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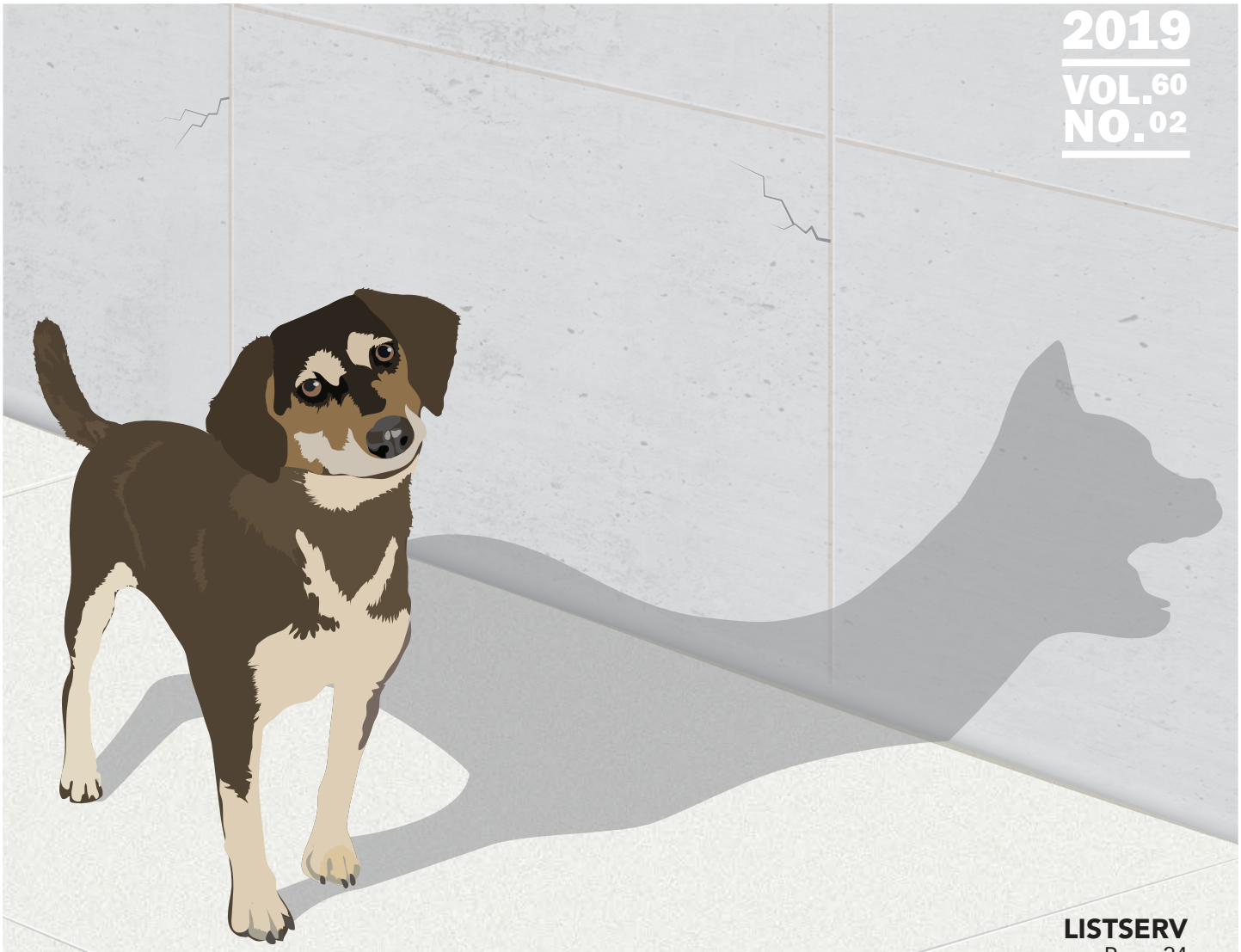

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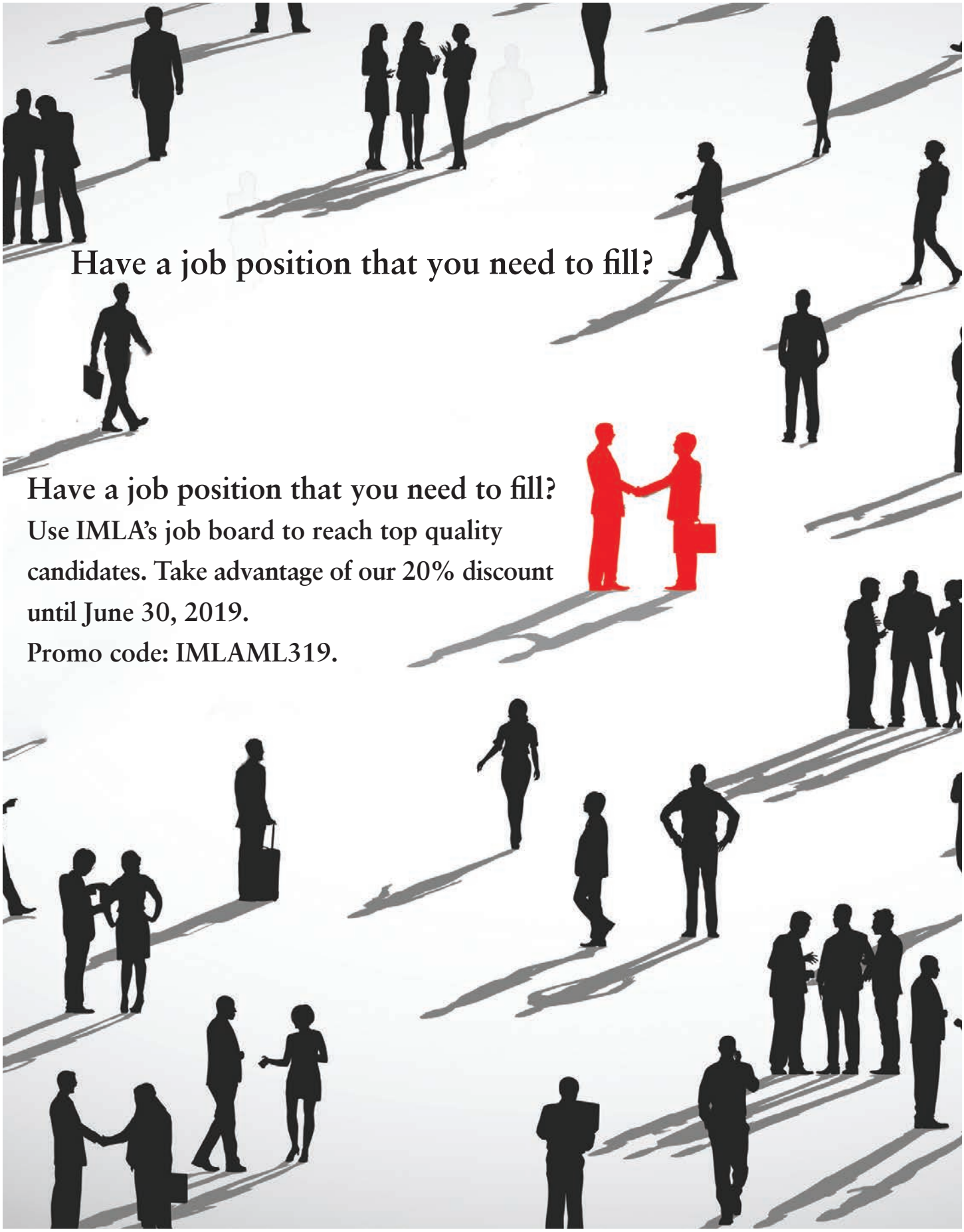
Cultivating Canine Civility: IMLA's Model Dangerous Dog Ordinance



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EDITOR'S NOTE



BY ERICH R. EISELT
IMLA Assistant General Counsel

A Dog's Life

This March-April 2019 *ML* again chronicles the broad and interesting parameters of municipal law practice. At one end of the spectrum we present the IMLA Model Dangerous Dog Ordinance, ostensibly an innocuous collation that should barely raise eyebrows. But when it comes to regulating people in their rightful enjoyment of canine companions, even an otherwise mundane law takes on larger dimensions. This articulation of municipal authority will not satisfy everyone—for some, its absence of breed-specific presumptions will be an irresponsible omission (despite ample evidence indicating the inaccuracy of such approaches). For others, the prospects that government can seize and euthanize a beloved animal may seem overreaching.

Those conflicts—and the many nuances in between—are addressed in the Model. Despite its simple focus, the IMLA dog legislation carries the same constitutional DNA which suffuses American municipal governance generally: It endeavors to define terms such as "dangerous" so as to avoid vagueness, it requires firm substantiation of alleged offenses, it demands due process in the form of written notice of violation and the opportunity to confront damaging evidence, and it provides for an appeals process. In short, the Model—supplemented by its Editorial Notes—takes its modest subject matter with complete gravity.

