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De-"coding" the Visual Landscape:
Municipal Sign Ordinances, Murals, and the First Amendment

Public Records and Open Meetings

Human Trafficking: National Problem, Local Solutions

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The Good, the Bad, and the Ugly: Selecting, Retaining, and Supervising Outside Counsel

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THE MUNICIPAL LAWYER MAGAZINE

De-"coding" the Visual Landscape: Municipal Sign Ordinances, Murals, and the First Amendment

By: Shannon T. O'Connor, Goldberg & Segalla LLP, Syracuse, New York

The distinction between artistic expression and commercial messaging is a matter of nuance, especially when writ large on outdoor walls—and ordinances must be carefully crafted to survive judicial scrutiny.

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Public Records and Open Meetings

By: Frayda S. Bluestein, David M. Lawrence Professor of Public Law and Government, University of North Carolina School of Government, Chapel Hill, North Carolina

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Human Trafficking: National Problem, Local Solutions

By: Rebecca Ruscito, Counsel, New York State Conference of Mayors and Municipal Officials, Albany, New York

Congress first addressed human trafficking in the United States nearly 20 years ago. But there is much to do at the state and local level, particularly in decriminalizing and diverting the victims of sex slavery.

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EDITOR'S NOTE:



THE MUNICIPAL
LAWYER MAGAZINE

The Municipalities that Roared

A common pattern characterizes most lawsuits where municipalities are parties. In thousands of litigations which play out across the country every day, the locality is routinely the defendant. The flow of plaintiffs challenging municipal actions--on the grounds of excessive force, denial of free speech, uncompensated takings, deprivation of due process, unwarranted searches, invalid zoning actions and the like—is daunting.

But in many ways, the year just passed was a remarkable role reversal for America's townships, counties and cities, as they affirmatively asserted their rights against much bigger adversaries. Municipalities became vocal and relentless plaintiffs--in many cases, very pivotal ones.

The Trump Administration encouraged much of the local pugnacity. Within weeks after the so-called "travel ban" Executive Order was signed, New York, Seattle and more than 30 other jurisdictions had signed on as amici successfully challenging its constitutionality and bringing it to a halt. The President and the Department of Justice were repeatedly forced to recast and limit the Order.

The Travel Ban was followed shortly by the Sanctuary Cities Executive Order. Again, the municipal response was swift and effective. Law departments in San Francisco, Chicago, Santa Clara County and others took on the challenge as plaintiffs, more than adequate for the task. Washington's efforts to bully localities by threatening wholesale funding cuts and imposing dubious compliance requirements fell flat, and the Tenth Amendment came into focus.

Over the last year, more than 150 localities filed to recover damages against manufacturers, distributors and others in the chain of complicity leading to the epidemic of opioid addiction and death sweeping the country.

And within the last week, San Francisco, Philadelphia and New York sued the Defense Department for failing to comply with its own procedures to identify high-risk personnel who should not be carrying firearms.

The municipality as instigator may have an unlikely literary antecedent. In 1955, Irish author Leonard Wibberly penned "The Mouse that Roared," a widely-read satire profiling a tiny imaginary nation nestled in the Alps—the Duchy of Grand Fenwick. The little country took on various superpowers—and won. Subsequent titles followed the Duchy as it successfully challenged a host of bigger adversaries.

One year ago, *Municipal Lawyer* noted that according to the Chinese calendar, 2017 would be the Year of the Rooster. But for America's municipalities who took to the courtroom over the past year to assert and protect their rights, in many ways 2017 should be celebrated as the Year of the Mouse.

Best wishes for 2018-

Erich Eiselt

PRESIDENT'S LETTER

By: Art Pertile, IMLA President



Thank you, Municipal Lawyers, for all that you do for the citizens in Cities, Villages, Counties and Provinces across the United States and Canada.

"Thank you, for being here to support us during this hurricane. It means a lot to know that you care about us."

In late August as I was sitting in the Emergency Operations Center of one of my client cities, wondering if I should change my name to "Noah" as it appeared that Hurricane Harvey's rain was never going to end, the Chief of Police sat down next to me and said, "Thank you for being here to support us during this hurricane. It means a lot to know that you care about us." His statement summed up why I have represented governmental entities and officials for the totality of my 31-year legal career. It is important that municipal lawyers be caring people.

"Always remember the shoes."

Municipal lawyers affect the daily lives of people in ways that most people do not understand. My mentor, William Earl Bracken, Jr., who served the City of Waco, Texas and its citizens as City Attorney for 33 years, told me, "Always remember the shoes." In one of his mentoring conversations with me, also known as butt-chewing sessions, he explained how important our advice is to the lives of people. He explained that a simple call from a department head regarding allegations of employee misconduct can result in a recommendation from the legal department of placing the employee on leave with or without pay. Although a "routine" decision, I needed to realize that leave without pay will result in the employee going home and having to explain to her son that his mom will not be able to buy him new shoes this week because she does not get paid while off without pay.

My "take away" was that in every situation it is the municipal lawyer's job to anticipate the unintended consequences of each decision you help your client in making. The decision is the client's but it is our job to make sure that the decision is an informed decision.

"I hear them saying you'll never change things and no matter what you do it's still the same thing. But it's not the world that I am changing, I do this so this world we know never changes me. What I do is so this world will know it will not change me." –Garth Brooks

It has been my experience that municipal lawyers are caring people. We are the ones that help cities and townships after a natural or manmade disaster has damaged their community. The municipal lawyer is the person that guides the City through the reams of paper and the maze of regulations regarding what purchases may be reimbursable and which are clearly not, a Herculean task, but we do it with passion, commitment, and dedication to excellence. I have worked on both sides of a hurricane event-the impact side, Hurricane Ike and Hurricane Harvey, and the receiving side, Hurricane Rita and Hurricane Katrina. Hurricanes and similar disasters are life-changing events for many of us and will affect not only the way we live, but the way we practice law. This wonderful area of law that we practice, municipal law, should get more recognition for what we do in assisting people. IMLA sits in the unique position to be able to show people across the U.S. and Canada that, yes, we are lawyers, but we are lawyers with heart.

I will be asking those of you that can and are willing, to participate in a *Habitat for Humanity* or *Keep Houston Beautiful* event during the IMLA's 83rd Annual Conference October 17-21, 2018. The event will allow people to see municipal lawyers and their families doing what we do best - Helping People! Prior to the Annual Conference you will also receive a request from me asking for a photo of you or a member in your office or firm participating in a community event, for example, cancer walk, house construction, neighborhood clean-up, etc. We will use the photos as screen savers during the Houston Annual Conference.

IMLA's priority is to educate and promote our members. What better way to do this than to serve on a committee? In 2008 IMLA President Susan Rocha, appointed a committee to: 1) review the makeup of the Board of Directors; 2) provide guidance on moving the Board of Directors forward regarding diversity on the Board; and 3) ensure that representatives of all backgrounds had an opportunity to serve on the Board and to potentially lead the organization. Ms. Rocha appointed me as Co-Chair of that Committee and I am forever grateful to have had that opportunity to serve. (Thank You Queen!) I believe that anyone looking at the racial and gender diversity of the current Board of Directors in relation to our membership will say, "Job well done!" However, one area that needs more diversity, both on the Board and in our membership, is Young Lawyers. The more young lawyers we can attract to the organization, the more effective we will be. I have appointed a young lawyer to co-chair on all member committees. Having young lawyers taking active roles in the committee structure will enable deeper interaction with more seasoned lawyers, and that collaboration will generate new approaches to solving old and new challenges. Co-chairs working together will invigorate the Board and member committees. The energy will propel the entire organization into the next millennium. Speaking of the next millennium – what about our Millennials? Any organization that is not preparing to deal with the changes that the Millennial generation is bringing to the workplace and the legal profession will shortly be irrelevant. With that thought in mind, I have appointed a new committee, the Social Media Committee, to advise the membership, committees and the Board on the most effective ways to communicate the IMLA message to the public and to our members. I look forward to the report from this new committee.

A heartfelt "Thank You!" to the IMLA staff and Chuck Thompson, our Executive Director, for the wonderful job that you do. ML

De-"coding" the Visual Landscape: Municipal Sign Ordinances, Murals, and the First Amendment.

By: Shannon T. O'Connor, Esq., Goldberg Segalla, LLP, Syracuse, New York



INTRODUCTION

Murals or other works of creative expression on public walls can be classified as signs, artwork, or both, presenting challenges for municipal lawmakers and counsel. Regulation of murals and outdoor artwork is increasingly becoming an issue for municipalities, particularly as localities launch mural programs to create cultural identity, preserve history, promote economic development, focus revitalization efforts, address blight, encourage and foster community engagement, and contribute to long-term community planning.

This article will examine the regulation of murals, beginning with a brief background into municipal sign law and the various ways in which local control of signs raises First Amendment challenges. Cases addressing whether a mural falls within the provisions of local sign laws will be reviewed and analyzed, and the legal implications of various municipal mural programs will be addressed.

Purpose of Sign Ordinances and Regulations

With the birth of modern zoning acts shortly after the turn of the 20th century, municipalities assumed the right to determine what constituted a valid use of their police powers. At first, the local government role in health, safety, morals, and welfare was narrowly defined.[1] As a result, aesthetic concerns did not typically instigate an exercise of police powers.[2] This changed in the late 1920s as courts became more progressive and began to allow for regulation of visual elements so long as the laws in question promoted other goals such as health, safety, and morals.[3] Courts began to give great deference to legislative determinations as to whether a local ordinance was a valid use of its police powers.[4] As a result, sign ordinances proliferated, covering an abundance of visual mediums under the police power justifications of safety and, more interestingly, aesthetics.[5]

A. How Much Do These Ordinances and Regulations Cover?

Sign ordinances as a comprehensive legislative scheme may cover not only the physical characteristics of the sign but also the message it communicates. Physical elements subject to regulation include size, height, shape, number and location or placement of the sign — which can be further broken down into categories of on-premise or off-premise, private property or public property, and attached (to a structure) or detached. Given that sign regulations also often restrict content, through either the manner of its display or the message itself, such ordinances unfailingly come under judicial review for potential violations of the First Amendment.

Despite being a somewhat modern extension of zoning laws, sign ordinances have grown to cover a vast amount of content and mediums.[6] Typically, municipalities tailor sign ordinances around their own municipal needs, governing body/elected official's preference, zoning code organization, and even legal counsel recommendations.[7] The result is that most sign ordinances cover billboards, awnings, directional signs, monuments, projectors, vehicular signs, window signs, projectors, and most

curiously, murals.[8] Within that coverage, sign ordinances address the number of signs, their height, size, weight, location, lighting, and illumination, with the specific details dependent on each municipality.[9] However, creating a sign ordinance is not as simple as picking a type of sign and plugging in restrictions. There must be a sufficiently sensible justification for each restriction, especially as municipalities attempt to enforce such ordinances.

B. Municipal Justifications for Sign Ordinances and Regulations

One of the most common challenges in sign regulation is subjectivity. This is particularly the case when dealing with murals. What constitutes art is subjective; what is good art or appropriate art is even more so. Thus, the logical question becomes: How can municipalities regulate signs given the very subjective nature of what they are regulating? To the extent that there is an answer to this question, it is found in a municipality's police powers — where safety and general welfare have long been held as valid justifications for implementing sign laws.[10] The takeaway for municipalities reviewing longstanding zoning ordinances is to ensure that the statement of purpose for the regulatory scheme clearly explains the justifications, goals, and objectives of the legislative enactment. As the Second Circuit noted in *National Advertising Co. v. Town of Babylon*, it could not find a case where "a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech."[11] In contract, the Ninth Circuit found, in *Outdoors II, LLC v. City of San Diego*,[12] that the sign ordinance's statement of purpose "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City" sufficed to establish the requisite governmental interest.

Governments often rely on two interests to support the position that a sign regulation is a valid exercise of its police powers—traffic safety and community aesthetics.[13] The Supreme Court upheld these two elements as significant governmental interests sufficient to satisfy intermediate scrutiny in its analysis of sign ordinances in *Metromedia, Inc. v. City of San Diego,* stating "[n]or can there be substantial doubt that the twin goals that the ordinance seeks to further — traffic safety and the appearance of the city are substantial government goals."[14]

Following *Metromedia,* it has become standard practice for municipalities to recite in their sign ordinance statements of purpose that the regulatory interests at stake are safety and community aesthetics. These have often been augmented with other legitimate municipal concerns. For example, other regulatory interests could include economic development, encouragement of free speech, blight prevention, community enhancement, and even protection of property values.

C. Areas Where Local Governments Regulate Artwork

Although beyond the scope of this article, it is worth noting that municipalities potentially regulate artwork in many areas of daily operations. Some common areas of such regulation exist in nuisance abatement controls, such as graffiti abatement, bidding and procurement processes for improvements to public buildings or parks that include art installations, or zoning codes addressing sculptures. As such, these may be other areas of government activity subject to First Amendment or other constitutional challenges.

II. Constitutional Rights: The First Amendment

The First Amendment states in relevant part, "Congress shall make no law... abridging the freedom of speech." Courts, including the Supreme Court, continue to grapple with the extent to which local governments can restrict signs — whether digital, artistic, or traditional signage — without violating the free speech protections afforded by the First Amendment. Courts continue to use different analytical approaches and levels of scrutiny, which in turn results in a lack of clarity and predictability with few bright-line rules. As discussed further below, when the cases involve murals, these different analytical approaches seem to result in inconsistent outcomes, which are difficult to reconcile.

Any regulation that implicates the First Amendment must balance carefully on a tightrope between regulating too much speech and not regulating enough. Regulate too much speech, and a court will be more likely to find the law violates the First Amendment for not providing sufficient means and manner of communication; regulate too little, and a court will be more likely to find that enforcement is biased toward or favors one particular type of speech.

A. Judicial Review and Constitutional Law Scrutiny Levels

In order to determine how well a regulation walks that tightrope, courts will apply one of three scrutiny frameworks to challenged regulations: rational basis (the least demanding standard), intermediate scrutiny (the middle tier of review) and strict scrutiny (the most exacting test). The level of scrutiny applied will heavily influence the outcome of the review. Courts that apply the rational basis framework commonly uphold regulations targeting signs; likewise, courts that apply the strict scrutiny framework commonly strike down or invalidate these laws. As such, a basic understanding of those standards of review is helpful in drafting regulations.

1. Rational Basis Review

Rational basis review is the default standard when constitutional challenges arise and is generally used unless the question involves fundamental rights or suspect classifications. The rational basis test affords great deference to the government and governmental action, because the ends or objectives of the regulating entity need only promote a "legitimate" governmental purpose.[15] The means adopted by the government to achieve those ends only need to be reasonable. Applying this test requires that a challenger establish the law does not serve any conceivable legitimate purpose and/or is not reasonably related to achieving or attaining the stated ends. Essentially, rational basis review merely prohibits the government from imposing restrictions that are arbitrary, capricious, or irrational and require the court to speculate as to the legitimate interests at stake.[16]

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Thus, courts infrequently invalidate laws when applying this test and local governments are likely to be successful in defending their laws under such a deferential standard.

2. Intermediate Scrutiny

The middle level of review, used in only selected contexts, is intermediate scrutiny. It applies to gender-based classifications, restrictions based on illegitimacy, and elements of free speech. In particular, this level of scrutiny is used in the evaluation or analysis of regulation of commercial speech; speech in public forums; content-neutral speech laws; and time, place, and manner restrictions on speech.[17]

To satisfy intermediate scrutiny the regulation must be narrowly tailored to achieve the stated goal. A law reviewed under this standard will be upheld if it is substantially related to a "significant" or "important" government purpose. As the Supreme Court has stated, "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it."[18] However, satisfying intermediate scrutiny is difficult to pin down, as it seems to float between absolute rigidity (strict scrutiny) and no rigidity at all (rational basis review).[19]

3. Strict Scrutiny

Under strict scrutiny, the law must be necessary to achieve a "compelling" governmental purpose. Furthermore, the means chosen must be specifically fashioned to accomplish that purpose. As the most stringent standard of judicial review, strict scrutiny applies when a regulation implicates a suspect classification such as race or nationality, or a fundamental right such as voting or freedom of speech. To survive strict scrutiny, the regulation must be the least restrictive means for achieving the asserted governmental interest — in other words, there exists no other less restrictive method of achieving the regulation's end. Strict scrutiny is known for being "strict in name, but fatal in practice," meaning that a regulation subjected to strict scrutiny review is almost always struck down as being unconstitutional.

B. Murals and First Amendment–Related Challenges

Mural regulations will be subject to the aforementioned trilogy of review standards. Under a generic dictionary definition, a mural is "a painting or other work of art executed directly on a wall." Based on this definition, and on the applicable case law, it is simple to classify murals as a painting or image on a structure. However, it far less simple to determine whether a "mural" is a "sign" subject to regulation under a municipal ordinance. As one federal court aptly and succinctly noted, "[i]t is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of law relating to sign regulations."[20]

The Supreme Court addressed the validity of a sign ordinance in *Metromedia,* applying the *Central Hudson* test.[21] The San Diego ordinance in question banned commercial billboards by imposing various restrictions on the erection of "outdoor advertising display signs,"[22] prohibiting all off-premise outdoor advertising display signs and imposing special provisions for on-premise signs. In addition, like most sign ordinances, it contained specified exceptions. In a plurality decision, the Court upheld the billboard ban, but found that the on-premise limitation to commercial advertising and the exceptions were unconstitutional.

