting a stay is likely to succeed on the merits is a part of the calculus on whether to stay the decision. But in the end, like so many other major cases that divide the Court, the outcome will almost certainly come down to Justice Kennedy's key vote.

2016 Supreme Court Scorecard

IMLA and local governments fared better during the 2016 Supreme Court term than in prior years. Specifically, in the 2016 term, IMLA filed eight amicus briefs, of which four were definitive wins for local governments: *Murr v. Wisconsin*, *Count of Los Angeles v. Mendez*, *Bank of America v. City of Miami*, and *Town of Chester v. Laroe Estates, Inc.* Only one, *Manuel v. City of Joliet*, was a loss. *Expressions Hair Design v. Schneiderman and Packingham v. North Carolina*, both First Amendment cases, had neutral outcomes, in that the party IMLA was supporting may have lost or the case may have been remanded for further analysis, but the overall principle IMLA advocated was advanced (in these cases, IMLA filed its briefs to prevent any expansion of *Reed v. Town of Gilbert*). And the last case where IMLA filed an amicus brief in the 2016 term, *Ivy v. Morath*, was dismissed before oral argument as moot. One other notable victory was *Hunter v. Cole*, in which IMLA filed an amicus brief at the certiorari stage in a qualified immunity case. In that case, in a win for the officers and IMLA, the Supreme Court granted the petition and vacated and remanded the case, overturning the lower court's denial of qualified immunity

If you need help with amicus assistance or would like more information about IMLA's legal advocacy program, please contact Amanda Kellar at akellar@imla.org. ML

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"THEY the People of the United States?"

By Brad Cunningham, Municipal Attorney, Lexington, South Carolina

It is my intention to avoid political talk as much as possible in this column, and while I am going to talk about government operations, I hope that no reader sees me as taking a "side" in any political debate. I'm just going to talk about two ideological theories of my own that to me seem to be causing governmental operational issues across the country. We all experience these as members of local government. I have been given a stark reminder of it recently.

First, over the years there has come to be a line of thinking that the government is some endless pot of money that just falls out of the sky. It comes from nowhere, and we all are entitled to a share of it whenever we feel the need arises. This we expect to happen without repercussion or consequence. After all, it is free money of which "they" have an endless supply. (Just exactly who "they" are is another question.)

Second, there is a growing trend toward avoiding responsibility for the actions and choices we take as members of society. Nobody accepts fault, and when an injury or damages occur there is a rush to find someone to blame. Usually there is a correlation between how much money a party has, and the level of effort to blame that party. Since the government is a nameless faceless entity, "they" are almost always a target. "They" are a convenient party to blame for almost everything. "They" have a lot of money.

I have been sent a reminder of that very recently from a listserve colleague. A citizen called and indicated that her teenage son had been injured on public property while riding his bicycle. He broke two fingers and surgery was required for the injuries to be healed properly. She wanted to know where to send the bill.

Question number one: WHERE did this occur? The accident occurred while he was riding on a sidewalk adjacent to a city street. I don't know about other states, but in South Carolina many municipalities have ordinances prohibiting bicycle riding on a sidewalk. This particular municipality was one of them. The theory, of course, is that sidewalks are for pedestrians.

Question number two: HOW did this occur? Perhaps an even more important question... It happened because he was on the cell phone TEXTING and wasn't paying attention and hit a tree that was close to the sidewalk. He was knocked off the bicycle and injured his fingers and hand. (I am told the cell phone survived... Important information in today's electronic society)

So, my colleague has received a request to pay for injuries to someone who was 1) Committing an illegal act; and 2) Engaging in careless behavior while committing the illegal act. My colleague advised the citizen of the aforementioned ordinance, and suggested politely that the texting while riding was probably not a good idea. The caller was miffed. "Well, I'm certainly not going to pay for this. It wasn't my fault." The report of injury was sent by my colleague to the city's insurance company, which agreed with the above analysis and denied responsibility for the incident. The caller phoned my colleague back complaining that "I can't believe "they" are refusing to help! Just who do "they" expect to pay for this?" Apparently, it never occurred to her that it could be the child's fault, and that she would have to bear the burden. But, isn't "they" (the government) an endless pile of money waiting to be paid out in relief of all that ails the citizenry?