At the other end of the spectrum, we note an event which is taking place this morning as our digital *ML* reaches your inbox: the Justices of the Supreme Court are hearing oral argument in *The American Legion v. American Humanist Association*, a case examining once more the complex cross-currents emanating from the First Amendment prohibition against governmental establishment of religion. IMLA joined an amicus brief in *American Humanist*, urging greater clarity in the standards which govern establishment analysis.

For those who aver that canines and the High Court have nothing in common, one has only to consider Justice Breyer's comments last November during oral argument in *Murphy v. Carpenter*, when assessing the potential impact of a determination that nearly half of Oklahoma is still within the Muscogee Reservation: "There are 1.8 million people living in this area," he said. "They have built their lives not necessarily on criminal law but on municipal regulations, property law, dog-related law, thousands of details. And now, if we say really this land ... belongs to the tribe, what happens to all those people? What happens to all those laws?"

Clearly, at least one Justice recognizes the utility of well-crafted dog regulations.

This varied menu of issues, from narrow (how long should a dog's leash be) to expansive (does a government establish religion when it maintains a century-old, 40-foot high stone cross), is what makes municipal law invariably absorbing. We are pleased to bring you some of its many facets on these pages.

Best regards-

Erich Eiselt

ML

PRESIDENT'S LETTER



BY ANDREW J. WHALEN
IMLA President and City Attorney, Griffin, Georgia

As I've mentioned in previous President's Letters in *Municipal Lawyer*, one of the outstanding attributes of our organization is the "International." While most of us focus, quite appropriately, on the issues affecting our local governments, IMLA also brings to its membership the opportunity to learn about and observe other legal systems. Under the energetic leadership of Ben Griffith, IMLA's International Committee continues to explore new horizons. There is no better spokesperson for the International Committee than Ben himself, in his own words:

IMLA International Committee Report on Berlin and Israel:

Have you have ever wanted to touch the Berlin Wall, visit the German Bundestag, take a Trabi-Tour, speak with the Berlin Minister of Justice, eat with the governing Mayor of Berlin who oversaw the fall of the Berlin Wall, or simply learn how to pronounce Bundesverfassungsgericht? If so, then you need to join the IMLA in Germany this November. The IMLA International Steering Committee is currently planning a trip to Berlin, Germany to coincide with the 30th Anniversary of the fall of the Berlin Wall. The Committee has been working with Berlin Parliamentarian Sven Kohlmeier, the American Council on Germany, and others to organize a fun-filled agenda that will be informative, thought provoking, and worth every minute of your time.

The International Steering Committee is currently lining up speakers and thought leaders to cover a wide range of topics relevant to municipal practice, including issues related to cyber security, the sharing economy, immigration, smart cities, privacy, and much more. Plans for this trip are currently being finalized and will be presented at the International Steering Committee's business meeting during IMLA's mid-year Seminar in Washington D.C. If you have any interest in attending, which we hope you will, then please stop by the meeting.

The Berlin trip is only one of several international projects planned by the International Steering Committee.

In addition to our very successful trip to Cuba in 2016, IMLA also sponsored a recent meeting to Israel. A group of thirteen IMLA members and their spouses/partners participated. On the first day they took a walking tour of the ancient port city of Jaffa, with buildings over 5000 years old, and the most beautiful areas of modern Tel Aviv. Dr. Einat Wilf, Senior Fellow with the Jewish People Policy Institute and former foreign policy advisor to Shimon Peres, spoke to the group at the opening dinner that evening, providing an excellent overview of current geopolitical issues facing Israel and a pragmatic analysis of the complexities surrounding efforts to arrive at a principled, comprehensive approach to the two-state vs. one-state alternatives.

The second day included a revealing discussion of the Jewish Connection to the Land of Israel led by Dr. Ian Stern, a renowned archeologist, scholar and educator, followed by a walk along Rothschild's Boulevard formerly known as the Street of the People, with a stop at Independence Hall where the new State was declared in 1948. Following lunch with Erica Solomon Vassar, CEO of the Israel Bar Association, the IMLA group visited Tel Aviv University and met with representatives of the faculty of law, followed by a visit with Uzi Salman, Tel Aviv General Attorney, capped off by dinner that evening with the Counselor for Political Affairs with the U.S. Embassy for a discussion on U.S.-Israel relations.

The third day included a meeting with representatives of the Federation of Local Authorities for an overview of their legal and professional responsibilities for civil and criminal matters involving Tel Aviv municipal government, the intricacies of their roles within each community, and the municipal challenges faced in different sectors around Israel. Following lunch at the Fish Market in the new in town Sarona Mall, the IMLA group met with Daniel Reisner at the Herzog, Fox & Neeman law offices for a discussion of the legal status of the Jewish settlements in the West Bank. Reisner, widely recognized as the Godfather of Israeli Experts on international law and war crimes, has served as a Head of the International Law Branch of the IDF Legal Division. The group then learned about Israel's Narrow Waistline, with a briefing on current issues from the West Bank Settlement led by the former Deputy Director of the Israel Government Press Office (Prime Minister's office) who currently works at the Weizmann Institute of Science. Traveling north to Galilee, the IMLA group had a memorable dinner meeting at Dovrovin with Rasool Saade, Director of the Safe Communities Program at the Abraham Fund Initiatives and former Department Head for the Advancement of Arab Students at the Israel Student Union.

On the fourth day, the group ascend-

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Cultivating Canine Civility: IMLA's Model Dangerous Dog Ordinance

BY: IMLA EDITORIAL STAFF



ILLUSTRATION: TRUJILLO DESIGN

In late 2018, IMLA released its Model Dangerous Dog Ordinance ("Model Ordinance"), drafted in association with Best Friends Animal Society and intended to provide localities with a mechanism for defining and controlling dangerous dogs. This article provides some of the thinking behind the drafting process, followed by the full text of the Model Ordinance. (The complete Model Ordinance and Editors' Commentary is available to the public on IMLA's website, under the "Reference Materials" tab).

I. Introduction

The Model Ordinance is designed to assist local government attorneys in drafting legislation which regulates, but does not prohibit, the ownership and care of dogs that are a nuisance or pose an extraordinary risk of danger to persons and property if not properly controlled. As the Editors caution, "Because it is aspirational, it may contain provisions that are difficult if not impossible to implement within certain jurisdictions;" and local and state law must always be consulted.

II. Drafting Overview

A number of guidelines should be kept in mind when drafting a dog ordinance:

- Clearly define what is meant by a "potentially dangerous," "vicious" or "dangerous" dog.
- Establish the mechanisms that satisfy the dog owner's due process rights.
- State the appropriate burden of proof (for criminal penalties, "beyond a reasonable doubt" applies.
- Specify the actions that a dog owner must take if the dog is declared dangerous at the end of a hearing or court proceeding, and describe the applicable penalties if the owner does not comply.

III. The Police Power to Regulate Dangerous Dogs

Property rights in dogs are of an imperfect or qualified nature. While governmental bodies may be powerless to enact a general ban on the ownership of dogs,[1] it is well established that municipalities may regulate the keeping of animals within their jurisdictional limits as a valid exercise of police power delegated from the state. In *Sentell v. New Orleans & Carrolton R.R.*, the constitutionality of a New Orleans ordinance requiring pet owners to obtain license tags for their dogs and a Louisiana statute requiring all dogs to be registered was contested.[2] In upholding both the state and city regulations, the United States Supreme Court concluded that dogs are subject to the full force of the police power and may be destroyed or otherwise regulated in such manner as the legislature deems reasonable to protect citizens.[3]

Many state courts have since held that a legislative body has broad police powers to control all dogs as means of guarding against public nuisances that endanger people. Typical of these is *Thiele v. Denver*, in which the Colorado Supreme Court stated unequivocally that a dog, like all other property, is held by its owner subject to the inherent police power of the state and cannot be used or held in such way as to injure others or their property.[4] In *King v. Arlington County*, the Virginia Supreme Court held that a county law making it illegal to keep a dog known to be vicious or which has evidenced a disposition to attack human beings was a valid exercise of the county's police power.[5] (Because a generalized claim of "known propensity" for dangerousness is usually contested, it is more effective to list specific behaviors).[6] To justify the state's assertion of its authority on behalf of the public, it must appear that the interests of the public require such interference. Also, the means chosen must be reasonably necessary to accomplish the government's purpose and not unduly oppressive upon individuals.