Justice Rehnquist in his dissent described the plurality decision as a "virtual Tower of Babel, from which no definitive principles can be clearly drawn."[23] His dissent was prescient: since *Metromedia*, lower courts have applied widely analytical approaches in mural cases — and handed down equally disparate decisions. However, despite the confusion surrounding *Metromedia* and the shaky foundation for sign law it provided, the decision made clear that there are two distinct First Amendment issues relating to sign ordinances that will also arise in the context of murals: commercial versus non-commercial analysis and content neutrality analysis. More importantly, many consider *Metromedia to be the* leading case on the distinction between commercial and noncommercial speech, which is the starting point for analysis with murals related to businesses.

1. Commercial Speech vs. Non-Commercial Speech

Determining whether a mural constitutes commercial speech (and is thereby subject to more rigid regulation as a sign by a municipality) or non-commercial speech (and afforded greater protections under the First Amendment) is a fact-based inquiry. Making this determination is rarely simple and courts reach different conclusions in factually similar cases. Moreover, level and framework of judicial scrutiny plays a significant role in whether or not the court will deem government regulations permissible.



Complete Angler-no commercial message in mural, not subject to regulation.

For example, in *Complete Angler, LLC v. City of Clearwater*,[24] a Florida bait shop challenged the city's sign and banner ordinances, both on their face and as

applied, regarding the marine-themed mural on the outside wall of its shop, (as well as the First Amendment banner the owners placed over the mural when the City of Clearwater attempted to order the mural's removal). The court applied strict scrutiny and concluded that the mural was protected non-commercial speech. The ordinance at issue included 26 different categories of signs exempt from the permit process, including "[a] rtwork and/or architectural detail."[25] The court reasoned that the mural's primary purpose was not commercial activity, but rather to promote the local marine environment. Stated differently, the mural qualified as artwork because it contained non-commercial speech. The local artist who had painted the mural, who demonstrated the mural was his impression of the local habitat, and that he intended it to bring attention to endangered species of fish, evidenced this non-commercial character. As a result, the court determined the mural did more than "propose a commercial transaction,"[26] classifying it as artistic expression (non-commercial speech), which enjoys First Amendment protections.

In contrast, the court in *Wag More Dogs, LLC v. Cozart*[27] concluded that a mural on the side of a dog daycare business constituted commercial speech. Attempting to capitalize on their location near a dog park, the owners of Wag More Dogs, LLC commissioned a mural on the rear of their building that depicted happy cartoon dogs and dog-related imagery. Zoning administrators cited the business and demanded that it cover the cartoon dog mural. The owner filed suit. The court found that many of the cartoon dogs in the mural incorporated the Wag More Dogs, LLC cartoon logo and therefore concluded the mural was commercial speech. The locality's restriction therefore satisfied intermediate scrutiny.

The factual similarities between these two cases make it difficult to reconcile their differing outcomes. Both involved large painted murals which were located on the business-owners' respective shops, and both were commissioned with the goal to bring attention to the related commercial enterprise.

To reconcile these decisions, one must review the Supreme Court's definition of commercial speech. In *Central Hudson*, the Supreme Court characterized commercial speech as an "expression related *solely* to the economic interests of the speaker and its audience."[28] Further, the court in *United States v. United Foods, Inc.* found that commercial speech typically consists of "speech that does *no more* than propose a commercial transaction."[29] Thus, when applying the emphasized aspects of these definitions to *Complete Angler* and *Wag More Dogs* the fact that the artist in *Complete Angler* created the imagery in the mural to bring awareness to the local environment while the mural in *Wag More Dogs* incorporated elements of a business logo makes all the difference. Hence, while these murals ostensibly served the same purpose, the fact that the message in *Complete Angler* was not solely economically motivated and did more than market a commercial enterprise explains the divergent outcomes in the two cases.



Some may argue that any "secondary purpose" is a matter of semantics and can easily be crafted for the purposes of avoiding the commercial speech label. This may be true, but these cases accurately depict the aforementioned tightrope that lawmakers must walk when sign ordinances and regulations restrict speech.

Another court's interpretation and application of the commercial and noncommercial definitions supports this view. In *Tipp City v. Dakin*,[30] an Ohio municipality obtained an injunction against a business, alleging that its mural violated the local sign ordinance. The mural depicted a mad scientist with beakers and chemical molecules on a building occupied by "Warrior Racing," a business that sold racing fuel additives. The court framed the issue as "whether the expression depicted in the ... mural either extends beyond proposing a commercial transaction or relates to something more than the economic interests of the appellants and their customers," adding "[i]f so, it qualifies as noncommercial speech and is entitled to stronger First Amendment protection."[31] The court concluded that the mural constituted commercial speech since it "plainly is intended to attract attention to Warrior Racing" because "the chemicals and molecules depicted on the sign propose a commercial transaction to racing aficionados and others."[32]

2. Content Neutral vs. Non-Content Neutral

A second overriding issue in mural cases is the determination of whether the regulation is content-based. As previously mentioned, regulations must be justified without reference to the content of the mural. While most mural regulations will fall under

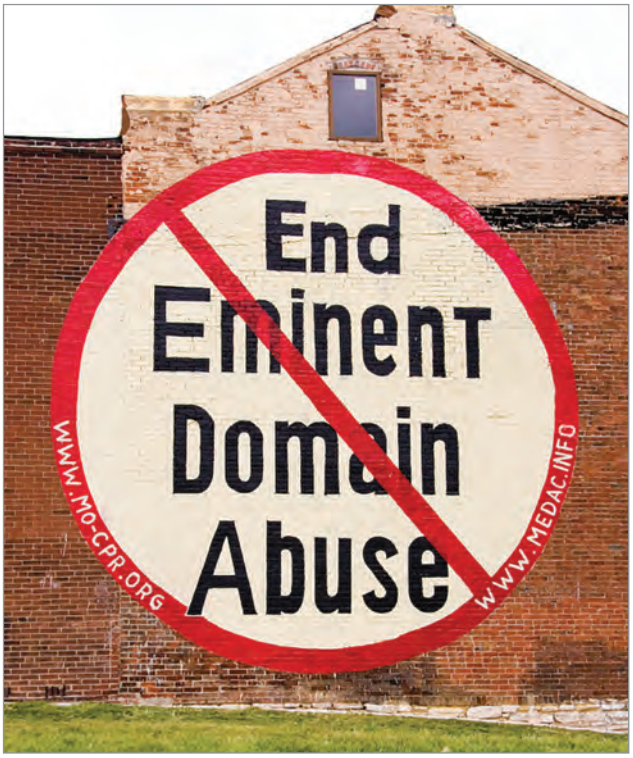
Continued on page 10

intermediate scrutiny, if a regulation is content-based it is subject to strict scrutiny and a court is almost certain to find it unconstitutional.

In *Neighborhood Enterprises, Inc. v. City of St. Louis*,[33] an individual who "describe[d] himself as a critic of St. Louis's use of eminent domain for private development," painted a mural on a side of a building, stating "End Eminent Domain Abuse" in a red circle with a slash through it. As you can imagine, this caught the attention of code enforcement, who issued a citation on the basis that the mural was an illegal sign for which the owner had not obtained a permit. The owner then sought a permit, which the city's zoning administrator denied on the basis that the mural did not meet the requirements of the zoning code. Litigation commenced. The *Neighborhood Enterprises* decision is a good example of the steps necessary for a court to determine which scrutiny level to apply. Here, the court first looked at the definition of a "sign" under the St. Louis ordinance to determine whether the mural was subject to regulation, or whether it was a non-sign or exempt under the ordinance. To complete this analysis, the court explained that it "must look at the content of the object."[34] The stated purposes or justifications for the sign restrictions by the city were "principally on concerns for traffic safety and aesthetics."[35]

The court concluded that the definition of "'sign' [was] impermissibly content-based because 'the message conveyed determines whether the speech is subject to the restriction.'"[36] Accordingly, strict scrutiny applied and the sign code failed in that it was not narrowly tailored. More specifically, the ordinance failed because its restrictions were not narrowly tailored to accomplish the city's interests in aesthetics or traffic safety. The court reasoned that the zoning code recited the city's interests "only at the highest order of abstraction, without ever explaining how they are served by the sign code regulations generally, much less by its content-based exemptions from those regulations," and "offers no reason for applying its sign regulations to some types of signs but not to others."[37]

The content neutrality issue had also been raised in *Complete Angler.* The plaintiff in *Complete Angler* offered evidence of five other similar murals in the area which had been condoned or allowed by the City of Clearwater without enforcement or requiring that those businesses obtain a permit. Thus, the application of the code was not content-neutral and the City of Clearwater could not satisfy strict scrutiny.[38]



3. The Prior Restraint Doctrine[39]

In *Mahaney v. City of Englewood*, the plaintiff owned a smoking accessory shop and challenged a provision of the city's sign ordinance requiring a special review procedure for wall murals. To prevent graffiti, the plaintiff hired artists to paint murals on the north and south exterior walls. The south wall mural consisted of famous musicians including Bob Marley, Jimi Hendrix, Jim Morrison, Jerry Garcia, and Janis Joplin. The north wall mural depicted scenes from *Alice in Wonderland*. Following citizen "inquiries," which likely meant complaints about the murals, code enforcement cited the plaintiff for various violations of the sign ordinance, namely failure to obtain a permit, failure to "obtain city manager approval," having more than one mural, and having murals that exceeded the size permissible under the code.

The *Mahaney* court did not determine whether the murals constituted art under the sign ordinance, which would exempt the murals from regulation. Rather, the court noted that under either the work of art or the wall mural provisions of the sign ordinance, the City of Englewood could not prevail. The court concluded that the special review procedure for murals constituted an impermissible prior restraint on free speech in violation of the Constitution, requiring strict scrutiny.

The court explained, "[a] municipal ordinance is a prior restraint when it subjects constitutionally protected speech to governmental regulation prior to the time that such speech is to occur."[40] The availability of judicial review, by itself, was insufficient to render the special review process constitutional because it still lacked the requisite procedural safeguards including a specified period in which the city manager must decide whether to issue a permit. As such, the city's special review process on its face, and as applied to the plaintiff's murals, constituted a "constitutionally impermissible prior restraint on protected speech" and the trial court erred in denying plaintiff's cross-motion for summary judgment.[41]

4. Historic Property or Historic District Ordinances

The inclusion of special zoning districts related to historic properties and murals can raise interesting questions. Notably, these regulations may pose or raise prior restraint problems with the permitting and procedures to decide whether some alteration or proposed development of a historic building is compatible with the neighborhood's historic character.

Most challenges to historic preservation

ordinances are made under the takings provisions, Due Process Clause, or Equal Protection provisions in the Fourteenth Amendment. However, in *Burke v. City of Charleston*, [38] the plaintiff challenged the city's historic preservation ordinance under the First Amendment in relation to a mural. Plaintiff painted a pop art-style mural in bright colors on the side of a restaurant in a historic district and the city ordered it removed. The mural included a section within the painting for the restaurant to advertise. Despite this fact, the court concluded that the mural constituted noncommercial speech for its First Amendment analysis.

The court held that the ordinance was content-neutral because the government's purpose was not to regulate the mural's content. Rather, the purpose of regulating the size, color, and format was the preservation of the historic district, and the restrictions went no further than necessary to achieve those goals.

5. Recent Mural Case Law

In a recent case, the City of San Diego was granted summary judgment in a case involving art murals. *Architectureart, LLC v. City of San Diego* [43] involved a requirement that signs visible from the right of way or signs on city-owned property obtain a permit. However, the San Diego sign ordinance exempted murals from the permitting process, or, specifically:

> [p]ainted graphics that are murals, mosaics, or any type of graphic arts that are painted on a wall or fence and do not contain copy, advertising symbols, lettering, trademarks, or other references to the premises, products or services that are provided on the premises where the graphics are located or any other premises. [44]

The city interpreted its mural exception as applying to "any painted art that is not advertising" and found that the stated purpose of the sign ordinance "is to optimize communication while protecting the aesthetic character of the City." [45] The plaintiff, a mural company, brought a challenge to the ordinance after being issued violations for its murals, which contained lettering. The plaintiff had received approval for previous murals. The plaintiff also alleged that an annual Comic-Con event received special treatment with its murals and advertising.

The court determined that the speech at issue was commercial, without much elaboration. It analyzed the regulations under the *Central Hudson* test and concluded that the sign regulations were constitutional, reasoning that the City had established that its interests in optimizing communication and community aesthetics were substantial, which justified the restrictions, and those restrictions advanced the City's interests without going further than necessary.

III. Municipalities and Mural or Public Art Programs

Some municipalities encourage and specifically implement programs to display murals or other forms of public art to address blight, encourage and foster community, develop appreciation of art, and promote aesthetic beauty. However, code enforcement and compliance with zoning regulations are typically not at issue in these circumstances since the municipalities implement mural design guidelines. Municipalities seek to use murals in various ways, such as to promote diversity, enhance or contribute to a neighborhood's identity, and signal that an area is the focus of revitalization efforts. For a review of mural programs in several cities, the City of Savannah, Georgia Metropolitan Planning Commission did a case study, *Mural Art versus Graffiti, Defining Mural Art in the City of Savannah*.

CONCLUSION

Murals create value in public spaces while at the same time sending a message that the community values the space as a collective. In general, First Amendment protections across all media have expanded over time, and it is unlikely that this trend will change. Meanwhile, murals have become increasingly popular and various, and business owners responding to this trend and commissioning murals on their property can often make credible claims to artistic or non-commercial expression, even when such a commission likely has some commercial motivation. As a result, First Amendment constitutional challenges related to regulations or ordinances restricting murals will likely increase. Additional open questions related to murals include First Amendment challenges based on local design requirements for murals in public art programs. In addition, potential challenges based on a municipality's restriction on size, height, or color of murals for aesthetic purposes may impermissibly restrict the messages conveyed by the murals. For example, it is not a stretch to see an artist of a mural argue that these types of restrictions regulate the communicative content of the mural.

It would be prudent for municipal entities to review outdated sign ordinances. In that process, keep in mind the competing interests of the First Amendment and governments seeking to regulate protected forms of speech. Free speech principles require a balancing of the constitutional interest in freedom of expression against the government's need to regulate in the public interest.

Some suggestions to keep in mind during the review, revision, or amending process include: focusing on the type of sign being regulated and not its content, articulating a compelling purpose statement while referencing a comprehensive plan or other legislative findings, cleaning up definitions to reduce content-based distinctions, and determining whether the exemptions in the ordinance pose potential for challenges. Any attempt to define artwork in sign ordinances is likely to pose challenges because distinguishing between a sign and art requires an interpretation of the message conveyed, and thereby becomes a content based regulation.

For murals, it appears that the better approach is to implement a mural program. Municipalities can set forth design guidelines to enhance revitalization or beautification efforts in accordance with their goals and objectives, reducing the likelihood of challenge.

Notes:

1. Robert M. Anderson, American Law of Zoning 7.01 (Kenneth H. Young, 4th ed. 1996); see also, Meg Stevenson, Aesthetic Regulation: A History, 35 Real Est. L. J. 519. 521 (2007); Geri Marie Rossano, Content Neutrality and the Intermediate Scrutiny Test in *Wag More Dogs, LLC v. Cozart*: A Missed Opportunity to Clarify the Rules of the Fourth Circuit? 24 Geo. Mason U. Civ. Rts. L. J. 61, 75 (2013).

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PRACTICE TIPS

The Good, The Bad, and The Ugly: Selecting, Retaining, and Supervising Outside Counsel

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City Attorneys are expected to know a lot. This myth fits nicely into the model that many of us pursued as we entered law school: many of us were the kid who knew the answers, who aced the tests, who raised our hands (some of us haven't grown out of that model). The problem is that our cities have so many issues and so many challenges that we cannot possibly know all of the answers. There are bond and finance issues. Land use and sign ordinances. How much of a city's reserves have to be in insured accounts? There is litigation (not everyone is a trial lawyer) and appellate arguments (we can't all be a former Solicitor General or Supreme Court clerk). We often need help.

Our role is often (though rarely discussed) similar to the General Counsel of a medium to large corporation. In most cities (depending on locale), the lawyer may serve as a member of the executive team, the *de facto* chief ethics officer, might be appointed either by the chief executive or by the legislative branch of the City, or any of myriad other options. An excellent discussion of the various roles of general counsel in the corporate world is found in Professor Deborah DeMott's article, *The Discrete Roles of General Counsel*, published in the Fordham Law Review.[1] In her article, Professor DeMott discusses in detail some of the challenges raised here. While Professor DeMott apparently disagrees, as applied to city and county attorneys, the role of the chief legal officer is largely the same regardless of whether the lawyer serves in-house or is part of a firm providing such services for a few or many clients.

Hiring outside counsel is not an easy choice for a City Attorney. There are a number of considerations or challenges to be overcome. It is impossible to identify or discuss all of those challenges. Once upon a time, when a baby lawyer complained that the team of trial attorneys and litigators he was a part of was as qualified and effective as those at BigLaw, a senior lawyer explained that corporations often hired a firm for representation based on the mantra of "covering one's backside" (or words to that effect). If the litigation or representation went badly, General Counsel or Chief Executives could look at the Board and say, "We hired BigLaw. What else were we supposed to do?" That may not always be an option. But it is an answer.

Selection is only the first step. City Attorneys must also supervise and manage the lawyers they hire. Sometimes, the outside lawyer makes reports directly to the governing authority, but most of the time City Attorneys take what they hear from the outside counsel and report to the governing authority (that's what I do and what I recommend).

In any event, the lawyer the City Attorney recommends or the lawyer she retains for her specialized problem remains a reflection of the lawyer who made the hire. If they are prepared, you are prepared. If they are unable to establish an answer to a direct question from the Court or an elected official, you didn't answer the question.