No doubt everyone feels bad that the child is injured, but does feeling bad entitle one to a government handout? I leave that open for debate, and agree of course that opinions on incidents such as these can swing upon specific facts. But, last time I checked the government was "WE the People" wasn't it? (Or is it "They" the People?)

This second incident is also sent from a listserve colleague in a nearby state. A party was cited for a sign ordinance violation. A sign had been erected on the business premises without a permit. The party fussed and complained about why they even needed a permit in the first place, and how this was an overreaching government intrusion, etc... Still, however, this is easy enough to fix isn't it? Let them come in and apply after the fact and everyone can go home happy. So, the party submits a permit only to find out that 1) The sign is in the road right of way; and 2) The sign is larger than the ordinance allows. The sign contractor goes ballistic, completely missing the clue that issues are precisely why a permit is required. "So, you're telling me that I need to take the sign down and put another one up? That's expensive! Who is going to pay me for this?" He continued, "I think the city should pay since "they" are the ones requiring the corrections." (The city that he said shouldn't be involved in the matter in the first place)

Again the theory surfaces that "It certainly can't be my responsibility," and "The government is an endless pile of money. Why can't "they" pay for it?" No thought at all to the theory that preventing situations like this may be why permits are required in first place,

or to that of possibly looking into the regulations before the sign was erected. Just jump in with both feet, and if all doesn't go well blame the government and ask for money.

As government attorneys, some of us face these attitudes in dealing with litigation. Some things I have heard: "You don't have a real client. Ok, you do have a real client, but "they" don't have a job and a checkbook to balance. Why are you being so hard-nosed about this? It doesn't come out of your pocket. "They" can afford to pay more easily than my client." Notice the absence of responsibility in the equation? How can it be MY fault? "They" have more money.

This type of thinking reminds me of a book written by my former elementary school principal, the late George Wilkins. The book was titled "My Pants are Wet but I Didn't Do It!" It also leads to warnings such as: "Do Not Iron Shirt While Wearing It." ... "Do Not Hold the Chainsaw by the Moving End"... Or the retail coffee establishment's cup that says "Caution – Hot! Avoid Pouring on Crotch Area."... "Do Not Put Children in the Washing Machine."... "Ingredients – 100% Peanuts.... Warning: Product may contain peanuts..." Without such warnings, people will most certainly claim "You didn't warn me." This is despite the overly stupid nature of the act committed. Ugh, when did we get this way?

WE are all in this together, folks. The government is not "they." It is us. We elected our officials and we can un-elect them. The preamble to the Constitution starts with "We the People of the United States...." So every time someone wants to sock it to the government, whether they realize it or not, they are taking it out of all of our pockets, and not the pocket of "they." It hurts us all when this type activity occurs.

Sorry, it's that time of year..... School is starting back, and even though I am "over 21," I still get a little bit bummed when school starts again..... This year it is a lot worse, since my only daughter, Lauren embarks upon her college career and will be moving into the dorm. The saving grace is that at least it means it is college football season.

So, to boost the mood, time for some more courtroom funnies..... Lest you ask, yes all of these happened either locally or to local lawyers in another venue. They are all true stories but the names have been changed to protect the innocent.

There was the guy who came to court dressed as a monk in a brown robe and rope around the waist. He was also carrying a small flute or similar instrument. He claimed to be a church pastor but couldn't tell where the church was, or the name of it. He tried playing the flute once, but was resoundingly discouraged from doing so. He was also convicted.

There was another guy who came to traffic court as an apparent "sovereign citizen." He had inserted a "dot" or period at the end of his name. For simplicity, let's say his name was Brad Cunningham. He had changed it to Brad Cunningham"." When his name (without the ".") was called in court, he failed to answer and proceeded to watch himself get tried in his absence. When everyone had cleared the room, the judge inquired as to his purpose for being in the courtroom. He replied that he was told to be here today. The Judge asked his name, and he replied Brad Cunningham"." The Judge (ignoring the ".") asked if he had heard his name called. The gentleman responded that he had heard a name similar to his called, but that his name was Brad Cunningham "." There was no humor or patience in the Judge that day and he stared the guy down and asked if he was paying the fine today. The gentleman said he had not been assessed a fine that day. The Judge just said pay it within ten days, and left the room. I bet if the City owed the guy money, he would have gladly ignored the "." as well.