IV. Breed-Specific/Discriminatory Regulations

Because local governments enjoy such broad discretion when regulating the keeping of dogs, ordinances aimed

at dangerous dogs and their owners that apply to all breeds usually do not raise questions about whether a city or county has overstepped its legal bounds. More controversial, however, is the use of breed descriptions to automatically characterize a dog as vicious or dangerous or in some other way restrict ownership of that breed. Nowhere is this more common than in legislation pertaining to alleged pit bull terrier dogs. At least 21 states currently prohibit breed discriminatory measures.[7] *Note that the 2005 version of this IMLA Model Ordinance contained breed-specific language; that wording has subsequently been removed.* Rather than attempt to regulate certain specific breeds, the current 2018 Model Ordinance contains a strong "vicious dog" category which is broadly applicable to all dangerous and vicious dogs. Unlike general vicious dog ordinances, breed-specific/discriminatory laws are not automatically accepted as valid and have faced numerous court challenges from both dog owners and breed or humane organizations.[8] These challenges include allegations of over-inclusiveness, under-inclusiveness, vagueness, violation of equal protection, and lack of a rational basis.

The vast majority of local governments have addressed public safety by passing comprehensive breed-neutral vicious dog ordinances that apply to dogs of all breeds.[9] These ordinances focus on the behavior of the owner and of the dog and are much less controversial than attempting to correctly identify and regulate an entire breed, especially if criminal penalties are involved and proof of the alleged breed is required beyond a reasonable doubt.

(This thinking is borne out in the service dog provisions of the Americans with Disabilities Act. United States Department of Justice guidance states that it "does not believe it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks.")[10]

Along these lines, the Best Friends Animal Society ("Best Friends"), which collaborated with IMLA in producing the Model Ordinance, notes that past

Unlike general vicious dog ordinances, breed-specific/discriminatory laws are not automatically accepted as valid and have faced numerous court challenges from both dog owners and breed or humane organizations. These challenges include allegations of over-inclusiveness, under-inclusiveness, vagueness, violation of equal protection, and lack of a rational basis.

breed-specific legislation was not supported by scientific validation--studies using animal welfare professionals including veterinarians and municipal animal control officers have shown that visual breed identification of dogs is highly unreliable.[11] Best Friends notes that ordinances targeting specific breeds have shown to be ineffective at enhancing public safety, expensive to enforce, and an interference with dog owner's property rights.[12] These factors presumably contributed to a 2012 the American Bar Association House of Delegates resolution urging local governments to repeal breed specific ordinances:

> *"Resolved, that the American Bar Association urges all state, territorial, and local legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog/reckless owner laws that ensure due process protections for owners, encourage responsible pet ownership and focus on the behavior of both dog owners and dogs, and to repeal any breed-discriminatory or breed-specific provisions."*

V. Due Process Challenges

The most common constitutional challenge to a dangerous dog ordinance is lack of procedural due process. Many drafters make the mistake of not allowing for a fair hearing before declaring a dog dangerous.[13] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[14] The determination of what due process protections apply requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the government's interest.[15] Regarding the private interest affected, a Washington court has held that "the private interest involved is the owner's interest in keeping their pets… is greater than a mere economic interest, for pets are not fungible. So, the private interest at stake is great."[16]

Restricting dog ownership amounts to a meaningful interference with the owner's possessory interest in that "property"—and acts as a constitutional deprivation. Restrictions may effectively limit the owner's ability to engage in previously-allowed activities, such as letting the dog run off-leash or playing ball without a muzzle on one's own property, and these restrictions often apply for the lifetime of the dog. (IMLA's Model Ordinance allows for an application to appeal the lifetime regulations).

Due process can also be implicated depending on the nature of the penalty imposed. Most state statutes establish the burden of proof for the municipality as either a preponderance of the evidence or clear and convincing evidence if the penalty is civil, and beyond a reasonable doubt if the penalty is criminal.[17] The court in *City of Pierre v. Blackwell*, held that because the ordinance in question imposed a criminal penalty for keeping a dangerous dog, the dangerousness of the animal had to be proved beyond a reasonable doubt. Moreover, because the court relied solely on the animal control officer's decision as to the dangerousness of the dog, and there was no independent assessment of the evidence presented by both sides, procedural due process was not satisfied.

The full text of the IMLA Model Ordinance follows:

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ARTICLE 4-2: IMLA MODEL ORDINANCE REGULATING DANGEROUS DOGS

Section
4-201 Authorization
4-202 Purpose and Intent
4-203 Definitions
4-204 Determination of Status
4-205 Potentially Dangerous Dogs
4-206 Dangerous Dogs
4-207 Vicious Dogs
4-208 Immediate Impoundment
4-209 Continuation of Dangerous Dog
4-210 Reckless Owner
4-211 Penalties
4-212 Appeals
4-213 Conflicting Ordinances
4-214 Severability

A public safety ordinance providing for responsible ownership of and licensing and keeping of potentially dangerous dogs, dangerous dogs, and vicious dogs within the corporate limits of the City of _____, authorizing impoundment and disposition of certain dogs, and repealing all ordinances in conflict therewith.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF _____:

SECTION 4-201. Authorization.

This Ordinance is enacted pursuant to the general police power, the authorities granted to cities and towns by the_____ State Constitution, and Sections ____ through _____ of the _____ State Code.

SECTION 4-202. Purpose and Intent.

The purposes of this Ordinance are to promote the public health, safety, and general welfare of the citizens of the City of _____.

SECTION 4-203. Definitions.

When used in this Ordinance, words have their common meaning and in addition the following words, terms, and phrases, and their derivations have the following meaning:

(a) *Animal control officer* means any person employed or appointed by the City who is authorized to investigate and enforce violations relating to animal control or cruelty under the provision of this Ordinance.

(b) *At large* means a dog that is not on its owner's property and not leashed.

(c) *Bite injury* means any contact between an animal's mouth and teeth and the skin of a bite victim which causes visible trauma, such as a puncture wound, laceration, or other piercing of the skin.

(d) *Dangerous dog* means any dog that has caused a bite injury and is not a vicious dog.

(e *Director* means the Director of the Department of Animal Control.

(f) *Domestic animal* means an animal of a tamed species commonly kept as pets and includes livestock

(g) *Enclosure* means a fenced or walled area having a fence or wall height of at least six (6) feet suitable to prevent the entry of young children and suitable to confine a dog.

(h) *Impoundment* means seizing and confining a dog by any police officer, animal control officer or any other public officer under the provisions of this Ordinance.

(i) *Muzzle* means a device constructed of strong, soft material or of metal, designed to fasten over the mouth of a dog that prevents the dog from biting any person or other animal and that does not interfere with its respiration.

(j) *Potentially dangerous dog* means a dog that while *at large*: (1) behaves in a manner that a reasonable person would believe poses a serious and unjustified imminent threat of serious physical injury or death to a person or *domestic animal*, or (2) causes injury to a *domestic animal*.

(k) *Provocation* means any action or activity, whether intentional or unintentional, which would be reasonably expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence.

(l) *Owner* means any person, partnership, or corporation having a right of property in an animal, or who keeps or harbors a dog, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her.

(m) *Sanitary condition* means a condition of good order and cleanliness to minimize the possibility of disease transmission.

(n) *Serious physical injury* means disfigurement, protracted impairment of health, or impairment of the function of any bodily organ.

(o) *Vicious dog* means a dog that without provocation or justification bites or attacks a person and causes serious physical injury or death or is declared vicious under this title.

SECTION 4-204. Determination of Status.
(a) The animal control officer may find and declare a dog potentially dangerous, dangerous, or vicious if the officer has probable cause to believe that the dog falls within the definition of "vicious dog", "dangerous dog" or "potentially dangerous dog". The finding must be based upon:

(i) The written complaint of a person who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of "vicious dog", "dangerous dog" or "potentially dangerous dog"; or

(ii) Dog bite reports filed with the animal control officer as required by city ordinance or state law; or

(iii) Actions of the dog witnessed by any animal control officer or law enforcement officer; or

(iv) Other substantial evidence admissible in court.

(b) The declaration shall be in writing, and shall be served by the animal control officer:

(i) On the owner if known using one of the following methods:

1. Regular mail to the owner's last known address, or by certified mail directed to the owner at the owner's last known address; or

2. Personally; or

3. If the owner cannot be located by one of the first two methods, by publication in a newspaper of general circulation and posting a notice on the property of the owner;

(ii) Where the owner is not known publication in a newspaper of general circulation.

(c) The declaration shall contain the following information:

(i) Name and address of the owner of the dog if known and if not known that fact.

(ii) A description of the dog.

(iii) Whereabouts of the dog.

(iv) Facts upon which the declaration is based.

(v) Restrictions placed upon the dog and when the owner is not known the intended disposition of the dog.