This article will discuss these competing and inextricably intertwined conditions and challenges of hiring and supervising outside counsel. Those challenges apply whether your city comprises one thousand persons or more than one million.

Hiring and Retaining Outside Counsel: A number of considerations arise under this rather simple sounding rubric. Should you? Must you? May you? Will you? Not to mention the ever important: Who?

1. When is Outside Counsel Advised? Or required?

Your City Manager calls you at 8:30 one morning. Just like when your mother told you that nothing good happens after midnight, nothing good happens when a phone call from City Administration comes before 9:00 am.

The challenge presented by this early morning call for assistance is an area of law you are not familiar with. The Model Rules of Professional Responsibility say lawyers should not take a matter in which they do not believe they are competent to handle the representation. ABA Model Rule 1.1. The comments to the Rule provide some further guidance. Comment [1B] suggests that if you can learn the area of the law, then you are competent. Comment [2] says that you are competent if you went to law school and passed the bar exam. (Is that even true?) Nonetheless, there are some things we all know, or should know to avoid unless we have specialized, e.g., bond work, employee benefits law, the intersection of tax law and municipal finance.

But that does not end the question, does it? Do you have the time to devote to the problem? What are the political considerations of the problem presented? Was your Council or Board split or united in their vote? Is there a vocal community opposition group and a contested election coming up? (Yes, I know you aren't supposed to take those questions into account, but we are not human if we do not acknowledge that they play some small role in the decision).

Each of these questions imparts some bit of data into the "should I" analysis. There is no bright line test for the resulting answer; no magic algorithm to be utilized and pop out the alchemical solution. Sometimes one consideration will win out over others. Sometimes an answer to that same issue will have no impact whatsoever on the analysis of whether to hire outside counsel. Each situation is unique (something I'm sure your clients hate hearing as much as mine do). In the end, it is a judgment call that you make with the blessing (and within the budget) of the city administration.

These questions are undoubtedly important, but they have little impact on the conflict or "must I" question. Legal conflicts of interest (*requiring* separate counsel for parties) arise in numerous circumstances. A few of those might include: (1) Is the target of the lawsuit, claim, or complaint the appointing authority (does your charter answer whether you are appointed by the Mayor or by the Council); (2) Are there facts in dispute between various participants in the transaction; (3) Are the facts alleged by the opposing party sufficient to create a difference of opinion or facts between the parties; (4) Are the parts of your client at war with themselves (this happens frequently in Georgia)? If you answer any of these questions in the affirmative, you then have to determine if the potential conflict is waivable by the client (and even if it is, whether you wish to seek a waiver).

In the four examples above, I would step aside and hire some other lawyer to represent the pieces and parts of the dispute, regardless of the possibility of securing a waiver. Remember a City Attorney represents the city, not individual officers, officials, or employees. This is an easy part of our jobs to forget (and one your elected officials and administrators likely always forget). As the advocate for the entity, your primary responsibility is to it, not any one person. You don't get to pick sides or parties or claims to defend. The best choice in those situations described above: Step away. Just step away.

Different, albeit similar, questions arise when the question becomes necessary to retain counsel to advise the Board or Council because they are sitting in a quasi-judicial role and the City Attorney is acting as an advocate. Different rules apply (arguably) when the lawyers are from an in-house law department, part of a law firm, or an individual lawyer.

The first step in deciding whether to obtain separate counsel is the client's ordinance. What procedure is called for? What role is defined for the legal advisor by the Ordinance? What arguments do you create for opposing counsel with the introduction of another lawyer into the mix? The fact remains that your quasi-judicial board needs your advice and counsel. Or at the least, the advice and counsel of someone with a law degree. The application of facts to law often requires at least some discussion of the interpretation of the applicable ordinance, statute, or case precedent. I try not to leave such matters to persons with access only to Google.

2. So, you decided you should hire outside counsel. How do you determine who should be retained?

Now that you made the initial decision that you should get outside help, how do you pick who to retain? That, after all, is the point, right?

Expertise and the ability to work with the lawyer you pick should be part of the criteria. Those pieces are so much part of the choice, they are cliché. But think about what cliché means. How many times has the foolish husband, who is working hard but not quite making it and is angry at the world, been part of a TV situation comedy in the last sixty years? When Ralph Cramden and the *Honeymooners* arrived on television, it was new and untried. The trope has reappeared over and over because it continues to be true and works, in comedic terms. Clichés exist because they are, at least in part, true and workable understandings of reality. Your outside lawyer must be someone you trust and whose expertise suits the challenge faced by the client.

What other qualities are important or necessary or nice-to-have?

A sense of urgency should be near the top of the list. If, in establishing boundaries and reporting (discussed further below), you ask to review documents before they are filed, you don't want to receive those documents at lunchtime when they are due to be filed that day by 5:00 pm. Your deadlines and requirements should become your lawyer's.

Similarly, a willingness to collaborate may be important. While the client is the same for both of you, as the general counsel for the client, your wishes are entitled to deference, if not preference. In this role, the city or county attorney serves two roles, first as lawyer and second as agent for the entity in the control of the legal matter being litigated. Given that those two roles are inextricably intertwined in dealing with outside lawyers, the city or county attorney should expect that its opinion of the matter is entitled to weight and (to some extent anyway) deference.

Deference can be a dangerous thing, however. Undoubtedly, if the same firm is not engaged over and over for similar matters, the repository of information on the global position of the city or county's other matters lies with the city or county attorney. This tactical choice enhances and strengthens the position of the city or county attorney, but like the lawyer who represents himself, there is questionable utility for the lawyer who only ever listens to himself.

Finally, *gravitas* can be an important consideration. Remember when the baby-lawyer asked why her team couldn't compete for the "bet the company" type of litigation? Well, the same rules occasionally apply to public entities. There may not be a bankruptcy pending if the litigation is lost, but the harm to the client may still be substantial, either in terms of absolute costs (decreased financial rating or large pay-out in damages), or in terms of damage to reputation and standing in the larger community. In such situations, selecting a lawyer who, either personally or by association with a particular firm, carries significant legal stature may be advantageous.

But it can also be dangerous. Several years ago, a metro Atlanta school district hired the Atlanta-based national law firm King & Spalding to represent it in a construction dispute. The firm entered into a split fee agreement with the school district, charging both an hourly and a contingency fee for the representation. After accruing $17 Million in fees over 5 years in the litigation, there was a potential pay out of another $19 Million if the suit proved successful. The trial court agreed

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that the contract appeared unfair, but said the issue of fairness was between the law firm and the client, not for the court to pass judgment on.[2]

As that story reveals, the choice of a firm with the power and heft to litigate a substantial matter may come at a price. That price might not be measured solely in dollars (though substantial), as the law firm providing general counsel duties (ostensibly for other reasons), the Superintendent, and most of the School Board are now different than they were at the time the litigation was initiated. There are many experts available, and not every expert is the right fit for the situation. Cost, expertise, staffing choices, and a host of other not strictly legal considerations go into the analysis of who is the right choice for the particular case in the particular circumstance.

Supervision and Establishing Expectations

Setting boundaries is always important. We have to train our clients when it is too late to call or text and expect an immediate response.

Boundaries are just as important to your outside counsel. You will no doubt receive a retention agreement or engagement letter from the lawyer you hire. That will establish your lawyer's expectations. What about yours?

As Chief Legal Officer, you are the legal face of the City. As Professor DeMott describes it, the Chief Legal Officer is the purchasing agent for the client entity.[3] Regardless of your perspective or role, you have the right to expect that lawyers working for the City keep you abreast of events in the matters they are working on. If they are retained by an insurer, you have the right to know what they are telling the insurer.[4] Regardless of who selects or hires the outside lawyer, you are entitled to be able to speak cogently when an elected official asks you about the status of a transaction or a piece of litigation.

I typically send a responsive letter to the engagement document. I outline what I expect and how often I expect it. If the matter is of interest to the media, I make sure the lawyer knows that. If there are issues with public perception about the matter, I communicate that as well. I try to make sure there are no surprises on either side of the representation. What is expected and communicated should, in the end, be mutual.

Here is how I establish the *quid pro quo* between me and outside counsel:

(Notice that the copies requested are all electronic. I do not have the time, space or staff to file paper copies of every matter referred to outside counsel.) The reasons for these requirements were learned over the years and from some embarrassing experiences. Here is just one of those cases from about 15 years ago:

I was defending a pair of cases arising out of the same incident on behalf of a South Georgia community. One case was filed in state court; the other in Federal court. We tried the state court case first and hung the jury 10-2 in our favor. The state trial judge was ready to tee things up almost immediately, but we were also specially set for the Federal trial within a couple of weeks. Before jury selection was complete, the seven-figure-plus demand came down to the low six figures. We had spent a week in trial with three days of deliberations in the state court case only to have to do it all again. The federal trial was not expected to be any shorter or less difficult.

I called the insurer and passed along the new demand. I did not, much to my later embarrassment, call the County attorney and let him know what was going on. Over the course of the next four hours, we were able to resolve both cases, largely (from the insurer's perspective) for what it would cost to try the two cases again. I packed my bags and headed for home, thinking I had done a good job for my clients but sorry not to get to try the case.

The next morning I got a call from the County Attorney. The settlement had hit the paper and the electeds were appalled, including the Sheriff (who I was told was particularly angry) (in Georgia, the county Sheriff's office is created by the State Constitution, a position that the Georgia Sheriff's Association guards like Beefeaters guard Her Majesty's Crown Jewels). I explained what happened, the insurer's analysis, and my repeated recommendations that the cases were winnable (it was an excessive force case and each Plaintiff had testified that during the alleged beatings, none of the officer said anything to any of them. Our expert, a retired FBI agent, was prepared to testify that no excessive force case ever occurs without some evidence of taunting or statements by the officers in an effort to trigger a response from the arrestee to allow more beating). What I failed to do, despite knowing better and having regularly kept the County Attorney informed on all of my other reports and discussions about the case, was call him and let him know what was going on. I broke the fundamental rule of representing public entities: do not let electeds get surprised by something you did that appears in the newspaper.

Set your expectations early. Adhere to your expectations. Yes, you will have to pay for some of those expectations, but that is a small (relatively speaking) price to pay to make sure your client is apprised of all relevant information and documentation.

OUTSIDE COUNSEL EVENT	MY EXPECTATION
Monthly Billing	Status Report and Plan for the next month
Any document sent to opposing counsel	An electronic copy
Communication with opposing counsel	An electronic copy
Initial evaluation report (for insurers)	An electronic copy
Communication regarding settlement	Addressed to me/ Phone call to me
Review of documents to be filed	Depends on matter
Any document that is filed	An electronic copy

Pitfalls, Pratfalls, and Other Lessons from the Trenches

1. When "We're going to win" becomes a frantic "We've got to settle"–or No Matter What, It's Still All About You

A colleague hired a trial lawyer with stellar credentials and many years of experience and trials to verdict to represent a public entity where my friend was the County Attorney. The trial lawyer was with a well-known national firm. The matter was a personal injury case

involving a collapsed roadway.

For months, the reports arrived regularly identifying and extolling the absolute defensibility of the case. No surprises. No issues. Discovery proceeding according to plan. No surprises in discovery.

Then a trial calendar arrives. All of a sudden there are immediate, repeated, and often frantic calls for settlement authority. The County Attorney then calls his Board Chairman and asks that an executive session be scheduled for the next work session. Upon arrival the County Attorney presents the most recent report and asks for settlement authority as suggested by trial counsel. The Board Chairman responds, "*You've* been telling us for months this case is winnable and now you want settlement authority?"

Note who is addressed. It is not the Trial Lawyer. It is the County Attorney. There is no distinction between National Firm lawyer and the County Attorney. They are the same person. The only person on the hook for this change in position is the local lawyer.

The lesson from this experience is two-fold: (1) Make sure that who you hire to try your cases really wants to try your case; and (2) The messenger always dies (maybe not literally, but at least figuratively).

Trying cases is not for everyone. It is strenuous and challenging work. Personally, I love trying cases. There is no more perfect forum for learning the craft of advocacy than a courtroom. But not all lawyers feel that way and even some dedicated trial lawyers no longer want to try a case.

Regardless of who you hire, the City (or County) Council knows its lawyer is you. When your message changes without sufficient notice and explication, you get blamed. It does not matter that you are relying on outside experts and lawyers. The message is yours. I tend not to wait on a face-to-face opportunity to deliver bad news. I get it to the client as early as possible, preferably in writing. I then follow up with individual phone calls with each elected official to make sure they have their questions answered. What changed? How did it change? Why did it change? When did it change? Answer those questions early and often to mitigate the effect of a changing situation on the messenger.

2. Who You Hire May as Well Be You OR It's Still All About You

You are the lawyer your electeds know. You are the one who has worked for months, years (decades?) to establish a rapport and a level of trust with your Board or Council. In a world where lawyers are seen as slightly more desirable than pond scum, you are (hopefully) the exception that proves the rule.

And let's face it: Being a defendant in a lawsuit makes it personal. Therefore, as far as the people who make up your client are concerned, no matter who the actual lawyer is, the lawyer they rely on is you. And who you hire as outside counsel is equated to being you.

Early in my career, I had City Managers decide who they wanted to hire. This rarely worked out well because many of those lawyers would be after my client to retain them for the general counsel work for my client, or perhaps had even interviewed or responded to an RFP for the work I was doing. This led to suspicion and challenges in understanding what the outside lawyer was doing and whether he/she was looking for something to create a wedge between me and the client. This didn't happen often, but it became a risk that I was constantly on the look-out for.

Nonetheless, the client still equated these lawyers with my office and the advice I provide. When they failed, or appeared unprepared, it may as well have been me who failed or was unprepared. This is what I call the "No good deed goes unpunished" rule of representing local government.

If the need for outside counsel is based on a legal conflict, the need is obvious and the result is somewhat different. There is a natural disconnect between the lawyer and the City/County based on the existence of the legal conflict. Nonetheless, depending on the reason for the conflict or who the conflicted officer or official is, the City Attorney will likely still need to receive reports from someone involved in the litigation in order to keep the entity (whoever or whatever that may be) apprised of the progress of the case. Remember, we exist, at least in part, to make sure elected officials do not get surprised by events in the paper.

3. Who gets to make the decision about WHO to hire?

Most of this article assumes that the decision whether to hire outside counsel is a conversation between the City/County Administration and City or County Attorney. Perhaps the Mayor or the Chair of the County Governing authority may be involved. If there is a need (for whatever reason) for outside counsel, the governing document for the City/County may offer guidance on the role or responsibility of the City Attorney.

The Charter of your city or county may also provide a basis of control. Most of the Charters I have worked with designate the attorney as Chief Legal Officer and require her to appear and represent the client in all litigated matters. The language provides at least an argument (if your city manager won't agree) that the lawyer gets to pick the lawyer. But that may not be enough. Besides, arguments with clients over the niceties of Charter language are some of the fastest ways out the door from that client.

The Model Retainer Agreement recommended by IMLA, many of whose terms I have adopted in my own agreements with clients, provides that ultimately the choice of outside counsel lies with the City orCounty Attorney. In truth that may be the single most important provision of my agreement, beyond the amount of the retainer or the hourly rate for matters outside the retainer. When the contract language is coupled with the language from your Charter, the arguments tend to fall by the wayside, resolving the question of

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Christopher Balch actively represents clients from across Georgia. His practice currently involves representing the City of Brookhaven, performing independent investigations for private and public entities, and advising businesses in risk reduction and dispute resolution. A veteran of the United States Marine Corps, Chris puts the lessons learned from over 100 jury trials to work for his clients

Public Records and Open Meetings

By: Frayda S. Bluestein, David M. Lawrence Distinguished Professor of Public Law and Government, University of North Carolina School of Government, Chapel Hill, North Carolina.



In the practice of local government attorneys, few subjects are more ubiquitous than transparency laws—often called "Sunshine" laws. Public records and open meeting laws vary from state to state, but it is critical that municipal lawyers understand when and where communications and actions by governmental officials are subject to scrutiny by the public, not only to afford constituents with the transparency they deserve but also to ensure that local officials do not violate the law. The following materials were developed for use in the annual Institute for Local Government Lawyers (ILGL), an IMLA program designed for new local government attorneys, law students, and seasoned attorneys who need a "refresher" in various general topics of local government law.

Public Records Overview

The federal "Freedom of Information Act" (FOIA – 5 U.S.C. § 552) does not apply to state or local government. *Rimmer v. Holder*, 700 F.3d 246 (6th Cir. 2012); *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369 (9th Cir. 1981). Public access to state and local government records is mostly governed by state law, usually as a matter of state legislation rather than common law, but in some cases, a mixture of the two.

A majority of states have a basic public records statute, which contains a broad definition of "public record," describes the right of access, and identifies remedies for denial of access. Exceptions typically are included in the main statute but also may exist in other provisions of law throughout the codified statutes. In most such states, a record held by government is presumed to be open to the public, and if the custodial government wishes to deny access it must find a statute granting an exception to the general rule of open access. In these states, courts are interpreting their own state statutes, which tend to be specific about the types of records exempt from public access. Courts in these states look much more to decisions from other states than they do to federal decisions. (In a few states, courts feel entitled to create their own exceptions grounds of public policy.)

A minority of states have adopted public records statutes modeled after the federal Freedom of Information Act (FOIA). These statutes attempt to be comprehensive treatments of access to records held by state and local governments, putting all the law in a single statute. The federal model leaves a good bit of discretion to courts in determining whether particular records are open or closed, and in these states, the courts rely very much on federal decisions interpreting the federal FOIA. Some of these states have created state-level Freedom of Information Commissions, which have the power to review agency actions regarding record requests.