The prosecution rests your honor...

Hopefully you made plans and are attending the IMLA 82nd Annual Conference, October 14-18, in Niagara Falls, ON. Some of you may not know that IMLA's Deputy Executive Director, Veronica Kleffner, will be retiring following the annual conference. Please make plans to attend this exceptional conference and bid a fond farewell to Veronica who has served us very well over the years. ML



Practice Tips Cont'd from page 21

Guidelines and provide feedback. After engaging with the committee and reviewing with the Deputy City Attorney, CA had final review, approval and promulgation authority.

The resulting document, "City of Colorado Springs Office of the City Attorney Legal Ethics Guidelines" (Guidelines), identifies the following mission:

> The mission of the Office of the City Attorney (the "Office") is to provide the highest quality legal advice to the City of Colorado Springs, acting through its various elected officials, enterprises, appointees, and employees. All attorneys employed by the Office shall comply with the Colorado Rules of Professional Conduct ("Rule of Professional Conduct" or "Colo. RPC"). A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> Each attorney in the Office has an ethical obligation to exercise independent professional judgment and to give consistent, objective legal advice to all constituent representatives of the City.

Colorado initially adopted the Model Rules in 1992.[20] The following topics and issues are addressed in the Guidelines:

- Functions of the CAO-Roles and responsibilities of the atto ney (Charter, Code, Statute)
- Attorney assignments-Hiring, assignments, collaborativegoals
- Advisor vs. advocate-Rules Preamble, Rule 2.1, Rule 3.1
- Client identification-Rule 1.13, Rule 1.6,
- Client conflicts - Rule 1.7
- Attorney conflicts -Rule 1.11
- When and how to employ ethical screens ("Chinese walls")-Rule 1.10, Rules Scope
- Outside counsel-Authority to hire, when to hire, how to hire
- Confidentiality-Rule 1.6, Rule 1.13
- Supervisor responsibilities-Rule 5.1, Rule 5.3
- Prosecutor responsibilities and interactions-Rule 3.8, Rule 4.2, Rule 4.1

Although CA had final approval authority, she presented the Guidelines to the council as a courtesy briefing. She also asked retained ethics counsel to prepare an independent analysis and evaluation of the Guidelines for the city council. Not surprisingly, more than one councilmember suggested that council ought to be able to modify the Guidelines because they didn't go far enough. The Guidelines, it was argued, were insufficient because the document failed to address a legal advisor for city council independent of the CAO or, at the very least, should have been more restrictive on the disclosure of communications between individual councilmembers and the CAO.

VI. Practice Pointers When Drafting Ethics Guidelines

Although necessitated by political pressures that made the job more difficult, the Guidelines project was a grounding experience for the CAO—an opportunity to step back, consider the big picture, and publicly recommit to the profession and to the client. Promulgating the Guidelines was the first step in rebuilding credibility, reliability and trust in the CAO that had suffered in the chaos that immediately followed the change in the FOG.

Consider the following practice pointers when deciding whether or how to draft ethics guidelines for your office.

- Creating ethics guidelines is not a novel idea. In addition to local and state codes of ethics, the APPA, ICMA, GFOA, APWA, state bars, state attorneys general, and a host of other organizations have codes of conduct, practice standards, and core competencies for their members and practitioners. There are plenty of examples out there.
- As you begin your research, if you find ethics guidelines that you like, use it as a model. Read every word carefully and give due consideration to what meaning the provisions have for your office and your municipal practice. Avoid the temptation to simply reproduce someone else's guidelines for your purposes.
- Consider the types of attorney-client issues you have experienced in your municipal practice. Can you use the guidelines to educate the client on your roles, duties, and responsibilities? Use real examples when describing communications, privilege, conflicts, and representation issues.
- Do not draft guidelines in a vacuum. Create a group to tackle the project. Involve the attorneys in your office. If you don't have other attorneys in your office, reach out to your colleagues in other cities or to your state municipal league. Buy-in is important.
- Have a clear understanding of what is needed for final approval. Is this within the city attorney's purview, or must another level or branch of government review and approve or consent?
- Think about how you will use the guidelines in the future. Guidelines can be both a shield and a sword. Consider providing