(vi) Penalties for violation of the restrictions, including possibility of destruction of the animal and fine and imprisonment of owner.

(vii) Availability of a hearing to contest the declaration by submitting a written request to the Board of Appeals within fifteen days of receipt of the declaration or if notice is given by publication or posting within 15 days of the earlier of the date the notice first appears in the newspaper or the property is posted.

(d) A dog may be declared dangerous under this section if the dog has within a twelve-month period attacked and killed a domestic animal on more than one occasion. For purposes of this subsection only, a domestic animal does not include any feral animal or does not apply where the attack was upon a domestic animal that was at large or upon a domestic animal that was tormenting or attacking the dog.

(e) Dogs shall not be declared dangerous, potentially dangerous or vicious if the threat, injury, or damage was sustained by a person who, at the time, was committing a willful trespass or other tort upon the premises occupied by the owner of the dog, or was tormenting, abusing, provoking or assaulting the dog or has, in the past, been observed or reported to have tormented, abused, provoked or assaulted the dog or was committing or attempting to commit a crime.

(f *Notice*. When notice is given by regular mail to the owner's last known address, notice is effective on the third day after the notice was placed in the mail, postage prepaid, to the owner's last known address. When notice is given by certified mail, notice is effective when received; provided however, if certified mail delivery has been refused, notice is effective by publication or posting and whenever notice is accomplished by publication or posting the notice is effective and deemed received on the earlier of the day the property is posted or the newspaper is published.

SECTION 4-205. Potentially Dangerous Dogs.
(a) No person shall maintain a potentially dangerous dog without a license or otherwise in violation of this section.

(b) No person owning, harboring or having the care or custody of a potentially dangerous dog shall permit the dog to go at large or leave the owner's property unless the dog is securely leashed and muzzled.

(c) *Spaying/Neutering*. All owners of potentially dangerous dogs must spay or neuter the dog and provide proof of sterilization to the Director of Animal Control within 14 days of the animal control officer declaring the dog potentially dangerous.

(d) In addition to any other penalty for a violation of this section, a court may revoke the authority of a person to keep a potentially dangerous dog within the city.

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(e) The owner of a potentially dangerous dog may apply to the Director of Animal Control to have the declaration waived after two (2) years upon meeting the following conditions:

(i) The owner and offending dog has no subsequent violations of this Chapter of the Code; and

(ii) The owner of the dog has complied with all the provisions of this act for a period of two (2) years; and

(iii) The owner provides proof to the Director of Animal Control of successful completion of a behavior modification program administered by a Certified Pet Dog Trainer (CPDT), Certified Dog Behavior Consultant (CDBC), or Veterinary Behaviorist, certified through the American College of Veterinary Behaviorists (ACVB) or equivalent training.

If the Director finds sufficient evidence that the dog owner has complied with all conditions in this subsection, the application shall be forwarded to the Court to rescind the potentially dangerous dog declaration.

SECTION 4-206. Dangerous Dogs.

(a) No person shall maintain a dangerous dog in violation of this section.

(b) *Keeping of a Dangerous Dog*. Once a dog has been declared dangerous, it shall be kept in a secure enclosure subject to the following requirements:

(i) *Leash*. No person having charge, custody, control or possession of a dangerous dog shall allow the dog to exit its enclosure unless such dog is securely attached to a leash not more than four (4) feet in length and walked by a person who is both over the age of eighteen and who has the physical ability to restrain the dog at all times. No owner shall keep or permit a dangerous dog to be kept on a chain, rope or other type of leash outside its enclosure unless a person capable of controlling the dog is in physical control of the leash.

(ii) *Muzzle*. It shall be unlawful for any owner or keeper of a dangerous dog to allow the dog to be outside of its proper enclosure unless it is necessary for the dog to receive veterinary care or exercise. In such cases, the dog shall wear a properly fitted muzzle to prevent it from biting humans or other animals. Such muzzle shall not interfere with the dog's breathing or vision.

(iii) *Confinement*. Except when leashed and muzzled as provided in this Section, a dangerous dog shall be securely confined in a residence or confined in a locked pen or other secure enclosure that is suitable to prevent the entry of children and is designed to prevent the dog from escaping. The enclosure shall include shelter and protection from the elements and shall provide adequate exercise room, light, and ventilation. The enclosed structure shall be kept in a clean and sanitary condition and shall meet the following requirements:

(1) The structure must have secure sides and a secure top, or all sides must be at least six (6) feet high;

(2) The structure must have a bottom permanently attached to the sides or the sides must be embedded not less than one (1) foot into the ground; and

(3) The structure must be of such material and closed in such a manner that the dog cannot exit the enclosure on its own.

(iv) *Indoor Confinement*. No dangerous dog shall be kept on a porch, patio or in any part of a house or structure that would allow the dog to exit such building on its own volition. In addition, no such dog shall be kept in a house or structure when the windows or screen doors are the only obstacle preventing the dog from exiting the structure.

(v) *Signs*. All owners, keepers or harborers of dangerous dogs shall display in a prominent place on their premises a sign easily readable by the public using the words "Beware of Dog."

(vi) *Liability Insurance, Surety Bond*. Subject to judicial discretion, the owner of a dangerous dog may be required to present to the Department of Animal Control proof that he has procured liability insurance or a surety bond in the amount of not less than one hundred thousand dollars ($100,000) covering any damage or injury that may be caused by such dangerous dog. The policy shall contain a provision requiring that the City be notified immediately by the agent issuing it if the insurance policy is canceled, terminated or expires. The liability insurance or surety bond shall be obtained prior to the issuing of a permit to keep a dangerous dog. The dog owner shall sign a statement attesting that he shall maintain and not voluntarily cancel the liability insurance policy during the twelve (12) month period for which a permit is sought, unless he ceases to own or keep the dog prior to the expiration date of the permit period.

(vii) *Identification Photographs*. All owners, keepers, or harborers of dangerous dogs must within ten (10) days of determination provide to the Animal Control two color photographs of the registered dog clearly showing the color and approximate size of the dog.

(viii) *Microchip*. All owners, keepers or harborers of dangerous dogs must within ten (10) days of determination microchip the dog and provide microchip information to the Director of Animal Control to register the dog as dangerous.

(ix) *Spaying/Neutering*. All owners, keepers or harborers of dangerous dogs must within ten (10) days of determination spay or neuter the dog and provide proof of sterilization to the Director of Animal Control.

(x) *Sale or Transfer of Ownership Prohibited*. Sale - No person shall sell, barter or in any other way dispose of a dangerous dog registered with the City to any person within the city unless the recipient person resides permanently in the same household and on the same premises as the owner of such dog, provided that the owner of a dangerous dog may sell or otherwise dispose of a registered dog to persons who do not reside within the city. Owner must disclose dog's status as a dangerous dog to anyone to whom the owner transfers custody or care of the dog.

(xi) *Notification of Escape*. The owner or keeper of a dangerous dog shall notify the Department of Animal Control immediately if such dog escapes from its enclosure or restraint and is at large. Such immediate notification shall also be required if the dog bites or attacks a person or domestic animal.

(xii) *Failure to Comply*. It shall be a separate offense to fail to comply with the restrictions in this section. Any dog found to be in violation of this Section shall be subject to immediate seizure and impoundment pursuant to 4-208. In addition, failure to comply with the requirements and conditions set forth in this Ordinance shall result in the revocation of the dog's license and the permit providing for the keeping of such dog.

(c) A dangerous dog owner may apply to the Director of Animal Control to have the declaration waived after three (3) years upon meeting the following conditions:

(i) The owner and offending dog has no subsequent violations of this Chapter of the Code; and

(ii) The owner of the dog has complied with all the provisions of this act for a period of three (3) years; and

(iii) The owner provides proof to the Director of Animal Control of successful completion of a behavior modification program administered by a Certified Pet Dog Trainer (CPDT), Certified Dog Behavior Consultant (CDBC), or Veterinary Behaviorist, certified through the American College of Veterinary Behaviorists (ACVB) or equivalent training.

If the Director finds sufficient evidence that the dog has complied with all conditions in this subsection, and has sufficient evidence that the dog's behavior has changed, the application shall be forwarded to the Court to rescind the dangerous dog declaration.

SECTION 4-207. Vicious Dogs.
It shall be unlawful to keep, possess, or harbor a vicious dog within the city limits.

(a) The provisions of this article shall not apply to a police dog being used to assist one or more Law Enforcement Officers acting in an official capacity

(b) The Director of Animal Control may order a dog euthanized that has been declared vicious.

(c) The owner of a dog that the Director declares to be vicious may appeal that determination to the Board of Appeals within 15 days of the declaration. If an appeal is timely filed, the order to destroy the animal is suspended pending the final determination of the Board except when the Director declares that public health and safety require the immediate destruction of the animal as in the case of rabies.