Elements of Public Records Laws

An attorney who represents state or local government agencies must become familiar with the statutory provisions that define the scope of access to public records. The definition of what constitutes a public record is important, as well as the list of exceptions, which may or may not exist all in one place.

Examples of common exceptions include:

Personnel records. (Some personnel records, such as salaries, are usually open to public access.)

Law enforcement records. (Some police records, such as incident reports and arrest records, are usually open to public access; in some states, police investigation records become open once a trial is held or an investigation is closed. Juvenile records normally receive greater protection.)

Medical records associated with specific patients. Hospital credentialing and peer review information is also often closed to access. Furthermore, with increased competition among hospitals, more and more states exempt information that might be important to a hospital's competitive position. Some states also explicitly exempt emergency medical system records. Federal law (HIPAA) affects access to certain types of protected individual health information.

Student records. Federal law (FERPA) requires that these records be confidential as a condition of federal education aid.

Trade secrets submitted to governments by private companies.

Income and sales information found in tax records. (Property tax records are usually open.)

Matters within the attorney-client privilege. (This is not universal, and in some states

attorney work product is also open to the public.)

Minutes of closed sessions of public bodies, at least for a time.

Records of economic development agencies regarding client contacts. Records about social services clients, because of federal requirements.

Records involving public security, including drawings and plans for public buildings and for infrastructure.

Individual financial or other identifying information, such as bank or credit card account numbers. Federal law limits the use of Social Security numbers (*See* 5 U.S.C. 552a (note); *Ingerman v. Delaware River Port Authority,* 630 F. Supp. 2d 426 (D.N.J. 2009)).

Consideration of Privacy Interests in Releasing Records

Public records laws significantly abrogate common law rights of privacy, but some statutes (including federal FOIA) include provisions exempting or allowing redaction of records in order to prevent unwarranted invasion of privacy.

Courts balance privacy interests against the strong policy of public access and also consider federal and state constitutional privacy protections. *See, e.g., Oklahoma Pub. Employees Ass'n v. State ex rel. Oklahoma Office of Pers. Mgmt.*, 267 P.3d 838 (Okla. 2011) (state employees' privacy interest in their birthdates and employee identification numbers outweighed interest in public access); *Déjà vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County,* 274 F.3d 377 (6th Cir. 2001) (privacy of personal information about owners or employees of sexually-oriented businesses outweighs interest in public access); *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press*, 4 So.3d 807 (La. Ct. App. 2008) (public interest in release of internal affairs investigation outweighs constitutional privacy interest); *Herald Co. Inc. v. Kent County Sheriff's Dep't*, 680 N.W.2d 529 (Mich. Ct. App. 2004) (internal affairs report public, but personal information redacted); *Kentucky Bd. of Examiners v. The Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992) (client complaints included in report about psychologist sexual misconduct exempt); *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576 (5th Cir. 1987) (FERPA did not shield public school teacher's college transcript from disclosure because she had not attended any school within the school district and was therefore not a "student" under the FERPA definition; public's interest in qualifications of schoolteachers outweighed teacher's privacy interest in transcript).

Other Statutory Provisions Governing Access

Governments may adopt regulations governing access to public records, as long as those do not significantly deter the public's right of access.

Statutory provisions typically include: *Custody/retention requirements:* Defining who has custody and to whom requests must be made. Delineating requirements for retention and preservation of records, and authorizing their destruction.

Allowable costs: Charges imposed on requesters of public records are usually nominal, covering only the marginal cost of making the copy. Sometimes statutes permit higher charges for specific types of records or for extensive requests.

Required format of copies: If a record is maintained in electronic form, in most states the requester is entitled to a copy in that form.

Time for production: Records usually must be produced within a reasonable time, and what is reasonable depends on many variables: size of request, number of requests, location of record, etc. A custodian may not, however, automatically put the records request at the bottom of the list of things to do. In some states the statute sets a specific number of days within which a records request must be responded to.

Identity of requester/intended use: The purpose for which someone seeks a record is irrelevant to that person's right of access. Some statutes have incorporated restrictions on commercial use of individual information and lists.

Records, not information: Access extends to specific records, not information, so an agency is generally not required to compile information from records or create new records upon request. But note that courts may require production of information contained in electronic databases.

Personal/Private/Constituent Records

Records relating to personal or private matters that do not involve the transaction of public business generally are not considered public records. *See Denver Post v. Ritter*, 255 P.3d 1083 (Colo. 2011) (cell phone bills for Governor's privately owned phone are not public records); *Associated Press v. Canterbury*, 688 S.E.2d 317 (W. Va. 2009) (emails written by a justice of the state Supreme Court of Appeals were not public records because they did not relate to public business or official duties); *Denver Pub. Co. v. Board of County Commissioners of County of Arapahoe*, 121 P.3d 190 (Colo. 2005) (romantic emails between county clerk/recorder and a subordinate are not public record because don't involve public business.); *Office of the Governor v. Washington Post Co.,* 759 A.2d 249 (Md. 2000) (records of telephone calls made at governor's residence, paid for by the state, are not public records); *State ex rel. Wilson-Simmons v. Lake County Sheriff's Department,* 693 N.E.2d 789 (Ohio 1998) (racist email on departmental computer not public record). *But see Capital Newspapers v. Whalen*, 505 N.E.2d 932 (N.Y. 1987) (personal papers found in mayor's office after his death are public record because in possession of a public agency).

This analysis of personal or private records may also extend to records of elected officials that relate to political or constituent communications and that do not specifically relate to local government activities.

Access to Email and Other Electronic Records

Generally, email and other electronic records are subject to public records laws. Requests for copies of email can be extraordinarily onerous, but the costs of isolating email in response to a request may have to be met by the government.

Content, not location, usually governs the status of the record: Private email on a public email system may not be a public record; public email on private systems may be a public record. *See City of San Jose v. Superior Court*, 389 P.3d 848 (Cal. 2017) (holding that when a city employee uses a personal account to communicate about the conduct of

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public business the writings may be subject to disclosure under the public records law); *Schill v. Wisconsin Rapids School Dist.*, 786 N.W.2d 177 (Wis. 2010) (personal emails created on public system are not public records); *Griffis v. Pinal County*, 156 P.3d 418 (Ariz. 2007) (private emails created on government email system not public records); *State v. City of Clearwater*, 863 So.2d 149 (Fla. 2003) (private email on government- owned computer not public record). *Compare Ohio ex rel. Bowman v. Jackson City School Dist.*, 2011 WL1770890 (Ohio Ct. App. 2011) (unpublished) (private emails used as basis for suspension are public records).

The distinction between records and information is blurred with electronic records. Although courts have held that a local government need not create records or reprogram a computer in order to respond to a public records request, the law may require retrieval of information in a database. *See Data Tree, LLC v. Romaine*, 880 N.E.2d 10 (N.Y. 2007) (question of fact as to whether the request requires reprogramming or retrieval).

Questions arise as to whether metadata associated with an electronic record is sufficiently part of the record to be available as a public record. *See O'Neill v. City of Shoreline*, 240 P.3d 1149 (Wash. 2010) (city must search council member's personal hard drive to provide access to specific requested email containing addressee "metadata" information); *Fagel v. Dep't of Transp.*, 991 N.E.2d 365 (Ill. App. Ct. 2013) (provision of "locked" version of excel spread sheet requested in electronic form was not acceptable as response to FOIA request), *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 905 F. Supp. 2d 161 (D.D.C. 2012) (petitioner's argument that it was entitled to metadata failed as a matter of law where providing metadata would require creation of new records rather than production of those which already existed). For an explanation of metadata and recent cases, *see,* Kara Millonzi, School of Government, UNC Chapel Hill, North Carolina Coates' Canons Local Government Law Blog: Is Metadata a Public Record? Case Law Update https://canons.sog.unc.edu/is-metadata-a-public-record-case-law-update/.

Federal law places limitations on access to electronic records such as email, text, and voice mail messages stored on private systems. *See* Stored Communications Act, 18 U.S.C. § 2701.

Relationship to Discovery/Attorney-Client Privilege

Public records laws do not necessarily coincide with or recognize rules of discovery or privileges that exist under other laws. A majority of courts have held that a public records request can be used in litigation as an alternative to, and notwithstanding some of the limitations of, the discovery rules. *See Scott v. Smith,* 728 S.W.2d 515 (Ark. 1987) (attorney work-product available under public records law); *Chief of Police, Hartford Police Dep't v. Freedom of Info. Comm'n*, 746 A.2d 1264 (Conn. 2000) (use of public records law allowed); *Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860 (Ky. Ct. App. 2001) (use of public records law allowed); *McCormick v. Hanson Aggregates Southeast, Inc.,* 596 S.E.2d 431 (N.C. Ct. App. 2004) (attorney work-product available through public records law). *But see In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (report prepared for litigation exempt under "other laws" exception to public records act).

Regarding the attorney-client privilege, compare *Suffolk Const. Co., Inc. v. Division of Capital Asset Management,* 870 N.E.2d 33 (Mass. 2007) (public records law does not abrogate attorney-client privilege), and *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 824 N.E.2d 990, 997 (Ohio 2005) (indicating that "in Ohio, the attorney-client privilege extends to government agencies consulting with in-house counsel for legal advice or assistance"), with *News and Observer Pub. Co., Inc. v. Poole,* 412 S.E.2d 7 (N.C. 1992) (matters within attorney-client privilege available under public records law), and *City of N. Miami v. Miami Herald Pub. Co.*, 468 So.2d 218 (Fla. 1985) (communications between lawyer and public-entity clients only shielded from disclosure during pendency of litigation pursuant to limited statutory exemption).

Open Meetings Overview

Each state has its own open meetings law, and there are significant differences among their provisions. Therefore, the decisions of other courts are often not helpful in interpreting your jurisdiction's statute. A new attorney needs to read his or her state's statute, any cases and attorney general's opinions interpreting it, and any publications explaining the statute.

The new attorney should seek answers to the following questions:

What bodies are covered?

Elected governing boards are universally subject to open meetings laws. Sometimes boards with advisory powers only are not covered. Sometimes committees of larger boards are not covered.

Sometimes boards of private organizations are covered, if these organizations are subject to effective government control, carry out governmental functions, or are acting as agents for government. This kind of coverage is usually the result of case law rather than explicit statutory provision.

What meetings are covered?

In some states only meetings at which action is taken are subject to the law. In some states only formal meetings are subject to the law. Informal gatherings of a board's members are not covered.

In many states, any gathering at which board members deliberate about board business is subject to the law.

What about email and other electronic communications?

Courts are grappling with the question of whether email and other electronic communications among board members constitute meetings under open- meetings legislation. *See Citizens Alliance for Prop. Rights Legal Fund v. San Juan Cnty.,* 359 P.3d 753, 763 (Wash. 2015) concluding that an "'e- mail/telephone' exchange did not constitute a 'meeting' of the [County Council]" in part because there was "no indication that the participants had the requisite collective intention to meet"; explicitly not reaching the issue of whether such an exchange of communications could ever constitute a meeting under state law); *Allen v. Lake-*

side Neighborhood Planning Comm., 308 P.3d 956, 963 (Mont. 2013) (affirming lower court's ruling that an electronic meeting did not occur in this case, but declining to adopt the position that a meeting "could never by convened by way of a Yahoo email group"); *Johnston v. Metro. Gov't of Nashville & Davidson Cnty.*, 320 S.W.3d 299, 312 (Tenn. Ct. App. 2009) (certain email exchanges involving "reciprocal attempts at persuasion" among members of local legislative body fell within scope of state open meeting law); *District Attorney for Northern District v. School Comm. of Wayland*, 918 N.E.2d 796 (Mass. 2009). *But see Lambert v. McPherson*, 98 So. 3d 30, 35 (Ala. Civ. App. 2012) (school board member's email to other board members was not a meeting under state law because it "was a unilateral expression of [the sending member's] ideas or opinions" rather than an "exchange of information or ideas among a quorum of board members" (internal quotation marks omitted)); *Hill v.* Fairfax Cnty. Sch. Bd., 727 S.E.2d 75 (Va. 2012) (a series of emails among council members was not a meeting); *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010) (one-on-one briefings and email exchanges may be violation, but cured by genuine deliberation in open session).

What notice is required of meetings?
In a few states the statute contains no notice requirement.
In some states the statute requires "reasonable" notice, or a comparable formulation, and the courts will determine whether the notice given was in fact reasonable.
In some states the statute sets out very specific requirements for notice.

What can be discussed (or acted upon) in closed or executive session?

Common topics include:
- Personnel matters.
- Litigation, administrative proceedings, and discussions of other claims.
- Attorney-client discussions.
- Property acquisition and/or disposition.
- Deliberations in quasi-judicial matters.
- Deliberations on economic development projects.
- Matters involving patients or physicians in public hospitals and other health facilities.
- Discussions on matters confidential under other statutes.

What remedies are available when the statute has been violated?
Most commonly, litigants can seek declaratory or injunctive relief.
In many states, litigants can seek to invalidate actions taken after statutory violations.
In a few states, violations expose board members to civil penalties or criminal prosecution, or to personal liability for plaintiffs' attorney fees.

Application of Public Records and Open Meetings Laws to Private Entities
A private entity does not become subject to sunshine laws simply by contracting with or receiving funds from a public entity. On the other hand, government cannot avoid sunshine laws by delegating its responsibility to a private entity. Courts have analyzed this issue by applying different tests and sets of factors including: whether the private agency is performing governmental functions or serves as the "functional equivalent" of a government body; the extent of oversight and control the public agency has over the private agency, with respect to specific records; whether the public agency owns or has a right of access to the record. *See SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012) (private entity was subject to state public records law where stadium contract for operation of a minor league ball park was found to be a "delegation of some non-ancillary undertaking of government"); *Evertson v. City of Kimball*, 767 N.W.2d 751 (Neb. 2009) (private investigator report prepared under contract is public); *State ex rel. Oriana House, Inc. v. Montgomery*, 854 N.E.2d 193 (Ohio 2006) (functional equivalent test for determining whether nonprofit organization is subject to law); *News and Observer Publishing Co. v. Wake County Hospital System, Inc.*, 284 S.E.2d 542 (N.C. Ct. App. 1981) (multiple factors evaluating extent of control).

Resources
Public Records
For those states that operate under statutes modeled after the federal Freedom of Information Act, the U.S. Department of Justice maintains a website containing information about FOIA and related open government resources: http://www.justice.gov/oip/foiapost/mainpage.htm
David M. Lawrence, Public Records Law for North Carolina Local Governments, (School of Government, 2d ed., 2009), available at https://www.sog.unc.edu/publications/books/public-records-law-north- carolina-local-governments-second-edition (Although this book focuses on North Carolina, it draws on cases from around the country and therefore might be a useful starting point for investigating the law and finding cases.)

Open Meetings
In most states there will be some state-level source on that state's open meetings law. The most likely publishers are state leagues or associations of cities or counties, the state attorney general's office, or a university-based public service organization.
There is one comprehensive national source on open meetings laws and cases: Ann Taylor Schwing, Open Meetings Laws, (Fathom Pub. Co., Anchorage, 3d ed. 2011), available at http://www.openmeetinglaws.com/. ML



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Human Trafficking: National Problem, Local Solutions

By: Rebecca Ruscito, Counsel, New York State Conference of Mayors and Municipal Official (NYCOM), Albany, New York



In July 2017, a tractor trailer truck containing over one hundred victims of human trafficking was discovered in a Wal-Mart parking lot in San Antonio, Texas. Eight victims were found dead in the truck, two more died after being rescued, and nearly thirty of the victims were hospitalized having suffered from heat stroke and dehydration, with some experiencing "irreversible brain damage" according to the city's fire chief.[1] Tragedies like these, while devastating, are neither uncommon nor uncharacteristic of human trafficking in the United States.[2] As a result, foreign nationals transported across international and state lines have become the expected, even stereotypical, image for victims of human trafficking and sexual slavery in the United States.

But the smuggling of foreign persons is representative of only one side of the human trafficking epidemic. Domestic trafficking, particularly domestic sex trafficking, is perhaps as pervasive as its international equivalent, yet its magnitude is consistently misunderstood and unrecognized by most citizens and governmental leaders.[3] A common misperception of trafficking is that physical transportation of a victim is a prerequisite for the crime.[4] Sex trafficking is also often mistaken as prostitution, which perpetuates the fallacy that the trafficked victim chose that way of life.[5] According to the founder and executive director of the Girls Educational Mentoring Service, Rachel Lloyd, herself a survivor of sex trafficking, this represents the "two-tiered system of victims" present in the United States in which internationally trafficked women and children are considered "real" victims, while American women and girls who are subjugated and forced into prostitution are not.[6]

This article will identify the legal framework under which sex trafficking crimes are currently recognized and prosecuted, discuss the deficiencies that remain under this statutory structure, and provide recommendations to local government leaders to facilitate a coordinated response with law enforcement agencies and the courts to eliminate this criminal industry.

Legal Framework

Human trafficking is the largest manifestation of slavery today and involves the exploitation and commoditization of sexual and physical servitude through force, fraud, and coercion.[7] The United States Department of State estimates that over 12 million individuals are trafficked globally, and nearly one-half of trafficking victims are children and teens under the age of eighteen.[8] Women and girls account for 80% of all trafficking victims, of which 70% are sold into sexual slavery.[9] The sex trade is the third most profitable illegal activity in the US, behind only drug and weapon trafficking, generating revenues estimated between seven and nineteen billion dollars annually.[11] Unlike other unlawful enterprises, sex trafficking involves very little risk to the principal transgressors, who often go unidentified and uncharged.