Wynetta Massey has been with the Colorado Springs City Attorney's Office for 27 years and currently serves as the City Attorney, leading an office of 27 attorneys and 14 support staff. Wynetta holds undergraduate degrees from the University of Missouri-Columbia in speech communication (with honors) and political science, and received her juris doctor from the University of Kansas School of Law. Wynetta is a frequent speaker at professional conferences and CLEs on a wide range of topics including ethics and conflicts, takings, local land use authority, medical marijuana regulation, and the council-mayor form of government.

briefings or trainings for those in the government that speak for the client or have regular contact with the city attorney's office. If the situation warrants, retain outside ethics counsel to advise you and/or your client on the guidelines.

- Expect some push-back from elected and administrative officials. Even though your municipal attorney-client relationship may be prescribed, most constituent client representatives believe they are special and that they have a personal relationship with you as well. No one likes being told that, from the attorney's perspective, it is a professional relationship. Be clear and don't apologize.

- As issues arise, consult the guidelines. Go back to your drafting committee and use them as an *ad hoc* ethics sounding board. If the guidelines don't address an ethical issue you've encountered and there is a chance it may arise again, considering updating the guidelines to address it.

- Follow-up and follow-through. Use the guidelines to synthesize the Model Rules into your everyday practice. It is hard to avoid ethical pitfalls if you aren't on the look-out.

Notes

1. http://www.imla.org/images/links/ML/cospringscaethics.pdf
2. Colordo Springs, Colorado City Charter (City Charter) § 2-10(a).
3. City Charter § 3-10(a) and (b).
4. City Charter § 3-70(e).
5. City Charter § 4-40(e).
6. The Charter also required mayor appointment and Council confirmation of the heads of the public works, parks, and planning departments, and the director of aviation. City Charter § 4-40(f)(5).
7. To be fair, the amended Charter also required city council to "maintain a strategic plan which prioritizes goals for the city council and establishes measurable outcomes. The plan process shall consider public input. Council shall provide the plan and goals to the mayor for consideration in the development of the municipal administrative budget." City Charter § 3-10(c).
8. City Charter § 13-10(a) was amended to authorize a mayoral salary of $96,000 (with CPI adjustments after every election). Previously, the mayor was paid a stipend of $12,500. Prior to and after the change, in the FOG, Colorado Springs Councilmembers receive stipends of $6,250. City Charter § 13-20(b).
9. Colorado Springs owns four service utilities (gas, electric, water, and wastewater) that it operates as Colorado Springs Utilities, an enterprise operation of the city. Since its inception, city council has served as the Utilities Board. The Charter amendments implementing the Council-Mayor FOG removed the mayor from the city council, but permitted the mayor to continue to participate on Utilities Board as an *ex officio* member. City Charter §§ 4-40(j) and 6-40(a).
10. City Charter § 7-20(a).
11. City Charter § 4-20.
12. While there were only two required within 90 days of voter approval of the change in the FOG (City Charter § 15-10(c)), the City Charter wisely acknowledged that the transition from council- manager to council-mayor would be an evolving and iterative process. City Charter §15-10(a).
13. Communications director, human resources director, streets manager, traffic engineer, to name a few.
14. Prior to this time, departments identified in the budget mirrored the structural organization of departments in the City.
15. Ordinance No. 11-95.
16. City Charter § 5-10 (emphasis added).
17. Colordo Springs, Colorado City Charter (City Code) § 1.2.301(B) (emphasis added).
18. City Code §§ 1.5.104 and 1.5.105.
19. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html ML



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