(d) The owner of a vicious dog shall be liable for and shall pay all costs associated with impoundment, removal, or euthanasia of said animal. The owner shall pay any other associated costs incurred.

SECTION 4-208. Immediate Impoundment.
(a) A dog suspected of being dangerous or vicious may be immediately impounded when the Director of Animal Control or the Director's designee determines such immediate impoundment is necessary for the protection of public health or safety.

(b) If the owner of the dog impounded under subsection (a) of this section is not reasonably ascertainable at the time of impoundment, the Director shall immediately notify the owner by mail sent to the owner's last known address postage prepaid which upon the passage of three days be deemed complete or by personal service within five (5) business days after the dog's impoundment.

(c) The notice of impoundment shall inform the owner of the dog that the owner may request, in writing, a hearing to contest the impoundment. Upon receipt of the notice of impoundment either through personal service or by mail (receipt is complete three days after mailing to the last known address of owner postage prepaid), the owner has 5 business days to request a hearing by serving on the Director of Animal Control a written request for the hearing.

(d) Upon request by the owner of the dog for a hearing under subsection (c), a hearing must be held within ten (10) business days after receipt of the request. Notice of the date, time and location of the hearing shall be provided by

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regular mail to the dog owner requesting the hearing. The impoundment hearing shall determine if the dog poses a risk to public health and safety [**insert here the appropriate standard: preponderance of the evidence; clear and convincing evidence; or beyond a reasonable doubt**] or if the dog could be released. If the trier of fact determines the dog does not pose a risk to public health and safety, the dog shall be immediately released back to the owner pending further proceedings either administrative or judicial.

(e) The owner must pay all of the cost of the impoundment and upon request must post sufficient funds to cover the anticipated costs for continued impoundment. In the alternative, the owner may propose a suitable facility where the dog could be contained and maintained at the sole cost of the owner and upon approval of the Director the dog may be impounded at that facility under the terms and conditions set by the director. Failure to post funds sufficient to pay for the costs of impoundment constitutes a waiver of any rights the owner may have to a hearing under this Section.

(f) If the owner timely appeals an impoundment or seizure, the owner may also seek review of the Director's determination of boarding costs by filing an appeal with the Board of Appeals within 5 days after the Director issues a demand for prepayment. The Board or a designee, must review the Director's decision within 2 business days after receiving the appeal. The owner must provide the Board with information sufficient to show that requiring prepayment of boarding costs would be a serious financial hardship on the owner. The Board may ask the owner to provide additional information at an informal hearing conducted in person or by telephone. The Director must not require the owner to prepay any boarding costs pending the Board's decision. The Board may make any decision the Director could have made such as requiring the owner to prepay boarding costs retroactive to the initial boarding date of the animal, posting a bond, or placing the animal in a suitable facility at the owner's sole expense. The owner may ask the Board to review the Director's decision regarding prepayment of boarding costs as part of its review of the underlying appeal.

(g) If the owner is successful in appealing the decision to impound the dog, the Director must refund to the owner any costs paid for the impoundment.

SECTION 4-209. Continuation of Dangerous Dog Declaration.

Any dog that has been declared dangerous or vicious by any agency or department of this City, another municipality, county, or state shall be subject to the provisions of this Ordinance. The person owning or having custody of any dog designated as potentially dangerous or dangerous by any municipality, county, or state government shall notify the Department of Animal Control of the dog's address and conditions of maintenance within ten (10) days of moving the animal into the City of _____. The restrictions and conditions of maintenance of any dog declared dangerous by this City, another municipality, county, or state shall remain in force while the dog remains in the City. No dog declared a potentially dangerous, dangerous, or vicious dog by any other designation agency or department of another municipality, county, or state based solely on size, breed, mix of breeds, or appearance shall be subject to this Section.

SECTION 4-210. Reckless Dog Owner.

(a) Any person convicted of:

(i) a violation of the City of ____ Code of Ordinances Chapter on Animals three (3) or more times in a 24 (twenty-four) month period; or

(ii) a violation of this Article two (2) or more times in any five-year period, shall be declared a reckless dog owner.

(b) The Director of Animal Control shall issue a notification of the declaration of Reckless Dog Owner to the person with the following:

(i) name and address of the person subject to the declaration, and;

(ii) the description, violation, and conviction that led to the declaration, and;

(iii) the name, description, and license number of all dogs subject to the effects of the declaration, and:

(iv) instructions on appealing the declaration to the Board of Appeals.

(c) Once declared a reckless dog owner, the city licenses of all dogs owned by the person shall be revoked, and the person shall not own, keep, possess, or harbor a dog for a period of 5 (five) full years from the date of the declaration.

(d) A person declared to be a reckless dog owner may apply to the Director of Animal Control to have the declaration waived after two (2) years upon meeting the following conditions:

(i) The person has no subsequent violations of this Chapter of the Code; and

(ii) The person has complied with all the provisions of this act for a period of two (2) years; and

(iii) The person provides proof to the Director of Animal Control of successful completion of a program designed to improve the person's understanding of dog ownership responsibilities and based upon an interview with the Director of Animal Control establishes that understanding.

If the Director finds sufficient evidence that the person

has complied with all conditions in this subsection, the Director may rescind the reckless owner declaration subject to conditions that can help to ensure no future violations. If the Director declines to remove the declaration, the person aggrieved may appeal to the Board of Appeals within 30 days of that decision. Upon appeal, the person must provide clear and convincing proof that ownership of a dog in the future will be handled responsibly and not in violation of any law or ordinance.

SECTION 4-211. Penalties.
(a) Any person violating this Article shall, upon conviction, be punished by a fine of not less than $500.00 nor more than $1,000.00, by imprisonment in the county jail for a term not to exceed 180 days, or by both such fine and imprisonment. [Note: In some jurisdictions this may be labelled a civil fine, in others a misdemeanor and in others the jurisdiction may choose to make violations both a civil offense as well as a criminal offense. ***See optional provisions below.***]

(b) Upon conviction of a violation of this Article, the court may order abatement of the violation and order restitution be paid to any person injured as a result of the violation up to the maximum amount allowed by law.

SECTION 4-212. Appeals.
(a) Any person aggrieved by a decision of the Director of Animal Control to declare a dog potentially dangerous, dangerous or vicious, or to declare a person a reckless dog owner, or to impound a dog, or to have a dog euthanized may appeal the decision to the Board of Appeals within 30 days of the decision unless a different period is provided under this Title. A person aggrieved by a decision of the Board of Appeals may appeal that decision to the courts in accordance with and pursuant to state law and the rules of court.

(b) If the Director of Animal Control orders a dog to be euthanized for public health or safety reasons other than for rabies, the owner may immediately appeal that decision to the courts and upon a showing of good cause the court may suspend the order to euthanize the dog until the appeal is finally resolved.

SECTION 4-213. Conflicting Ordinances.
All other ordinances of the City of _____ that conflict with this Ordinance are hereby repealed to the extent of such conflict.

SECTION 4-214. Severability.
The provisions of this Ordinance are declared to be severable. If any section, sentence, clause, or phrase of the Ordinance shall for any reason be held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Ordinance, but they shall remain in effect; it being the legislative intent that this Ordinance shall remain in effect notwithstanding the invalidity of any part hereof.

Optional Provisions

A. Guard Dog Provisions
This section is provided as an option as some may believe the jurisdiction should allow owners to use their dogs as security even though the dogs are potentially dangerous or dangerous. Although we do not endorse it, this option provides some suggested language if the local jurisdiction prefers to use it:

[Optional*] Guard dogs.
The owner of a potentially dangerous or dangerous dog may apply to the Director to put the dog into service as a guard dog. The owner must describe in a written application how the dogs will be used and how the use may differ from any condition required for maintaining a potentially dangerous or dangerous dog. The Director must review the application and either approve the proposed use and terms of use, deny the use or terms of use and may issue an order authorizing the use under terms established by the Director.

B. Alternative Penalty Provisions
This section offers options for different penalty provisions:

[Optional] Civil Penalties.
(a) Any person violating this Article is guilty of a civil violation and must pay a fine of $500.00.

(b) If a court finds that a person has violated this Article, in addition to any fine imposed the court may order abatement of the violation and order restitution be paid to any person injured as a result of the violation up to the maximum amount allowed by law.

[Optional] Criminal Penalties.
(a) A violation of this Article is a misdemeanor punishable upon conviction by a fine of up to $1000 or imprisonment of up to six months in jail or both such fine and imprisonment.

(b) Upon conviction for a violation of this Article, the court in addition to any penalty imposed, may order abatement of the violation and order restitution be paid to any person injured as a result of the violation up to the maximum amount allowed by law.