At the federal level, Congress first addressed the issue of human trafficking in 2000 by enacting the Trafficking Victims Protection Act (TVPA). The statute defined sex and labor trafficking as crimes in the United States, established criminal penalties, and provided victim services for these wrongdoings.[12] The United States Department of State's Office to Monitor and Combat Trafficking in Persons identifies this approach as the 3P paradigm: prosecution, protection, and prevention.[13] However, the statute has a decidedly foreign posture and focuses primarily on women and girls who are often disproportionally affected by human trafficking due to the lack of economic opportunities and discrimination in their countries of origin.[14]

Understanding that trafficking also has a significant domestic component, the New York State Legislature in 2007 and 2008 enacted the Anti-Human Trafficking Law and the Safe Harbor for Exploited Children Act, respectively, to fill the gaps left by TVPA. The laws reflect the methodologies promulgated by the TVPA and support the 3P approach by creating the crimes of labor trafficking and sex trafficking in New York State, establishing criminal culpability for buyers and traffickers, and requiring all trafficked persons be connected with necessary services.[15]

Another facet to New York's approach to combatting human trafficking is its development of Human Trafficking Intervention Courts (HTIC). These specialized courts exist almost exclusively in urban jurisdictions, and are intended to connect trafficking victims being prosecuted under prostitution charges with social services. Judge Toko Serita, the presiding judge of the inaugural HTIC in Queens County, explains, "The HTIC provides alternatives to incarceration for people arrested on prostitution-related charges, premised upon the understanding that many of the defendants are victims of sex trafficking. Thus, the objective of this

court is to provide supportive services to enable these defendants to leave the commercial sex trade."

Practical Realities are Sustaining Sexual Slavery Despite Available Legal Remedies

Despite having the most progressive and comprehensive legal framework to combat sex trafficking in the county, New York ranks among the top four states with the worst human trafficking problem in the nation, behind only California, Florida, and Texas. Nearly all communities throughout New York State are impacted by human trafficking. Minors trapped by sex traffickers are almost always runaways, street youth, or children who experienced domestic dysfunction and suffered from physical, psychological, or sexual abuse. The Center for Court Innovation estimates that between 70-90% of prostituted minors sustained childhood sexual abuse and children who suffer from sexual abuse are 28 times more likely than their peers to be exploited in the commercial sex industry.[19] Traffickers understand that children with these histories are "perfect prey" given their "profound vulnerability and powerlessness."[20]

While exploiters are often victims' significant others, traffickers may be anyone in the victim's life, including parents, family members, friends, and employers. However, the same power and control dynamics perpetrated by aggressors of domestic violence and sexual assault are used by sex traffickers to manipulate and influence their victims, irrespective of the nature of the relationship.[21] Isolation and intimidation is commonly used to eradicate victims' independence and resources.[22] Drug addiction also plays a significant role in trafficking, as both a coercive mechanism to engage victims (i.e. trading drugs for sex with those who are already addicted to illegal substances) and to exert and preserve control over victims' lives (i.e. involuntary drugging and ultimately addiction).[23]

The internet and more specifically the "dark web"[24] have driven the sex trade even further underground, virtually eliminating most street solicitations, and perpetuating the obscurity of this criminal enterprise**.** While street-level and pimp-controlled protection still constitutes the predominant forms of domestic sex trafficking, higher income and suburban communities are not devoid of traffickers. Safe Inc., a nonprofit organization operating in the City of Schenectady to provide supportive services to runaway homeless youth who are sexually exploited or trafficked,[25] reports that affluent populations are also being targeted by sex traffickers and compelled into the sex trade through revenge porn. Revenge porn generally takes the form of sexually explicit pictures taken of the victim without her consent and often while the victim is under the influence of drugs or alcohol. The threat of exposing these photographs for some victims is so coercive that they capitulate to the trafficker's demands.

Notwithstanding the universality of this criminal industry, there is a disconnect between the intent of the law and prosecutions under its provisions. In 2016, there were just 65 arrests and arraignments for sex trafficking under New York State Penal Law § 230.34.[26] Forty-eight of those cases remain open and only eight resulted in convictions. Of the convictions, only five resulted from a violation of Penal Law § 230.34.[17] In contrast, the same time period produced 1,560 total dispositions for prostitution related arrests, of which 484 resulted in convictions, and 251 of those verdicts produced sentences of jail or time served.[28] Clearly, traffickers are undeterred from continuing their nefarious trade, while victims endure criminal charges and convictions. This has resulted in exceptionally skewed statistics overemphasizing prostitution as a culpable decision and underrepresenting the ubiquitous incidence of forced sex trafficking.

Coordinated Efforts Lead to Local Solutions

The crimes of trafficking and prostitution are sometimes considered insignificant or unworthy of law enforcement, because the women, girls, and other individuals engaged in prostitution are perceived as choosing that life. Additionally, these crimes are considered lower priority when compared to other criminal infractions because there are fewer short-term results and visible community benefits to managing sex trafficking and prostitution offenses relative to other more easily recognized arrests and prosecutions. As the governmental entity closest to citizens, cities and villages can serve a pivotal role in combating domestic sex trafficking and reversing the inaccurate perceptions held among community members regarding the commercial sex trade.

Local governments are best situated to coordinate the efforts of the different, and sometimes divergent, interests of local agents. Bringing together the different perspectives of law enforcement and social service providers will ensure a more dynamic response to human trafficking is achieved. The United Nations suggests:

> Local authorities should promote the understanding of and respect for human rights of all individuals within their jurisdiction through education and training. Organize on a systematic basis human rights trainings for elected officials, staff, and police departments and disseminate relevant information among citizens. By promoting human rights local authorities can help build a culture of human rights in the community.[29]

Anti-trafficking organizations and community service providers, like Safe Inc., often provide these types of trainings at no cost to municipalities. Comprehensive instruction is essential to show to law enforcement and local courts how arresting victims might be the best way to connect victims with the services that may lead to their rehabilitation. Training police departments and local officials to work in conjunction with service providers will also facilitate a cooperative approach to trafficking-related offenses that will help validate the importance of addressing these issues throughout the community.

Community organizations that train public officers also frequently have the resources and ability to connect victims with social services.[30] Additionally, by determining which service providers are available to assist trafficking victims, courts will be better equipped to engage in judicial diversion programs to provide treatment alternatives to incarceration for prostitution offenses, even where HTICs are unavailable. Connecting defendants with services and recognizing that most individuals engaged in prostitution are victims of trafficking is part of a trauma-informed approach to combating these crimes.

Instituting such an approach among law enforcement officers may also help to direct the arrests of those patronizing the sex trade because increased awareness of human trafficking among the law enforcement community should hasten efforts to identify and prosecute sex industry traffickers and consumers. Reducing the demand for commercial sex by addressing consumer accountability and targeting consumption will starve the industry by decreasing its profitability. Developing awareness among community members may also be achieved through local awareness campaigns. The New Jersey Coalition Against Human Trafficking urges mayors and municipal officials to post public service announcements and videos on the municipal-

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ity's social media platforms to raise awareness about human trafficking and local events and organizations that support anti-trafficking efforts.[31]

While 2017 marked the centennial of women's suffrage in New York, so many women and girls in this state are disenfranchised and commoditized by the commercial sex industry. Neither New York's robust legal framework to combat sex trafficking, nor the collective understanding that trafficked persons are victims forced into the sex trade, has diminished the viability of the commercial sex industry. But by developing a coordinated response to human trafficking, local governments may help stymie the commercial sex industry and serve and an integral component to effectively abolishing domestic sexual slavery.

For more information relating to local solutions for domestic sex trafficking or to obtain copies of the references cited herein, please contact NYCOM Counsel Rebecca Ruscito at 518-463-1185 or by email at rebecca@nycom.org.

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Notes

1. Holly Yan and Jason Morris, *San Antonio Driver Says He Didn't Know Immigrants Were In Truck,* CNN, July 25, 2017, www.cnn.com/2017-07-24-us/san-antonio-trailer-migrants/index.html; Manny Fernandez, Richard Perez-Pena, and David Montgomery, *For Human Cargo, Truck Door Closed Out the Light, and Life,* N.Y. Times, July, 25, 2017 at A1, https://www.nytimes.com/2017/07/24/us/san-antonio-truck-trafficking.html?mcubz=0.
2. Toko Serita, *In Our Own Backyards: The Need for a Coordinated Judicial Response to Human Trafficking,* NYU Rev. Law & Soc. Change 635, 637 (2013).
3. Despite this article's reference to several Department of State statistics, other estimates supplied by the United Nations have been significantly lower. These discrepancies result from the difficulty in accurately accounting the total number of trafficking victims worldwide due to the illegal and clandestine nature of the enterprise (Madevi Sun-Suon, *Human Trafficking and the Role of Local Governments: Good Practices, Challenges and Ways Forward,* United Nations Institute for Training and Research, available at https://www.unitar.org/dcp/sites/unitar.org.dcp/files/uploads/newcoverhuman_trafficking_final.compressed.compressed.pdf).
4. 2017 Department of State Trafficking in Persons Report at 3.
5. Serita, *supra* note 3 at 639 (quoting, Nicholas D. Kristof, *What About American Girls Sold on the Streets?* N.Y. Times, Apr. 24, 2011 at WK10).
6. Serita, *supra* note 2 at 638.
7. 22 USC § 7101 (2000). *See also,* Safe Inc. of Schenectady, June 19, 2017 (unpublished PowerPoint on file with author).
8. Serita, *supra* note 3, at 636 n.8; Safe Inc. *supra* note 6, at 6 (citing US Department of Justice figures from 2005).
9. Serita, *supra* note 3, at 636 (citing Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act,* 80 Fordham L. Rev. 403, 409 (2011)).
10. *Id.* at 637 (citing US Department of Justice figures from 2008).
11. Safe Inc., *supra* note 6 at 19 (citing UN Office on Drugs and Crime).
12. 22 USC § 7101 (2000).
13. Office to Monitor and Combat Trafficking in Persons, *The 3Ps: Prevention, Protection, Prosecution,* (2016) ("The United States also follows this approach, reflected in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,* supplementing the *United Nations Transnational Organized Crime Convention* (Palermo Protocol) and in the United States' Trafficking Victims Protection Act, as amended").
14. 22 USC § 7101(4).
15. N.Y. Penal Law §§ 135.35, 230.34 (2007); Soc. Serv. Law §§ 447-a, 447-b, (2008); Soc. Serv Law §§ 483-AA – 483-FF (2007).
16. Serita. *Supra* note 2, at 635 n.5.
17. Safe Inc. of Schenectady, June 19, 2017 (citing US Department of Justice. 2005) (unpublished PowerPoint) (on file with author).
18. Serita, *supra* note 2, at 641.
19. Center for Court Innovation, *Identifying and Responding to Sex Trafficking: A Guide for the Courts,* available at http://www.courtinnovation.org/sites/default/files/documents/DV_SJI_Risk%20Need_.pdf.
20. Serita, *supra* note 2, at 641.
21. Danielle Malangone and Katie Crank, *The Intersection of Domestic Violence, Sexual Assault, and Human Trafficking,* Center for Court Innovation, available at http://www.courtinnovation.org/sites/default/files/documents/UnderstandingHumanTrafficking_2.pdf.
22. *Id.* at 1.
23. Serita, *supra* note 3, at 641.
24. *See* https://en.wikipedia.org/wiki/Dark_web
25. Safe Inc. of Schenectady, What We Do, available at https://safeincofschenectady.org/what-we-do/.
26. DCJS, Computerized Criminal History System, as of February 17, 2017.
27. *Id.* The remaining three convictions resulted from non-trafficking charges. DCJS, Computerized Criminal History System, as of August 18, 2017.
29. Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee, Aug. 7, 2015, U. N. Doc A/HRC/30/49; HRC, 30th Sess., Agenda No. 3, 5 (2015).
30. Center for Court Innovation, *supra,* note 19, at 1.
31. NJ Coalition Against Human Trafficking, *Community Awareness Toolkit*, available at https://static1.squarespace.com/static/58a7d370ff7c50f538d6a78e/t/58c9d92f440243bf342b9521/1489623347662/NJCAHT+Community+E-Toolkit+2017.pdf



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De-"coding" the Landscape Cont'd from page 11

2. *See id.*
3. *See* Wulfsohn v. Burden, 150 N.E. 120 (N.Y. 1925); see also Newman F. Baker, Aesthetic Zoning Regulations, 25 Mich. L. Rev. 124 (1927).
4. *See e.g.* Central Hudson Gas & Electric Co. v. Public Service Commission, 447 U.S. 557 (1980); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion).
5. Christina Chloe Orlando, Art or Signage?: The Regulation of Outdoor Murals and the First Amendment, 35 Cardozo L. Rev. 867, n. 21 (2013) citing Alan Weinstein, Legal Issues in the Regulation of On-Premise Signs, in Context-Sensitive Signage Design 119, 119-120 (Marya Morris et al. 2001).
6. *See e.g.* Pennsylvania Land Trust listing of the types of communication and types of media aid covered in sign ordinances (http://conservationtools.org/guides/50-sign-ordinance).
7. *Id.*
8. *Id.*
9. *See e.g.* https://www.dos.ny.gov/lg/publications/Municipal%20Control%20of%20Signs.pdf
10. Christina Chloe Orlando, *supra note 5.*
11. 900 F.2d 551, 555-56 (2d Cir. 1990)
12. 506 F.3d 886 (9th Cir. 2007)
13. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)(plurality decision).
14. 453 U.S. 490, 507-08 (1981).
15. United States v. Carolene Products Co., 304 U.S. 144 (1938).
16. See FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).
17. *See* Central Hudson Gas & Electric Co. v. Public Service Commission, 447 U.S. 557 (1980) (commercial speech; Court adopted a four-part balancing test, less than strict scrutiny, but more restrictive than rational review and appears to be an intermediate plus standard;); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (speech in public forums); United States v. O'Brien, 391 U.S. 367 (1968) (content-neutral speech laws); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) ("erogenous zoning" restrictions affecting speech).
18. Edenfield v. Fane, 507 U.S. 761, 770 (1993).
19. *See* Bowers v. Hardwick, 478 U.S. 186 (1986), contrast to Lawrence v. Texas, 539 U.S. 558 (2003); *see also* Witt v. Department of the Air Force 527 F.3d 806 (9th Cir. 2008).
20. Granite State Outdoor Advertising, Inc. v. Clearwater, 213 F.Supp.2d 1312, 1327 (M.D. Fla. 2002), affirmed in part and reversed in part, 351 F.3d 1112 (11th Cir. 2003).
21. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)(plurality decision)
22. *Id.* at 493
23. *Id.* at 570
24. 607 F. Supp.2d 1326 (M.D. Fla. 2009).
25. *Id.* at 1331.
26. *Id.* at 1331-33.
27. 680 F.3d 359 (4th Cir. 2012).
28. 447 U.S. 557, 561 (1980).
29. 533 U.S. 405, 409 (2001) (emphasis added).
30. 186 Ohio App. 3d 558, 564-65 (Ohio Ct. App. 2010).
31. Id. at 573.
32. *Id.*
33. 644 F.3d 728 (8th Cir. 2011).
34. *Id.* at 736.
35. Id. at 732.
36. Id. at 736
37. Id. at 738.
38. 607 F. Supp.2d 1326, 1334 & fn. 9 (M.D. Fla. 2009). *See also* Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782 (Or. Ct. App. 2011) (holding that distinctions between "painted wall decorations" and "painted wall signs" constituted impermissible content-based restrictions).
39. 226 F.3d 1214 (Colo. Ct. App. 2009).
40. Id. at 1219.
41. Id. at 1220.
42. 893 F. Supp. 589 (D. S. C. 1995), vacated and remanded for lack of standing, 139 F.3d 401 (4th Cir. 1998).
43. 2017 WL1226913 (S.D. Cal. 2017).
44. *Id.* at *2, 6.
45. Id. at *5.



Shannon O'Connor focuses on municipal and governmental liability and employment and labor matters. She has taken numerous trials to verdict in Section 1983 and Title VII employment discrimination cases and was recognized as an IMLA Local Government Fellow in 2016. Before entering private practice, she served as Assistant Corporation Counsel for the City of Syracuse. Shannon holds a J.D. from the Syracuse University College of Law.

The Good, The Bad Cont'd from page 15

control and responsibility in favor of the City or County Attorney.

Early in the representation of a local government, my City Manager decided she was going to choose who represented the City in a litigated matter. There was no consultation nor any discussion about who would perform the services. The whole episode was about control and establishing a pecking order, and to make sure I knew where on that pecking order I belonged. As mentioned briefly above sometimes knowing when not to fight is often more important than knowing when to fight (see *The Art of War*, Sun Tzu, quoted in Sun Tzu's 31 Best Pieces of Leadership Advice, 15.1)[5], and I elected not to take that battle on at that time.

Conclusion

Recognizing the need for, then selecting and supervising outside counsel can present a challenge to the City or County Attorney unlike most of the challenges faced on a daily basis. Even when supervision of other lawyer employees is part of the daily routine, supervising peers or lawyers who may have more experience than you or have expertise that far exceeds yours in a particular area can be challenging in the best of times. If the lawyer you hire knows more than you do about employee benefits, how do you know you are getting good advice? However, if you can truly evaluate the advice you receive, why did you need the expert in the first instance? It becomes a bit of a Sisyphean task to ask for, much less receive, quality advice when you need it, if that becomes the standard against which you measure the choices.