Notes
1. *See In re Ackerman*, 6 Cal. App. 5, 13 (1907).
2. *See Sentell v. New Orleans & Carrolton R.R.*, 166 U.S. 698 (1897).
3. *See Id.* at 704.
4. *See Thiele v. Denver,* 312 P.2d 786, 789 (Colo. 1957).
5. *See King v. Arlington County*, 81 S.E.2d 587, 589 (Va. 1954).
6. *See e.g. State v. Hanson*, No. 90,372 (Kan. 2004).
For a list of states banning this type of legislation, please see Best Friends Animal Society, *Anti-Breed-Specific Legislation By State* https://bestfriends.org/resources/anti-breed-specific-legislation-state (last accessed Aug. 1, 2018).

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7. *See e.g.* Plaintiff's Complaint, *Nelson v. Town of New Llano*, No. 2:14-cv-00803 (W.D. La. May 26, 2014); Plaintiff's Motion for Preliminary Injunction, *Nelson v. Town of New Llano*, No. 2:14-cv-00803 (W.D. La. May 26, 2014); Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, *Nelson v. Town of New Llano*, No. 2:14-cv-00803 (W.D. La. May 26, 2014); *Schreiner v. City of Clay,* No. CV2013-903036.00, (Ala.Cir.Ct. Sept. 14, 2014).
8. *See* Animal Farm Foundation, Inc., *Breed Specific Legislation Map*, https://animalfarmfoundation.org/community-advocates/bsl-map/ (last visited Aug. 20, 2018).
9. 28 C.F.R. § 35.136 Supp. 81 (2010); *see also Sak v. City of Aurelia, Iowa*, 832 F. Supp. 2d 1026, 1033 (N.D. Ia. 2011).
10. *See* Victoria L. Voith, *Shelter Medicine: A Comparison of Visual and DNA Identification of Breeds of Dogs;* Kimberly L. Olson, *Pit Bull Identification in Animal Shelters,* University of Florida, 2012; Kathleen C. Croy, et al., What kind or [sic] dog is that? Accuracy of dog breed assessment by canine stakeholders, Abstract online; and Victoria L. Voith, et al., *Comparison of Visual and DNA Breed Identification of Dogs and Inter-Observer Reliability,* 3 Am. J. of Sociological Research 17 (2013).
11. *See e.g.* City of Topeka, Proposed Ordinance on Animal Cruelty and Dangerous Dogs, https://www.pitbullinfo.org/uploads/7/8/9/7/7897520/topeka_kansas_against_bsl.pdf (last visited Aug. 20, 2018); Prince George's County, *Report of the Vicious Animal Legislation Task Force* (2003); Prince George's County, *Report of the Vicious Animal Legislation Task Force: Appendices* (2003).
12. *See County of Pasco v. Riehl*, 635 So.2d 17 (1994).
13. *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976).
14. *See Id.* at 335.
15. *See Rhoades v. City of Battleground*, 115 Wash.App. 752, 766 (2003).
16. *See In re Winship,* 397 U.S. 358, 364 (1970).
17. *See City of Pierre v. Blackwell,* 635 N.W.2d 581 (S.D. 2001).

* We do not endorse this view

IN MEMORIAM



As this issue of *ML* was going to print, we received notice from Lee Greenwood of Best Friends Animal Society that Captain Cowpants, Best Friends' much-loved canine spokesperson seen at IMLA Conferences over the past several years, succumbed to cancer in mid-February. He will be missed greatly.

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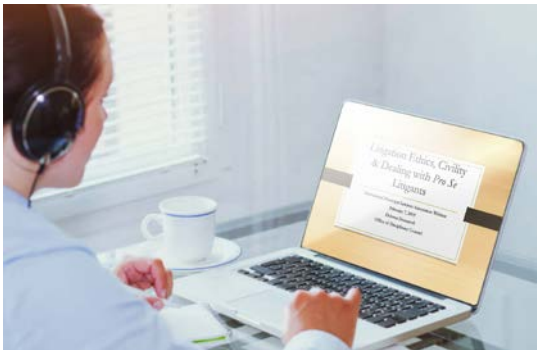

IMLA's Kitchen Sink Webinar Program

brings a wide range of domain experts to you, providing leading-edge information across the spectrum of municipal law subjects relevant to your practice. Here is a sampling of the webinars IMLA has already scheduled for 2019, with many more to come!

March 6	*General Government: Legislative Immunity* Speaker: HENRY BERNSTEIN
March 11	*Health & Environment: PFAS Update* Speakers: ROBERT BILOTT, RICHARD HEAD & KEVIN J. MADONNA
March 13	*General Government: Punitive Preemption* Speaker: RICHARD BRIFFAULT
April 4	*Personnel: Employee Speech vs. Employer Discipline-Government Employers and the First Amendment* Speaker: BARRY UHRMAN
April 8	*Health & Environment: Waste Collection* Speaker: BARRY SHANOFF
April 17	*Telecommunications: Selling Your Cell Lease* Speakers: JOHN PESTLE & JONATHAN KRAMER
April 23	*Land Use: Marijuana Business Zoning and Licensing* Speaker: ALAN WEINSTEIN
May 13	*Telecommunications: FCC Changes to Cable Franchising* Speaker: GERARD LEDERER
June 3	*Case Law Update: Post Reed v. Town of Gilbert* Speaker: SUSAN TREVARTHEN
June 4	*Health & Environment: Stormwater Update* Speaker: ANDRE MONETTE
June 6	*Telecommunications: Understanding the FCC's 2014 Order* Implementing Section 6409(a) Speakers: JOHN PESTLE & JONATHAN KRAMER
June 18	*Health & Environment: Disaster Recovery - Best Practices* Speakers: DWIGHT MERRIAM, OTTO HETZEL & ERNIE ABBOT
July 11	*Personnel: ADA - Reasonable Accommodations and Employment* Speakers: JONATHAN MOOK & ROBIN CROSS
July 16	*Land Use: Fair Housing Ordinances and Local Governments* Speaker: BRIAN CONNOLLY
July 18	*Constitutional Law: SLLC Presents SCOTUS-Attack on Qualified Immunity* Speaker: LISA SORONEN

When the Elected Official is the Problem: What to Do When They Say (or Do) Something Horrible

BY: CHRISTOPHER D. BALCH | *The Balch Law Group, Atlanta, Georgia*



ILLUSTRATION:TRUJILLO DESIGN

I hit a nerve, apparently, last year when I decided to host a table at the Annual IMLA Conference Wonk Breakfast entitled, "When the Elected Official is the Problem." That table oversold and required assistance to adequately address the numbers and issues we face in working with elected and appointed government officials who are wont to run their mouths. From the Sandusky/Penn State scandal, or the Nassar debacle at Michigan State, the #MeToo movement, multimillion dollar lawsuits against Big Law Firms for pay equity or harassment, or the Grand Jury Report into sexual abuse by clergy in Pennsylvania, or…..well, you get the idea, it seems people continue to say and do stupid, harmful, and evil things. Despite their protestations to the contrary, public officials remain people.

But public officials have long said and done stupid things. The most significant new challenge facing the lawyers representing them is the perception of reality. There seems to be little agreement on what is true or false, what is fake, or what is real. InfoWars can be one person's true and accurate source of information causing them to show up at a pizza restaurant to rescue imprisoned and exploited children (who aren't there), while MSNBC or The Huffington Post could be another's. The national debate over accuracy filters down to local government, and our clients are berated, belittled, and accosted for trying to do the "right" thing, whatever that may be. How many times have we each suffered through public comment when some self-styled "community leader" or "engaged citizen" starts falsely claiming that we are short 35 (or more) sworn police officers (which would mean that there would be no officers on the streets on some shifts, a verifiable falsehood), that the City can't manage its money (despite superior credit ratings, consecutive clean audit reports, or recognition by the Department of Community Affairs for good financial management practices), or that the City needs to ignore recognizing its youth sport teams, or allowing children to gavel the meeting into order because such "feel good" or "Kodak" moments detract from the council's real obligation of running the city/county "like a business" (can someone please help me understand what it is that a local government manufactures, creates, or otherwise "sells" to the local economy?) despite a fiscally conservative and balanced budget, a reserve exceeding state minimums, and retention of our senior employees for 3 years or more (what business can say that?). Or maybe that's just my clients.

Against this backdrop of "fake news," attacks on media, attacks from the media, policy in 140 characters or less, expectations that government will communicate important data via Tweet or Facebook post, and the insatiable desire of news outlets to be "firstest with the mostest," local government has to find a way to credibly and responsibly respond to communications challenges that address the needs of their community.

I. What if it's an Elected Official?

I'm confident none of us has ever sat in a public meeting and wished for divine intervention to stop the elected official with the floor from continuing to talk. The problem is that intercession almost never occurs and you are left with statements on the record that are damaging at best, and horrific at worst. And I'm not yet talking about what they say in social media (am I the only one who wants to shut down Next Door?).

In the heat of that moment, all you can hope for is to protect the client, which (of course) is the entity, not the individual official. Statements like, "the Councilmember was explaining his vote, not advocating for other votes," or "All of the other members had already explained how they were voting, thus, there is no evidence those state-

ments were meant to persuade or speak for the council as a whole" can mitigate the damage, but not eliminate it.

I once defended a case where a member of the body was supposed to have said something in executive session that was lamentable even if factually accurate, but the plaintiff claimed established illegal animus. Not only did the court order us to disclose confidential deliberations in Executive Session as part of discovery, it also denied summary judgment claiming that the jury could conclude that the vote swayed enough others to vote a particular way that it tainted the entire process. Lesson learned: work with your electeds about what they should say. If you focus on what they should not say, they will not hear the "not" and that is all they will talk about.

The greater problem is posed not by what they say at meetings, though that can be its own challenge, but what they say to their constituents or in social media, or better yet, when they "apologize" for what they said on social media. The question of what role or impact a comment by a public official may have on the City presents a unique set of concerns. Is it the City's problem? Are City interests implicated? Do the first Amendment rights of the official supersede the ability of the local government to respond, sanction or address the conduct?

II. It's Not Just Going to Go Away

The most common response to bad news is to hope it doesn't really exist. It is simply human nature. It is also likely that some other event, disaster, scandal, or larger story will steal the interest or headlines created that morning. However, true preparation and adequate representation of local government should mean taking a proactive and directed response.

Just like the First Gulf War changed the way people expect to receive their news, the Internet has vastly altered the way news is gathered. A purely local event posted to the Internet can become an international sensation in hours, if not minutes. Bloggers, reporters, producers, and people simply looking for their 15 minutes of fame can gather, repackage, and disseminate stories in seconds. We have all witnessed the odd or fantastic or strange videos that friends or acquaintances are sharing. Sometimes they are funny. Sometimes they are poignant. Sometimes they are horrifying. What they all share is the completely democratic means by which the story is spread. Once spread, more traditional news outlets may decide to become part of the dissemination process and make the story their own.

Wishful thinking is not the same as good advocacy. County and city attorneys are paid to identify and minimize risk to their clients. Simply wishing bad events away does nothing to minimize risk and can instead expose the client to even greater risk or greater exposure, even if that exposure is little more than bad publicity.

Former Fulton County, Georgia, prosecutor Nancy Grace, now on Sirius/XM radio, has fashioned a second (maybe third?) career for herself out of sensationalizing one story at a time. Local media outlets compete with each other with their investigative reporters, their I-Teams, or by "asking hard questions." The more sensational the local news broadcast, the larger the viewership, and the higher the resulting ad rates can be to support the station's operations. Accordingly, sensational sells and the old adage that "if it bleeds it leads" may be truer today than it was when it was first coined. Not only are traditional outlets competing for those sensational stories, anyone with a smart phone can break the next great story (remember the poor guy from Abottabad who broke the Osama bin Laden raid as it was happening via Twitter?)

Wishful thinking is not the same as good advocacy. County and city attorneys are paid to identify and minimize risk to their clients. Simply wishing bad events away does nothing to minimize risk and can instead expose the client to even greater risk or greater exposure, even if that exposure is little more than bad publicity. In Gwinnett County, Georgia, the private Facebook posts of one commissioner about Congressman John Lewis caused terrific publicity and a claim of damages by the commissioner (which he has not as yet turned into a lawsuit). But more on those challenges in a bit.

III. It's all about Relationships

Which really means it's about leadership. As we all know, we have no actual power in the legislative process. We have no vote. Officials can (and often do) ignore our advice, counsel, or suggestions. So where, then, does our ability to influence decisions arise? Where is our authority?

Fundamentally, our authority (or power, if you will), arises from three sources: credibility, persuasiveness, and relationships with our officials. The first two are pretty self-explanatory. Let's focus, then, on the last one.

First, a disclaimer: I am not suggesting we should be friends with our elected officials. I have been fortunate to genuinely like and admire most of my elected and appointed clients over the years. There are many I would not trust out of reach or out of sight. Some have outright lied to me while looking me in the eye (that's always most fun when I know they are lying and they know I know). But, notwithstanding their credibility, the willingness of members and department heads to listen and mostly accept my legal advice has been the key to any professional success I have enjoyed over the years.

Nonetheless, historical models are effective for learning how and when political and non-political roles or relationships work. During the Civil War, President Lincoln went through commanders of the Army of the Potomac like locusts through a wheat field. The fundamental similarities among all of the generals prior to Grant is that none of them fully believed in their Lincoln and his political leadership and all of them aspired to higher political office (McClelland, for instance, became the Democratic nominee for President

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in 1864). Neither of those qualities, standing alone engenders a wealth of confidence between the elected official and the appointed official. If the elected thinks you are out for their job, why should they listen to you? Similarly, if you have no confidence in their leadership, and you make that known (and it does not matter if it is overt, covert, or even mistaken), the elected official has no reason to trust the motives of your advice and counsel. (Put anecdotally, I tend not to play poker with other local government lawyers.)

By the end of 1863, Ulysses S. Grant had defeated and subdued most of the Western Confederacy. He was promoted to the rank of Lieutenant General in March 1864, a rank not in use since George Washington and the founding of the Republic. Grant made clear following his victories at Donelson in Tennessee and Paducah in Kentucky 1862, and his victory over Vicksburg in 1863 that he had no interest in political office. He was continually put forward by his supporters for this or that office, but always vehemently denied any interest in political office (which his detractors put down to false humility). He continued to decline and disclaim interest in political office after being made the commander of all Union forces against the states in rebellion in 1864. With the war going badly in the summer of 1864, prior to the fall of Atlanta, many in the nascent Republican Party floated his name as a replacement for Lincoln's at the top of the national ticket. When that failed, as the summer progressed and no real progress occurred, some wanted to substitute Grant for Lincoln, despite the fact the nominating convention had already occurred and the push toward election day in November was fast approaching. During all of this time, despite all of the efforts by his supporters or those who had long questioned Lincoln's leadership, Grant steadfastly refused to become embroiled in politics.

Similarly, Grant had shown himself a faithful follower of the policy objectives established by the National Command Structure. On New Years' Day, 1863, Lincoln issued the Proclamation 95, otherwise known as the Emancipation Proclamation. Grant immediately put the letter and spirit of Lincoln's directive into effect in the Tennessee and Mississippi. He expressed his whole-hearted support for the policy. Thousands of former slaves were utilized by Union forces in the West to rebuild rail lines, to serve as laborers, to run kitchens, and to tend the injuries and illnesses of soldiers. Later, male troops were trained for combat and demonstrated without exception (there is no historical record of any Regiment of black troops running from the enemy, despite widespread promises and actions by Southern armies to put any former bondsman found under arms against the Confederacy to death) the courage and esprit de corps that would later add the Tuskegee Airmen to annals of exemplary military conduct.

In both instances Grant demonstrated his willingness to support and defend the work of the President and defer to political leadership on matters of policy. Local government lawyers can learn from this example by Grant. As a result of his deference (and in no small part due to his general success on the battlefield), Lincoln listened and relied upon his field generals to prosecute the War. The President's confidence in Grant's work and his character gave Grant more authority and more ability to conduct his part of national policy than any commander before him. At no time in the history of the Civil War had any one battlefield leader held the reigns of strategy in his hands. The South had been divided into military districts with different field officers in command of each district. Only Secretary of War Stanton possessed even titular control over any general strategy for Union Forces. Until Grant's promotion in 1864, each commander was only responsible for the forces in front of him. In Grant, the Union for the first time saw a coordinated strategy that relied on the field expertise of Sherman in the West (which after Chattanooga's fall included Georgia), General Banks at Mobile in southern Alabama, General Butler and the Army of the James, the Army of the Potomac under General Meade, and the cavalry and armies led by General Phil Sheridan in the Shenandoah Valley, all answered to Grant and all responded to a single strategy designed to eliminate the Confederate army in the field.

With great authority comes great responsibility. Despite the military authority in the field, the civilian pressure to assume a more political role, and opposition to the principal of Emancipation, Grant resolutely refused to enter the political fray and steadfastly supported national policy. For local government lawyers, the history lesson describes our role perfectly. Lawyers don't set policy. We take direction from our clients and pursue that direction so long as it is lawful and comports with our duties under the Rules of Professional responsibility. That is precisely what Grant did. He let the elected leaders fashion policy and followed his orders and directions to the best of his ability. In other words, he stayed in his lane.