1. goo.gl/SHm65Z (last accessed August 31, 2017).
2. (goo.gl/A5b5s5 (last accessed on August 31, 2017).
3. See link *supra* and text accompanying note 82.
4. *See, e.g.,* Bank of America, N.A. v. Superior Court of Orange County, 212 Cal. App. 4th 1076 (2013).
5. Forbes.com (May 24, 2014) bit.ly/2grzmSt (last accessed August 31, 2017).



The Importance of (Actually) Talking to One Another, Every So Often

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

What a tremendous Annual Conference IMLA convened this past October in Niagara Falls, Ontario. Kudos to the entire staff for one of the best Conferences ever! As part of the event, we again gathered for the Sixth Annual Water Cooler Reunion on Monday evening at My Cousin Vinny's in Niagara Falls. Folks from a dozen states gathered around the table for excellent food and drink, and even better company and conversation.

One of the most popular topics was communication and how it has changed for this generation. We had discussed topics all year long in a virtual manner, but found no substitution for the tried and true old-fashioned face to face conversation. In two hours, we covered virtually a year's worth of happenings, coming and goings etc., in conversation that would probably have taken us almost all year to accomplish electronically. This is the great thing about the IMLA Mid-Year Seminar, Annual Conference and the corresponding reunions. You have the opportunity to engage in face to face communication without an electronic device.

Folks, I have come to the conclusion that verbal conversation is becoming a lost art.

We were really stricken by the way technology has changed society these days. My daughter recently registered for her first day of college, and was able to sign up online for classes in a matter of minutes. Technology has changed this dramatically from the four hour visit to the coliseum and handful of index cards that were required for me to register. (Larry Baer reports registering for class at K State with a chisel and stone).

As I spent the week in Canada, co-workers were able to text messages to me and email documents, which I could edit and send back in moments. Stark contrast to years past, when a week out of the office meant virtually no communication at all, other than the search for a pay phone, and a collect call to the office when we had time to manage one. A week away used to mean a week away. Now it merely means a week of non-physical presence. Thanks to functions such as "Remote Desktop," cell phones and email, some folks in the building didn't even know I was gone for the week – even the ones with whom I interacted. Lastly, I was not greeted with a giant mound of paperwork upon my return to Lexington, since I was able to put out fires along the way during my week "out of the office."

In our former lives, the method of communication seemed to be via letter, follow-up letter, and then phone call if it got really important and warranted the situation. The "MO" today appears to be social media/blog, email, and if it gets REALLY important, a direct text message. Actual verbal conversation is missing in the equation.

Be it for better or worse, this generation is learning to communicate without the art of letter writing or phone conversation, much less face to face interaction. I am reminded of the co-worker whose child was arranging a "study session" with another student in high school. The conversation went something like this: "Did you contact Johnny about the study session? ...Yes, I sent him an email three days ago ... Have you heard from him since? No, he didn't answer so I sent another email yesterday ... He didn't answer that one either, so I sent him a text this morning!" Turns out that Johnny's Ipad had some issues, and he didn't get the first two emails, but he did get the text message which was sent to his personal cellular communication device. (The word cell phone or phone was omitted intentionally, as a phone is something you use to talk on, or with which you make or amplify sound). But, the point is: verbal communication is completely out of the picture.

Another co-worker reports a conversation with children about watching their new TV. One child can't operate the remote, so concludes she will be unable to watch until dad comes around. (The power button and manual channel changer button go un-noticed) When they finally get to watch, another younger child disapproves of her older sibling's show selection. She approaches the TV, places a finger on the screen, and swipes the digit from side to side in an effort to change the channel despite her older sister.

Many folks today show very little need for a fax machine which serves no purpose in the scan and email age. They do not need to have a pen and paper ready to take a phone message. They don't know what a long distance card is, or a collect phone call. Many have never even seen a pay phone. For that matter, what is long distance? "You mean the phone was stuck to the wall and you couldn't move with it? How did you talk in the car?"

They will never experience the joy of connecting two cans together on either end of a string and passing along sounds. Or, the parental pangs of trying to locate a child by telephoning around to all their usual hangouts until hitting the right one.

In today's legal world, both parties to a real estate closing can walk away with a signed copy of the papers, without even meeting each other. One signs, then scans and emails to the other. In turn, the other party signs, scans and sends back a fully executed copy to the first party. Other parties collect the papers and keys, and you are all set.

And of course, through IMLA and the Listserve/Water Cooler, we can "meet"

and talk with our colleagues across the country and never leave the office. But, amid all this, does production increase via technology or is it more of a distraction?

Does technology always speed up the process or make it more efficient? How do you replicate tone of voice, inflection or body language into a virtual conversation? And if you make the social faux pas of sending something in all caps, how do you repair the damage of someone who has interpreted this as yelling and has been offended?

If your "network is down" in today's world, you can't read, watch TV, send letters or even make a phone call in many cases. Perhaps this is the virtual equivalent of solitary confinement? And since you have none of these available, you can't find out how long the outage will last. Where is that old telephone on the wall? How does it work without the Internet? How do I get my letter to Memphis if the Internet is down? Mail? A Stamp? Post office? What are those?

And, perhaps the biggest casualty for these folks (work wise) is the old fashioned job interview. Apply by email, answer questionnaire, email resume.... What? Interview? You mean I have to go talk to them? Do I show up in torn jeans and a T-shirt? Or sleep pants? How do I tie a tie? What is a tie?

You've got to love the advantages technology offers us. However, it seems keeping them in check would be a good practice. Let's not lose the art of face to face conversation. And, if there is a sick friend in the hospital, for heaven's sake don't send an email! If you can't personally go visit, make a phone call or even send a card. Email seems awfully cold and impersonal in such situations. Smiley face emoticons just can't cheer you up as much as a real smiling face!

The advantage of face to face conversation is no more evident than we experienced at the Water Cooler Reunion, and during the IMLA Convention. We can't do everything "virtually!" Thanks, IMLA.... We look forward to our next events, in DC in April and Houston in October.

AND NOW, FOR THE REST OF THE STORY (As Paul Harvey used to say) .... In the last issue of "Municipal Lawyer," you heard of all the interesting stories leading up to the Total Lunar Eclipse here in Lexington, South Carolina. You may recall we were in the center line of the eclipse, and had the longest period of totality on the East Coast.

Well, some numbers are in regarding the effect of the eclipse for this area. According to the State Department of Parks, Recreation and Tourism (SCDPRT), more than 1.6 million visitors traveled to or within South Carolina to view the solar eclipse. That does not include foreign visitors, several of which I met here in Lexington. These visitors pumped $269 Million into the state's economy.

Many traveled from within South Carolina to another point in the state (such as Lexington) to get a better view of the eclipse. However, more than 800,000 visitors were from out of state. Most stayed overnight at least one night, and many shopped, dined and enjoyed the beaches or mountains while they were here.

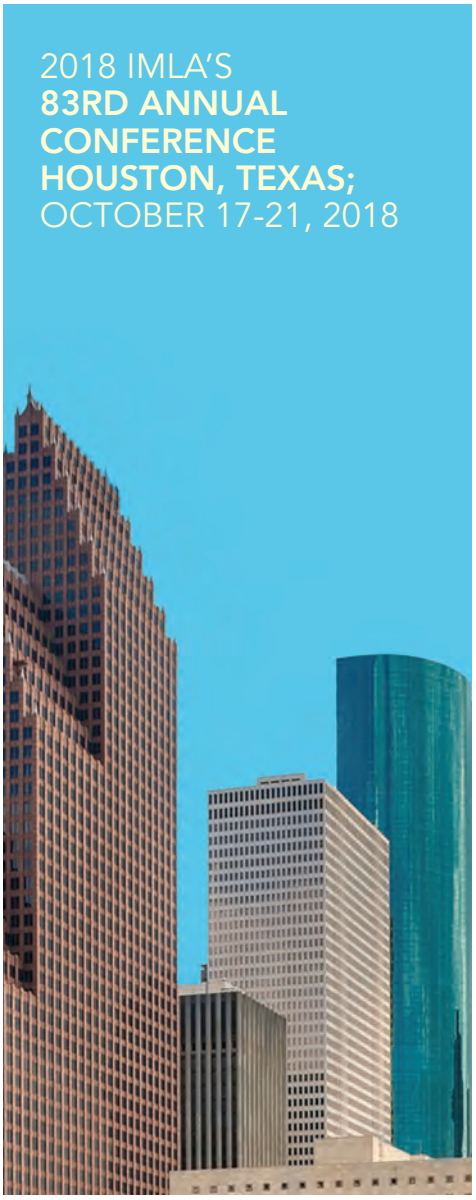
SCDPRT reports that hotel occupancy statewide was up 50 percent compared to a typical third week in August, and park attendance was up 400 percent. The SCDPRT survey also showed most visitors viewed the eclipse in the metro areas of Greenville, Columbia or Charleston. Nearly half of out-of-state visitors indicated they went to an optimal viewing site like a park, mountain site or coast. About one fourth indicated participating in an organized solar eclipse event such as the one here in downtown Lexington.

The State Museum reports that it raked in $437,000 of merchandise sales in the four days of the "Eclipse Weekend" alone. The next Solar Eclipse in South Carolina will be in 2078. Officials are planning a time capsule commemorating the 2017 event, which would be opened in 2077 prior to the next event.

Obviously, the effect of the eclipse on the local governments was tremendous. In Lexington, we had virtually 100 percent hotel capacity and a tremendous amount of extra traffic on the roads. Effects were felt in the Police Department, Parks Department, Utilities Department, Finance Department, etc. You name it, and we were affected. I guess it was well worth it after all. I am sure other cities affected by this once-in-a-lifetime event feel the same way.

Recently, we had a bench trial in court for a speeding ticket. The defendant showed up, pled not guilty, and indicated she was ready to proceed. The prosecution put on a rock solid case including video. The defendant's entire defense was "I am a newspaper carrier. In my job, time is of the essence. I had no other choice. I had to speed to stay on time." "Anything further?" the Judge asked. A negative response..... Moments later, "Based upon the evidence presented, and since you have admitted to speeding, the Court finds you guilty." The response: "But sir, I'm a newspaper carrier!" The defendant never accepted the fact that newspapers carriers were subject to traffic laws just like everyone else. She left the court angry, nearly being held in contempt, and asking how to appeal...

The prosecution rests, your honor... ML





CODE ENFORCEMENT

Noise, Light, and Unreasonable Interference: When a Neighbor's Holiday Merriment Gets out of Hand

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

For many, decorating the house and yard during the holiday season is an automatic annual event – and one that many of us immediately dread when we try to make the Christmas lights work! Indeed, it's said the use of holiday light decorations goes as far back as Thomas Edison—who, after inventing the light bulb, was asked to create a smaller bulb to be used for Christmas tree decorations. Over the decades since then, the Yuletide illumination on businesses and homes lining our streets has become more of a cultural tradition than a religious statement. And few would argue that the bright lights in December and early January aren't lovely.

Even so, we know that the best of traditions can get out of hand! Clark Griswold's home in the 1989 movie "Christmas Vacation" may be an extreme example – he had so many lights adorning his residence that the local electric company had to add an auxiliary power source – but extremes do arise. We may joke at the distraction as we drive by houses and yards with so many decorations and bright lights, but the neighbors next door – as in "Christmas Vacation," may not find it so amusing.

We know that as a general matter, excessive noise and light can affect the "quiet enjoyment" of adjacent and nearby property owners; these are at times the grist of code enforcement work. It may be easy to consider a complaining neighbor as the epitome of Scrooge. But what if that neighbor is not able to sleep because holiday lighting nearby is so bright it seems like daylight, or if there is accompanying music or other sounds? Many county and municipal codes include noise ordinances, the violation of which can result in a civil citation. While excessive light prohibitions are less common, most state and local codes do offer some protection for the common-law right of quiet enjoyment.

So the question is, even if they are considered Scrooge-like, what are the options for a person complaining about holiday decorations? What can code enforcement officers do when they receive such a complaint? And what laws might apply to address such a Clark Griswold-like situation which is truly excessive?

One might expect that most neighbors would be hesitant to file a formal complaint – to avoid becoming known as the local "Scrooge" of the community. And certainly the hope, as in any code enforcement matter, is that upon being notified of a complaint, a resident or business would try to take steps to correct the problem. There is little record of any complaints being formalized, which may reflect the fact that holiday displays are not intended to harass or interfere with someone's quiet enjoyment, and any complaints are informally addressed, person to person. Indeed, the goal of any code enforcement effort is, at core, to solve the problem. The other reality is that enforcement efforts, especially those requiring a Board or court hearing, can take time – even as much as many months, offering little relief for a person facing excessive light or noise every night.

Most holiday decorations consist of nighttime lighting. While many local development codes specify the types of permitted lighting, including a focus on reducing glare through the use of shielded or full cut-off fixtures to avoid light on neighboring properties, relatively few local governments have prohibitions on excessive lighting or glare as part of their property maintenance codes. But outdoor lighting standards may contain prohibitions on glare, such as the City of Bonita Springs, Florida's Ordinance No. 11-01. That ordinance specifies, at §12(d)(2)(a), that light "shall not be permitted" which shines on roadways and causes "glare, annoyance, discomfort or loss of visual ability;" it also limits the frequency of flashing or moving lights. In the event of a neighbor complaint, this provision could be potentially used to address glare. However, the section limiting flashing or moving lights creates an exception for "low wattage decorative lighting fixtures . . . used for decoration." That seems clearly intended to exempt holiday lights from the flashing/moving lights prohibition, but it should be noted that no such exception appears for the prohibition on glare on roadways causing annoyance. Even so, the requirement that the glaring affect a roadway as a condition, rather than simply annoying a neighbor, would limit its enforceability.

A similar exemption appears in the San Antonio, Texas ordinance which attempts to support night training at nearby military bases and is cited in support of the City's "dark sky" initiative to limit light pollution generally. That provision at City Code §35-339.04(b)(5) limits residential light at the property line to no more than 1.5 foot candles, considered a similar limitation to that of Bonita Springs. Yet subsection 15's exemptions



Chrstmas lighting on a home in Seattle.

include "[d]ecorative holiday lighting from November 15 through the next January 15."

Other limit restrictions, such as Portland, Oregon's Title 33, §33.262.080, simply prohibits glare from "all types of lighting" from directly or indirectly causing illumination of more than 0.5 foot candles of light, which can be measured by a light meter (and would be generally compared to a night light in a hallway for comparison purposes). Certainly a very bright holiday light display would run the risk of violating this provision, but the regulations are limited to nonresidential uses, creating off-site impacts in specified residential zones.

Especially with the built-in exemptions for holiday lighting, a glare prohibition may not provide relief against the most extreme light displays. It is also likely that even in a neighborhood, only one neighbor will be most directly impacted. But where displays include noise, some relief may be available, as more than one person may be willing to complain. Also, prohibitions on "unreasonably loud, unnecessary and unusual noise" such as Kernan, California's Chapter 9.26(a), are more commonly covered in municipal and county ordinances, and do not specify exceptions for holiday decorations—which might also include Halloween and other holidays as well as Christmas. Options vary as to what must be shown to demonstrate a violation; Kernan requires considerations of housing density, time of day, duration, noise level and proximity of the noise to sleeping facilities, among other factors. But ultimately, the question of "unreasonable noise" calls for a more subjective answer than an objective one.

That raises the main distinction between various noise ordinances – between tests which are objective or based on verifiable events, such as time of day, or are more subjective – based on whether a reasonable person would find the noise disturbing. In most cases, a holiday display using loud or amplified noise in a residential area would fall within even the most limited prohibitions, but the practical enforcement process for noise complaints can be challenging.

Enforcement can be elusive because while many code enforcement citations depend only on the municipal code officer's testimony, noise ordinance violations almost always require evidence from a witness rather than the code enforcement officer. As a result, objective tests with timelines and specific prohibitions, rather than subjective tests in which citations are issued based on unreasonable disturbances can be easier to prove and enforce. Overall, there are essentially four noise ordinance options:

1. Behavioral standards. These usually include time limits, and may for example include a prohibition on picking up trash within 500 feet of a residence before 6AM. It's not dependent on anyone saying they were bothered, but simply proving what happened, where, and at what time. Another example is the prohibition on using lawn equipment before 7AM or after 9PM, as Gaithersburg, Maryland's City Code §15-8(a) provides.

2. Time prohibitions for certain disturbances. This also depends on a time limit, but without clearly prohibiting specific behavior. Instead, the prohibition is on creating certain disturbing noise or, more often, creating noise on one property that is heard across the property line after a certain hour. As anr example, Miami, Florida's Chapter 36, §36-4(a) prohibits amplified noise that is "plainly audible" 100 feet from the building where it is produced. An-

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other example is prohibiting amplifying music after 11:00 pm. While the time standard is clear, whether music or other noise is "heard across the property line" can be interpreted in a subjective manner, because the question will come down to whether what someone heard was reasonable – even when the prohibition is on hearing anything.

3. Purely subjective tests. Many ordinances simply prohibit "any unreasonable noise," such as Lakewood, Colorado's City Code, §9.52.040, or the sending of such noise across the property line. While residents may often favor such laws – as they "sound" good in theory – in fact, this option can be the most difficult to prove in court. They are is also highly subject to disputes among neighbors, because they allow each to assert a personal definition of what is reasonable. The Lakewood ordinance includes specific auditory specifications, including, at §9.52.060, bells and chimes from 10:00 pm. until 7:00 am. Generally, enforcement of such subjective provisions requires multiple violations, often more egregious behavior than, for example, merely violating a timeframe such as 11:00 pm, and courts (or in some cases the ordinance itself) may require two or more separate complaints from two different addresses in the neighborhood.

4. Purely objective tests. Some local governments, such as Montgomery County, Maryland, at County Code §31B-5(a)(1), prohibit noise levels over 55 decibels in a residential area at night. Others, such as the City of Malden, Massachusetts, consider excessive noise, per City Code §7.9.1, as over 50 decibels between 9 pm and 7 am, when measured at the property line. Such tests will then require use of a noise calibration machine to show a violation. Thus, there is not the same need for multiple witnesses to show that the noise is unreasonable; as with time and behavior standards, the only question is whether the decibel limit was violated. While seemingly easiest to prove in court, that's not always the case, as showing a violation depends on a demonstrably accurate, well-maintained machine that correctly records noise levels.

Within those four options, the first can be most effectively enforced, as it simply requires a showing of the behavior – not whether it was unreasonable or even produced noise – and adding a time limit is equally objective. The others may vary, with the "unreasonable noise" subjective requirement as probably the most difficult to enforce; many, at some level, will depend on citizen testimony. Thus, even though a holiday display producing excessive noise may be easy enough to prove with multiple willing witnesses, resolution may ultimately depend on the offending neighbor to moderate the annoying behavior.

While noise and light can be the two main impacts from holiday displays, traffic caused by sightseers can also be a concern. ABC news reported on November 29, 2017 about a neighborhood complaint involving a residential holiday light display in the Town of Fairfield, Connecticut. The report referred to it as a "massive" display with more than 350,000 lights. The Fairfield noise ordinance, Town Code §§78-4 and 78-5, does specify decibel limits of only 45 for residential areas – much lower than Montgomery County, Maryland's 55 decibel limit – but there is no light ordinance prohibiting glare. The petition signed by 45 persons in the neighborhood did not focus on excessive light or noise. Instead, neighbors raised concerns about the traffic caused by observers coming to appreciate the massive display, known as "Wonderland in Roseville." The news broadcast indicated that the neighborhood dispute about excessive traffic was resolved when the host residents agreed to cut off their lights earlier in the evening and police agreed to provide some assistance in routing traffic through the neighborhood.

Regardless of the basis for the complaint - -whether noise, light, traffic or unreasonable conduct – it's also a reality that a local government pursuing such a complaint may face some backlash. A business owner in San Juan Capistrano, California, according to a local television station, was fined for a Christmas decoration which consisted of a large, inflatable Santa apparently marked with the business name. Such inflatable signs are prohibited by the City Code, §9-3.543(e)(8). The 2010 news report indicated that the owner said the oversized Santa helped business, and in the face of complaints, the City fined him for violating the municipal sign ordinance. Some residents characterized the enforcement effort as "pooh-poohing on Santa Claus," and the report referred to the sign ordinance as "The Scrooge Law"- - even though the ordinance did not target holiday displays, and no residential display was involved.

Note that the complaining parties in San Juan Capistrano were not compared to Scrooge, but the City ordinance definitely was – and one might expect that City officials enforcing "Scrooge's Law" would also themselves become known as "Scrooges" if the matter wasn't speedily resolved. That may be the risk even in addressing an extreme situation, which will depend on facts showing how extreme a display may be, and how it is impacting the neighbors, recalling Clark Griswold's example. The problem is that code enforcement staff aren't the ones likely to file these complaints – but, as in San Juan Capistrano in 2010, are simply responding to resident complaints. Thus, where informal, friendly, neighbor-to-neighbor resolution in the holiday season doesn't work, county and city staff will try again – and insist on the facts, which in many cases will require direct observation and some level of community support, to demonstrate behavior so extreme it violates local lighting, noise, sign, or "quiet enjoyment" laws.

I certainly hope everyone's end-of-year revelry has been enjoyable, and taking a cue from the community in Fairfield, Connecticut's Wonderland in Roseville, any disputes about holiday decorations were amicably resolved without requiring the intervention of any Scrooge. ML



Cases of Interest

By: Monica Ciriello, Ontario 2015

Appeal Granted Based on Literal Interpretation of Definition in Land Use By-law

***Fuhr v Parkland (County),* 2017 ABCA 413 (CanLII) http://canlii.ca/t/hp4cb**

Robert and Sheri Hanna (Residents" were granted a development permit by the Parkland County Development Authority to operate a small trucking and building company on their property under the "Home Based Business Level 3" definition of the *Land Use Bylaw*. The Applicant, neighbours of the Residents appealed the decision to issue a development permit to the Parkland County Subdivision and Development Appeal Board (Board), arguing potential concerns surrounding increased traffic, noise and a decrease in property values. The Board denied the appeal, finding that the use was discretionary and complied with the County's Bylaws. The Applicants submitted an application for permission to appeal the Board's decision.

HELD: Applicant granted permission to appeal.

DISCUSSION: Citing *Carleo Investments Ltd v. Strathcona (County),* 2014 ABCA 302, the Court outlined the three-prong test to grant leave to appeal; first, the appeal must raise a question of law or jurisdiction; second the question of law or jurisdiction must be sufficiently important to merit a further appeal; and third, the appeal must have a reasonable prospect of success. The current issue surrounding the third prong requirement in the wake of *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd,* prompted the Court to highlight that the standard of review on appeals from decisions of development appeal boards is uncertain. Until it is clarified the Court opted to interpret the Board's findings using correctness.

The Applicant relied on a plain reading of the "Home Based Business Level 3" definition as the crux of its argument for appeal. The definition in the *Land Use Bylaw* states that the type of business in this category means it is "within the residential dwelling and/or accessory building". The Applicant submited that the Residents' small trucking and building company does not meet this definition because the their business operates mainly outside the dwelling and accessory building. Based on this argument, the Court was satisfied that the Applicant met the first and second prong by raising a legal question and identifying that the question is of importance to the property owners in Parkland County. Turning to the third prong, the Court stated that the Applicants did not need to demonstrate that they are likely to succeed on appeal. Therefore, the Applicant was granted permission to appeal.

City's "Special" Transit Pass Results in Discrimination Claim From User

***Barchet v. Greater Sudbury (City),* 2017 HRTO 1563 (CanLII) http://canlii.ca/t/hp1q1**

The Applicant filed an application under the *Human Rights Code,* R.S.O. 1990 (*Code*) alleging discrimination with respect to services on the basis of disability against the City of Greater Sudbury (City). To promote accessibility of the City's transit system the City offers a variety of monthly passes at different price points. Since 2011, the Applicant, has purchased a "Special" pass offered to children or adults receiving disability or pension benefits. The Applicant, submitted that he was publicly humiliated when he used his "Special" pass because the pass indicated that he was in receipt of social assistance. As a result, the Applicant sought to have the pass remove any identification that would suggest that a user has a disability. The City requested to have the application dismissed under section 14 and or section 34 of the *Code.*

HELD: Request to dismiss denied.

DISCUSSION: The City's argument was twofold; first the City relies on section 14 of the *Code* which states:

> a right under Part I [of the *Code*] is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

The City submitted that the pass program which includes the "Special" pass used by the Applicant for the City's transit system was created for the purposes of section 14 of the *Code*, to relieve the hardships and assist disadvantaged persons. The Adjudicator disagreed, finding that section 14 does

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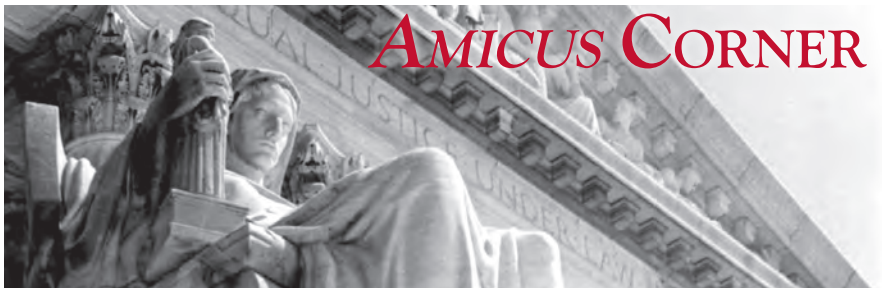

SCOTUS and the First Amendment: Can Any Governmental Regulation Survive?

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

The Supreme Court's 2017 docket is nearly complete and it is certain not to disappoint. By my most recent count, there are at least fifteen cases on the docket that are relevant to local governments on a wide range of topics: from speech to religion to states' rights and nearly everything in between. As the Court grapples with partisan gerrymandering and the intersection of new technology and privacy rights under the Fourth Amendment, it has also recently granted three new First Amendment cases, which this article will highlight, bringing the total of First Amendment cases it will decide this term to seven. To say that this is a Court that is interested in free expression and religious rights is an understatement.

In the context of municipal regulation, that interest increasingly arcs towards ever-broader protection of First Amendment rights. Last term, the Court decided four First Amendment cases, three of which were losses for the government (*Packingham v. North Carolina*, *Matal v. Tam*, and *Trinity Lutheran Church of Columbia v. Comer*) and the fourth was a neutral outcome (*Expressions Hair Design v. Schneiderman*). And of course, none of us will soon forget the impact of *Reed v. Town of Gilbert* to First Amendment jurisprudence. While nothing is certain in terms of predicting Supreme Court outcomes, given recent trends with the First Amendment and the Court's statistics more generally, the prospects in these cases may not bode well for the governments. Statistically speaking, the Court tends to reverse the lower court's decision more often than not. For example, the Court reversed the lower court's decision between 67% and 80% of the time over the last three years. Thus, the fact that in all three of the cases discussed below (and in five of the seven First Amendment cases this term), the governments were victorious below portends that it may be an uphill battle for them at the High Court. That being said, IMLA will file an amicus brief in all three of these cases in support of the governments' positions. We hope to buck recent trends and pull out victories for local governments.

Lozman v. City of Riviera Beach

Fane Lozman has been a thorn in the side of the City of Riviera Beach for quite some time. In fact, he has the improbable honor of making it to the Supreme Court for the second time in a dispute with the City of Riviera Beach. The first case, back in 2012, had to do with a fairly obscure issue involving maritime law and whether his house boat was wrongfully seized by the City. The case resulted in a victory for Mr. Lozman. The second case, which the Court recently accepted, will likely have far broader implications for local governments under the First Amendment.

As the foregoing may intimate, Mr. Lozman was an outspoken critic of the City. During a regular public City Council meeting, Mr. Lozman was granted permission to speak during the "non-agenda" public comments portion of the proceedings. He began by criticizing Palm Beach County officials as corrupt; a Councilperson interjected and told him to stop his comments as they were not relevant to *City* business given that the City and County are distinct entities. When he refused to curtail his soliloquy, the Councilmember asked law enforcement to intervene. A police officer informed Mr. Lozman that if left the meeting, he would not be arrested–but Lozman refused to depart and the officer therefore arrested him. He was charged with disorderly conduct and resisting arrest. The state's attorney determined there was probable cause for the arrest, but dismissed the charges.

Mr. Lozman subsequently filed a Section 1983 action against the City claiming that the arrest was retaliatory, in violation of the First Amendment. The case went to trial and the jury returned a verdict in favor of the City. The Eleventh Circuit upheld the jury verdict, concluding that the officer had probable cause to arrest Mr. Lozman, which therefore defeated his claim of First Amendment retaliatory arrest as a matter of law.

And that is precisely the issue that the Supreme Court will decide here: whether the existence of probable cause defeats a First Amendment retaliatory arrest claim as a matter of law. While the facts of this case may cast Mr. Lozman in a sympathetic light, IMLA nonetheless believes a bright line rule is appropriate in this context; otherwise law enforcement will be chilled from making lawful arrests anytime someone exercises a First Amendment right. For example, protesters at a rally who violate the law may claim their arrests were in violation of their First Amendment rights. A person who curses at a police officer but is arrested based on probable cause could claim a retaliatory arrest, because cursing is (often) protected under the First Amendment. And so on, and so on. IMLA believes that a police officer in this situation should not have to conduct a potentially amorphous First Amendment analysis when determining whether probable cause exists to make an arrest.

National Institute of Family and Life Advocates (NIFLA) v. Becerra

This case involves the California Fact Act, which requires certain disclosures by licensed pregnancy-related clinics and unlicensed clinics. Specifically, licensed pregnancy-related clinics are required under the law to disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion. The Fact Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed as a medical facility by the State of California.

NIFLA is a national religiously affiliated non-profit organization, composed of numerous pregnancy centers in California including both licensed and unlicensed clinics. NIFLA is strongly opposed to abortion. NIFLA and other similar organizations brought suit against the California Attorney General, claiming that the Fact Act violates its First Amendment free speech and free exercise rights.

The district court denied NIFLA's preliminary injunction and the Ninth Circuit upheld that denial. Regarding the free speech argument, the Ninth Circuit held that although the Act is content-based, it does not discriminate on viewpoint and therefore strict scrutiny does not apply. Notably, the court expressly held that even though it found that the Act was content-based, *Reed v. Town of Gilbert* did not require that every content-based regulation be subject to strict scrutiny. The court therefore concluded that intermediate scrutiny was applicable as the Act regulated professional speech, and the court found that the Act survived intermediate scrutiny. The panel also concluded that the notice for unlicensed facilities survived any level of scrutiny, including strict scrutiny.

NIFLA petitioned the Supreme Court for certiorari on the question of whether the disclosures required by the California Reproductive Fact Act violate the protections set forth in the free speech clause of the First Amendment.

IMLA believes this case presents a compelling issue for local governments, particularly because local governments have a strong interest in the promulgation of laws that promote public health. These ordinances are generally enacted to address information gaps (whether intentional or not) to help promote truthful, non-misleading information related to public health. We believe that local governments' police powers authorize their use of these disclaimers.

Perhaps more importantly, this case could directly impact the scope of *Reed v. Town of Gilbert* given that the Ninth Circuit held that *Reed* did not apply to these disclaimers even though it concluded that the law was content-based. This may be the first case where the Court directly analyzes the breadth of *Reed* and whether it can indeed be construed to exclude expression like commercial speech and/or professional speech. As we all are aware, local governments are battling *Reed*'s impact on many fronts, and this case offers an opportunity for local governments to argue that the reach of that decision should be more circumscribed.

Minnesota Voters Alliance v. Mansky

This case involves Minnesota Statute § 211B.11, which prohibits wearing a "political badge, political button, or other political insignia . . . at or about the polling place on primary or election day." To help determine which materials were political, Minnesota election officials distributed an Election Day Policy with examples including: "Issue oriented material designed to influence or impact voting" and "Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." Election judges were instructed to ask anyone wearing an item violating the Policy to remove or cover it. If a person refused, the election official would allow the person to vote, but record the person's name and address for potential misdemeanor prosecution.

A number of political associations brought suit claiming First Amendment violations. The district court granted the state's summary judgment motion on the plaintiffs' as-applied First Amendment challenge (after previously dismissing its facial challenge). The Eighth Circuit ruled that Minnesota's statute does not violate the First Amendment, citing *Burson v. Freeman* 504 U.S. 191 (1992), which upheld a Tennessee statute that banned the "solicitation of votes" and "campaign materials" within 100 feet of the polling place. In citing to *Burson*, the Eighth Circuit noted that a state "has a legitimate interest in maintaining peace, order and decorum in the polling place and a compelling interest in protecting voters from confusion and undue influence and 'preserving the integrity of its election process.'" 849 F.3d 749 (8th Cir. 2017), quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966); then quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (internal quotations omitted).

The Eighth Circuit did not address whether the statute is overbroad. Instead it opined that polling places are nonpublic forums and that the regulation is viewpoint neutral and facially reasonable.

The plaintiffs argued that banning Tea Party apparel at polling places is unreasonable because the Tea Party is not a political party. The Eighth Circuit rejected this argument, noting that the statute prohibits election-related apparel more generally. Further, the Eighth Circuit found that even if the Tea Party apparel was not election-related, it was still not unreasonable to ban it from a polling place because all "political material" was banned under the statute and such a ban helped ensure a "neutral, influence-free polling place." Minnesota put forth evidence that the Tea Party is political and the plaintiff offered nothing to rebut that evidence.

The Supreme Court accepted certiorari on the issue of whether Minnesota statute Section 211B.11, which broadly bans all political apparel at the polling place, is facially overbroad under the First Amendment. The Supreme Court has held that governments have a compelling interest in "preventing voter intimidation and election fraud." These laws are intended to maintain peace, order, and decorum in polling places and to protect voters from confusion and undue influence and to preserve the integrity of the election process. Local governments have strong interests in preserving the integrity of the election process and they should be entitled to enact laws aimed toward that goal. This is particularly true where polling places are found to be nonpublic forums and we would not want the Court to erode a government's ability to regulate speech in a nonpublic forum, as that could have broader implications.

For more information about these cases or IMLA's amicus activities, please contact Amanda Kellar, IMLA's Legal Advocacy Director, at akellar@imla.org. ML



Kicking Christmas off the Bus, Paying Less for More Work, and Muting Endorsements in Judicial Elections

By: Erich Eiselt, IMLA Assistant General Counsel and Editor, Municipal Lawyer

Barring Religious Ads on Public Buses
Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, **No. 17-2554 (D. D.C. Dec. 8, 2017).**

The District Court in Washington DC has upheld the City bus company's policy against religious ads on its buses, finding that, as a limited public forum, the bus exteriors are subject to governmental restrictions on categories of speech so long as the policies are reasonable and do not discriminate among religious views. An allowed Salvation Army ad was not "religious."

The Archdiocese of Washington and Donald Cardinal Wuerl, Roman Catholic Archbishop of Washington (collectively Archdiocese) sought to place an advertisement on the exterior of buses operated by the Washington Metropolitan Area Transit Authority (WMATA) as part of the Archdiocese's "Find the Perfect Gift" Christmas campaign.

As the Archdiocese explained:

> The Find the Perfect Gift campaign is an important part of the Archdiocese's evangelization efforts. . . . The campaign seeks to invite the public to consider the spiritual meaning of Christmas, to consider celebrating Advent/Christmas by going to Mass at one of our parishes and/or joining in one of our many outreach programs that care for the most vulnerable and poor during Advent and beyond.

WMATA rejected the ads as inconsistent with its advertising guidelines (Guidelines), in particular, the Guideline prohibiting "[a]dvertisements that promote or oppose any religion, religious practice or belief."

The Archdiocese filed a five-count complaint that asking that the Guideline be declared unconstitutional; because the advertising campaign was specifically tied to the liturgical season of Advent, which had already begun, it moved for a temporary restraining order and preliminary injunction that would direct WMATA to immediately accept the advertisements.

The district court declined. Noting that emergency injunctive relief is an extraordinary remedy that may only be awarded based on a substantial showing that the plaintiff is likely to succeed on the merits, it found the applicable constitutional principles to be "quite clear."

While private religious speech is protected under the Free Speech Clause to the same degree as secular speech, that rule does not necessarily apply when government property has not been designated or made available for broad public use for communicative purposes. "Control over access to a nonpublic or limited forum may be based on the subject to be discussed as long as: the lines drawn are reasonable given the purpose of the forum involved, they do not favor one viewpoint over another, and they are consistently applied."

It is settled as a matter of law that the exterior of a bus is not a public forum open to anyone who wishes to address any topic. WMATA had determined not to accept advertisements related to potentially divisive topics such as politics or religion out of well-founded concerns for the safety of the public and WMATA employees--and a desire to reduce vandalism and the administrative burden of reviewing proposed ads.

The Archdiocese tried unsuccessfully to characterize WMATA's action as depriving it of the right to express a sincerely-held religious belief under RFRA. The court was unpersuaded:

> Neither the Guideline nor its application in this case interferes with plaintiff's right to practice its religion in any way, and it does not compel the Archdiocese to take any action that burdens its sincere religious convictions. The Guideline does not establish any preference for or against one religion over another, and it is neutral and generally applicable, and therefore, WMATA's decision in this case does not violate either the Constitution or RFRA.

The Archdiocese also argued that it was deprived of the opportunity to express its view of Christmas, while allowing other entities to express Christmas messages. The court found that the other complained-of advertisements were hardly comparable:

> [T]he ads heralding the opening of another CorePower Yoga fitness studio in Clarendon, Virginia ("Muscle + Mantra"), nor the ads soliciting contributions to the Salvation Army's Red Kettle effort ("Give Hope. Change Lives") "promote or oppose any religion." While the Salvation Army is a Christian organization, and its charitable efforts, like those of the Archdiocese and other religious organizations, may be motivated in some measure by religious beliefs, the ads it chose to display on the buses do not promote or advance religion.

The Archdiocese's motion for restraining order was denied.

https://www.courthousenews.com/wp-content/uploads/2017/12/ARCHDIOCESE-RULING.pdf

Note:
On December 20, 2017, the D.C. Circuit denied the Archdiocese's motion for TRO, requiring the parties to file briefs on the merits in January 2018.

A Woman Steps into a Retiring Male's Role, but is Paid Less
***Lauderdale v. Illinois Department of Human Services,* No. 16-3830 (7th Cir. Nov. 30, 2017).**

Acknowledging that a state female superintendent who assumed additional responsibilities upon the retirement of a male executive was paid less that the retiring male, the Seventh Circuit has upheld the disparity based on a showing that the state's precarious fiscal condition required drastic belt-tightening.

Marybeth Lauderdale (Lauderdale) worked as superintendent for the Illinois School for the Deaf, during which she was paid a total of $88,048. Reggie Clinton (Clinton) was superintendent for the School for the Visually Impaired and was paid $121,116 per year. When Clinton retired and the state sought to combine the roles, paying just one superintendent, Lauderdale was offered the job and, after negotiations, was paid $106,500 for the job. Lauderdale filed a lawsuit alleging a violation of the Equal Pay Act based on the difference between what she was paid and what Clinton had been paid. The district court ruled against her, finding the difference was the result of budget concerns and from applying the Illinois Pay Plan. Lauderdale appealed.

The Seventh Circuit began by setting out that the Equal Pay Act prohibits employers from discriminating between employees on the basis of sex and that establishing a prima facie case requires an employee demonstrate "a difference in pay for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." If the employee clears this hurdle, the burden shifts to the employer to evidence a neutral factor which actually accounts for the pay disparity. Given that Lauderdale took over Clinton's job and took on additional work to supervise a second school, the state conceded she had made out a prima facie case.

Like the lower court, however, the Circuit found the state's evidence compelling. First was the fact that in making its decision the state did look to the Illinois Pay Plan (Plan) for guidance about how much the new position commanded in terms of salary and showed that it had produced a decision memorandum, as required by the Plan. Second, the Circuit found that, even if the state had not strictly adhered to every provision of the Plan, emails and documents showed that Lauderdale's previous salary was a determining factor in setting her new salary and, the court noted, it has repeatedly held this is a "legitimate factor other than sex." Finally, the Circuit found that emails also showed that budgetary concerns went above and beyond the normal status the factor plays in salary decisions – pointing out that Lauderdale herself, as well as other staff, had been required to take furlough days and were warned that schools might have to close entirely due to funding concerns.

Ultimately it held that if "presented with this evidence, no reasonable juror could find that Lauderdale was paid less because of her sex." It affirmed the lower court.

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D11-30/C:16-3830:J:Kanne:aut:T:fnOp:N:2070074:S:0

Montana Judicial Candidates Can't Use Endorsements
***French v. Jones,* no. 15-35990 (9th Cir. Dec. 7, 2017).**

Efforts by a judicial candidate in Montana to strike the state's law prohibiting his use of political endorsements have failed; based on Supreme Court guidance, the Ninth Circuit upholds the lower court decision finding that such a law is narrowly tailored and is neither over-inclusive nor under-inclusive.

Montanans select their judges through nonpartisan popular elections. In an effort to keep those elections nonpartisan, Montana prohibits candidates from using political endorsements in their campaigns: "[A] judge or judicial candidate shall not . . . seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate . . . ." In 2014, Mark French (French) ran as a candidate for justice of the peace in Sanders County. The Sanders County Republican Central Committee endorsed his candidacy, and two prominent Republican officeholders were also willing to consider doing so personally, if French had asked. Afraid of violating the rule, French refrained from seeking or using these endorsements in his campaign. He ultimately lost the election, but intends to run again in 2018. Seeking to use endorsements, he sued to invalidate the Montana rule on First Amendment grounds.

The district court rejected French's argument and entered summary judgment for the state.

The Ninth Circuit affirmed. It recited that content-based restrictions on judicial-campaign speech are subject to strict scrutiny, requiring the government to show that "the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. FEC*, 558 U.S. 310, 340, (2010) (citation omitted). The Circuit reviewed the Supreme Court's treatment of similar campaign speech restrictions in *White I* and *Williams-Yulee*, discerning "a clear shift in favor of state regulation." While *White I* had struck a restriction because the compelling state interest – judicial impartiality—was not adequately articulated in the regulation, *Williams-Yulee* moderated that posture significantly.

In contrast to *White I*, the *Williams-Yulee* Court did not attempt to define precisely what judicial integrity or impartiality means. Instead, it emphasized that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling." "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse . . . .' The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." (quoting *The Federalist No. 78*, at 465). The *Williams-Yulee* Court found the Florida statute being challenged was neither over-inclusive nor under-inclusive and allowed the prohibition to stand.

On that basis, the Ninth Circuit upheld the Montana restriction: "We hold that Montana has compelling interests in an impartial and independent judiciary. Rule 4.1(A)(7) is narrowly tailored to those interests because it strikes an appropriate balance between a candidate's speech and Montana's interest in an independent and impartial judiciary. French's arguments to the contrary are foreclosed by the Supreme Court's decision in *Williams-Yulee* . . . "

http://cdn.ca9.uscourts.gov/datastore/opinions/2017/12/07/15-35990.pdf

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not apply when a program such as the City's pass program that was intended to benefit individuals resulted in the discrimination against those individuals such as the Applicant.

In the alternative, the City argued that the application should be dismissed for delay. The application was filed in 2016 but the Applicant first raised concern with the pass program in 2011 and as a result violated the one year limitation period outlined in section 34. The Applicant argued that the discrimination had begun in 2011 but was ongoing, and therefore the limitation period had not run out. The Adjudicator relied on an analogous case *Garrie v. Janus Joan Inc.*, 2012 HRTO 1955, which held that each alleged occurrence of discrimination was a separate contravention of the *Code.* Therefore, as long as the Applicant purchased a "Special" pass within the prior 12 months, the limitation period in section 34 was satisfied. The Adjudicator clarified that if the Applicant wanted to proceed with the 2011 allegations, the Applicant would have to demonstrate that the delay was incurred in good faith. However, the Applicant would be permitted to rely on 2011 untimely allegations as contextual evidence, to the extent that they are relevant to the timely allegations.

Land Belongs to County After Railway Ceases Operation
***Corporation of the County of Oxford v. Vieraitis,* 2017 ONSC 6615 (CanLII) http://canlii.ca/t/hmw8f**

A piece of land acquired by the Canada Southern Railway Company (Canada Southern) in the late 1800's was at the centre of this dispute between Oxford County (County) and residents of the County, Mr. and Mrs. Vieraitis (Defendants). Both parties claim ownership of the land and both seek a declaration of fee simple ownership. When the railway line was discontinued, Canada Southern divested itself of the land as required by the *Canada Transportation Act*. At issue was whether the land was transferred to the County or reverted back to the original successors in title and thereby to the Defendants once the use for the railway ended. The County sought to use the land as a recreational trail, and argued that the Defendants interfered with its attempted use. The Defendants moved for a partial summary judgement.

HELD: Motion dismissed.

DISCUSSION: The County's position was simple; the original owner of the land conveyed full ownership of the lands to Canada Southern, and when Canada Southern divested, the County obtained a fee simple ownership in the land. The Defendants' position hinged on the statute that governed Canada Southern when the land was acquired; they and argued that the statute did not permit the land to be acquired in fee simple. Therefore, the argument followed that Canada Southern obtained a temporary interest only as long as it was necessary to operate the railway and once that interest was finished in the land, the land reverted back to the original transferor--and thereby the Defendants as the current successors in title.

The Court outlined three questions it needed to address to determine the interest that Canada Southern had acquired in the land: first, the language of the applicable statutes; second, the transactional documents between the original parties; and third, subsequent actions and declarations. When examining the statutory powers authorized to Canada Southern under the *Railway Act,* regarding its authority to acquire land in fee simple, the Court found that the statutory provisions were analogous to those examined in *Canadian Pacific Ltd. V. Lowe,* [1998] N.S.J. No. 69 (Q.B). In *Lowe* it was determined that a railway company should acquire and own real estate either by agreement or by expropriation for the construction, maintenance and operation of the railway. By relying on the findings in *Lowe*, the Court agreed with the County and determined that Canada Southern was permitted to acquire the land at issue in fee simple. The Court recognized that as a result of this transaction taking place in the late 1800's the details within the original transactional documents would be scarce. As a result, the Court reinforced that Canada Southern had a statutory authority to acquire the land in fee simple and therefore it was acting within its authority.

The Defendants unsuccessfully attempted to argue that the fee simple obtained by Canada Southern was determinable, and was terminated and reverted back to the successors in title when it stopped using the land for the purpose of the railway. The Court disagreed, finding that there was no wording in the transactional documents that suggested that the land would revert back. In reviewing the subsequent events, the Court concluded that Canada Southern obtained a fee simple interest in the land, and as a result the Defendants never acquired such an interest. Therefore, the Court held, the County is the owner of the land in fee simple.

Residency in Mobile Home is Not Recognized Form of Charter Discrimination
***Prediger v Calgary (City),* 2017 ABQB 755 http://canlii.ca/t/hp6vn**

Midfield Mobile Home Park (Midfield) in the City of Calgary (City) was operated by the City and managed by Calhome Properties (Calhome). The City became aware that Midfield was experiencing water and sanitary infrastructure problems, making the use of the land as a mobile home park undesirable. In 2014, City Council decided to close Midfield. To satisfy the requirements in the *Mobile Home Site Tenancies Act* (*Act*), the City sent residents a one-year termination notice in September 2016. As of September 2017, Midfield was formally closed; however, there were still residents occupying the lots. One of those residents was the Applicant, Mr. Prediger. On behalf of himself and other residents of Midfield, the Applicant alleged that by closing Midfield, the City and Calhome violated the *Act* and section 15 of the *Canadian Charter of Rights and Freedoms (Charter).* A cross-application was filed by Calhome to obtain vacant possession of the lots still oc-

cupied and permission to demolish the abandoned mobile homes.

HELD: Application dismissed, and cross-application granted in part.

DISCUSSION: The City argued that the application was misdirected and was truly a collateral attack on the original 2014 decision made by City Council. The City suggested that the Applicant should have argued for judicial review of City Council's decision, however the challenge was now barred under the limitation Rule 3.15(2) of the *Alberta Rules of Court*, Alta Reg. 124/2010. The Court agreed; the Applicant's argument primarily concentrated on City Council's conduct and its decision to close Midfield. Despite this finding, the Court proceeded to address the remainder of the arguments. The crux of the Applicant's argument was that the City deliberately neglected and failed to maintain Midfield's infrastructure so it could justify closing it. The Court disagreed; in part because the Applicant could not provide evidence that action or inaction by the City caused it to fail to meet its infrastructure obligations, and once City Council agreed to close Midfield, it was clear why the City no longer invested funds into improving the mobile home park.

The Applicant unsuccessfully challenged the validity of the termination notice, suggesting that it did not meet section 13(1)(a) of the *Act* because it was silent on the future use of the land. Relying on an analogous decision, *Howe v. 3770010 Canada Inc,* 2008 BCSC 330, it was held that the only requirement required was the indication that there was an intention to use the land for a purpose other than a mobile home park. Therefore, the Court dismissed the Applicant's argument. Lastly, the Court addressed the section 15(1) *Charter* violation raised by the Applicant. The Court referenced the Supreme Court of Canada (SCC) decision *R v. Kapp,* 2008 SCC 41 which outlines the two-prong test for demonstrating discrimination. The first prong required that the Applicant must be discriminated against on an enumerated or analogous ground. An enumerated ground is not applicable; as a result the Court examined the definition of an analogous ground as clarified by the SCC in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, 1999 CanLII 687; a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identify". The Court found that being a resident of a mobile home park does not meet this standard, and as a result did not proceed to the second prong. The Applicant's application was dismissed. The Court granted Calhome's cross- application in part, extending the date by when the remaining residents must vacate Midfield to February 2018.

Tribunal Searches for an Appropriate Remedy Following a Contravention Application

LaBerge v. Guelph (City), 2017 HRTO 1435 (CanLII) **http://canlii.ca/t/hmvrv**

The Applicant, a resident in the City of Guelph (City) filed an application under the *Human Rights Code*, R.S.O. 1990 (*Code*) alleging that the City discriminated against her on the basis of disability and age. The discrimination stemmed from the Applicant's experience on the City's transit system with other passengers. In the original application, the Applicant indicated that she was frequently asked by passengers with strollers to move out of the priority seating so they could sit with their strollers, even though she required this seating. Following the Human Rights Tribunal, the Applicant and the City entered into Minutes Of Settlement (MOS). The Applicant submits that the City has contravened the MOS.

HELD: Seven drivers were ordered to receive training upon return to work.

DISCUSSION: Section 45.9(3) of the Code allows a party who believes there has been a contravention of a MOS to make an application to the Tribunal. The Applicant submitted an application citing multiple contraventions of the MOS by the City. The first contravention was signage. The Applicant argued that the City did not install new interior signage explaining that disabled passengers have a higher claim to priority seating by the date outlined in the MOS. City conceded that it did not meet the deadline, but all signage was updated at the time of this hearing.

Next, the MOS required a priority seating public awareness campaign; the Applicant argued that the City failed to do such a campaign. The City highlighted the steps it took to satisfy this requirement: updating the City website, placing information at bus shelters, and creating written material for circulation. The City submitted that the MOS did not define the requirements of an awareness campaign. The Tribunal agreed, indicating that the steps taken by the City demonstrated its intent to carry out the terms of the MOS.

Third, the Applicant argued that the City did not provide updated training to its drivers about priority seating. This argument was premised on her recent experiences on the bus, where she was still asked by other passengers to move from priority seating. The City conceded that it did not train seven of the 170 bus drivers, as those drivers were off on long term disability. The challenge as suggested by the City was that regardless of the training provided, it had no control over the behavior of the passengers on the bus.

Finally, the Applicant agreed that the City did meet the MOS requirement to have an article published in the newspaper regarding priority seating, but the Applicant expected that there would be more than one. Article. The City highlighted the wording in the MOS which included "a" notice and submitted that this requirement was met, to which the Tribunal agreed. With regards to a remedy, the Tribunal cited *Matos v. Transplay,* 2010 HRTO 2527 which stated "the power to remedy a contravention of settlement is tied to the harm caused as a result of the contravention." At a loss for the remedy, the Tribunal required that the City have the remaining seven bus drivers trained within six months upon returning to work. ML

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