When local government lawyers advise councils, boards, commissions, or administrators and department heads, the goal must be to establish a framework and relationship with the officials that establishes the limits of our sphere and the boundaries of our authority. Every consideration needs to be made to address those boundaries in a way that is respectful but leaves no room for misunderstanding. Once that is done, the local government lawyer has a better chance of interceding when an elected or appointed official runs off the rails and lands themselves in the National Spotlight.

IV. Can We Do This Ourselves or Should We Retain an Outside Investigator?

It may seem that the short news cycle and aggressive reporting would require a fast, off-the-cuff, and in-house response. Usually nothing could be further from the truth. One readily available object lesson is found in the Atlanta Public Schools cheating scandal. A first "blue-ribbon" panel supervised by the Superintendent of Schools found nothing wrong. A second inquiry, appointed by the Governor and headed by former Attorney General and Gubernatorial candidate Mike Bowers, found extensive and widespread evidence of cheating, answer

changing, and other misconduct and led to the incarceration of a number of administrators and teachers.[1] There is a general perception that any internal investigation will simply be a cover-up of misdeeds or wrongdoing. One writer, in describing an internal investigation into an allegation of test cheating in Philadelphia schools, wrote, "Asking [Superintendent of School's Anne] Ackerman's minions to conduct an internal investigation into cheating is akin to asking Bernie Madoff's traders to investigate the outsized returns on his investments."[2] Even if the internal investigation reveals misdeeds, the public may still be left with the perception that other misconduct could have been found had the right inquiry been made. Where the internal investigation exonerates the officials, it is even more susceptible to scrutiny. Thus, an investigation conducted by unassociated outside personnel may be the best means of avoiding such criticisms; but even this option is not immune from criticisms of internal control and interference.

In some cases an internal investigation can and should be done by inhouse personnel. Police agencies, frequently quick to call in the GBI, are particularly suited to investigate themselves--that is after all what they routinely do and they are well-suited to examine misdeeds not only for criminal conduct but also violation of policy or procedure. In other departments the agency head or other decision maker needs to objectively determine if she has experienced personnel to conduct the inquiry, if they can and will dedicate appropriate time to a thorough examination of the event, and if the claim is sufficiently focused that the investigator will not be asking questions of senior officials or supervisors. Frequently, the department head may be too close (or potentially involved) in the scope of the allegations to correctly address these concerns without assistance. It is too easy to say, "that employee is accused of misconduct, I believe he did it, that ends it." As we all know, that may not be the end of it, neither factually nor legally.

There are three questions that should be evaluated and weighed in determining whether to retain an outside investigator. First, the local government should consider the scope of the public relations issues. Second, the presence or absence of counsel for the Claimant or allegedly harmed party as well as the presence or absence of legally cognizable claims must be considered. Third, the governing body should consider its own political will in being willing to accept and deal with the consequences of the outcome of any investigation performed.

The investigator must be able to cogently explain why the inquiry asked the questions and came to the conclusions reported. For instance, if a single low level official is accused of grossly negligent misconduct, the natural inclination (as discussed above) is to investigate what that person did and stop there. However, as we all know, that is not the end of the legal inquiry.

How bad is it? Obviously, the answer to this fundamental question will vary on a case-by-case basis. Not every public relations challenge will be caused by an opening appearance on Good Morning America or media inquiries from the United Kingdom. Allegations of political favoritism or official corruption may require external inquiry simply to satisfy the local public's quest for information without regard to any wider or broader audience. The more broadly a particular crisis is reported the more likely an outside investigation will be required to put the allegations and claims to rest, at least in the public's eyes. In addition, adding an outside investigator to address a broadly publicized claim of official misconduct can provide an automatic face and spokesperson for the local government to respond to inquiries for information.

What does the legal landscape look like? If the challenge being faced includes allegations or assertions that might turn into a lawsuit, hiring someone from outside of the entity to do the inquiry satisfies two obligations. First, assuming the investigator is a lawyer, there are obviously protections provided for some if not all of the inquiry performed in anticipation of litigation. Even if the investigator is not a lawyer, having an outside, nonemployee conduct the inquiry creates an objective witness for the government's approach and response to the allegations of misconduct and may still be protected from some required disclosures. While the objectivity of the investigator may be both legally helpful and harmful (depending on the investigation's outcome), the credibility of the government gains by retaining and relying on an objective outside person may outweigh any legally harmful facts developed during the course of the investigation.

The investigator hired should have a demonstrable knowledge of the legal claims that might be made as result of the complaint being aired in the media. Public officials may often want the most narrowly focused inquiry possible. The investigator must be able to cogently explain why the inquiry asked the questions and came to the conclusions reported. For instance, if a single low level official is accused of grossly negligent misconduct, the natural inclination (as discussed above) is to investigate what that person did and stop there. However, as we all know, that is not the end of the legal inquiry. In order to get to the deep pockets of the public entity, the complainant will need to show the conduct of the official was ministerial (and is not subject to any state law immunities) or that the alleged misconduct was pursuant to an act or omission (such as action pursuant to policy or a failure to train and supervise) by the local government resulting in a constitutional violation. In either case, the investigation must go beyond the particular facts and the particular allegations of misconduct and examine the culture and environment in which the act of misconduct occurred to determine whether there is potential

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liability on the part of the governmental entity. In other words, stopping at the particular act in question answers none of the litigation or legal questions necessary for the decision-makers to make informed choices. They may not want the answers, but that is not the same as not needing the answers.

How willing are the council members or commissioners to accept the outcome of the investigation? This is mostly a question of political will. A divided board may be less willing to accept the consequences than a board that is united on facing the situation head-on. This conundrum is further complicated if it is one of the board members, or more than one of the board members, who may be the subject of the investigation.

In one instance, the Board was fundamentally divided on both the need for the investigation (which had been requested by the chief administrative officer) and its potential outcome. At one point, members nearly came to blows over the events. Ultimately, the recommendations for discipline was carried out for lower level employees and supervisors, but the ultimate decisionmakers, the ones who the investigation demonstrated had utterly failed in their duty to supervise, train, and communicate their expectations to their troops clearly, consistently, and directly were never sanctioned at all. That was their choice, as the elected body. It is not for me to say whether it was the right choice or not.

V. How Long Should the Investigation Take and What Happens in the Interim?

Needless to say, media and public scrutiny will not end upon the appointment or announcement that an investigation is being conducted. Furthermore, the longer the investigation takes the more likely will be the outcry or suspicion of corruption or cover up.

It is simplistic to say an investigation takes as long as it takes. Mr. Bowers' and Mr. Wilson's investigation into the APS cheating scandal took 10 months. The inquiry into the Spalding County firefighter video of a single car fatal accident that ended up on the internet and was sent to the decedant's parents, took six days (including the time to write and present the report), and was still criticized as being done too quickly and for investigating too much. Various investigations (inside and outside the University) into allegations that former Michigan State and USA gymnatics physician Larry Nasser assaulted and molested athletes for decades took over 2 years and some of the fallout continues for the University and for United States Olympic Gymnastics.

Saying an investigation should take as long as necessary does not mean the investigator should have carte blanche to draw out the investigation without good reason. What may seem straightforward or initially indicate a limited scope of inquiry may, upon completion of early interviews, become substantially more complex or open other questions to be resolved. For instance, what may initially looked like a fairly straightforward inquiry into allegations of an inappropriate relationship between a department head and a subordinate may result in broader questions surrounding the motivation of the complainant and/or the general knowledge of the employer concerning the relationship. In one particular investigation involving a small police department, the municipality initially identified only two witnesses who need to be interviewed, but during those conversations other witnesses quickly came to light that were necessary to understand the scope and risk associated with any Title VII or §1983 claims against the municipality. Whatever committee, or person, or Board, is overseeing the investigation and will receive and act on the report's recommendations and conclusions must be kept apprised of the course of the inquiry and approve any expansion of its scope and purpose.

Not only can the scope of the investigation change based on the information provided by witnesses, the cooperation, or lack of cooperation, from affiliated agencies or entities can dramatically increase the length of time an investigation may take. Unlike police agencies, an internal investigation usually does not have subpoena power to compel the cooperation of anyone who is not an employee of the employing agency. In one investigation, the public entity outsourced some public tasks to outside entities. Those entities, understandably concerned about the safety and welfare of their employees, at first declined to cooperate in the enquiry. It was only after careful negotiation (and ultimately a decision to rewrite the contract to require cooperation in such circumstances in the future) that the contractor's employees were made available for interview: interviews that provided much-needed confirmation and corroboration of the complainant's allegations and further evidence of misconduct by the supervisor.

All of those challenges make things take longer. The potential for criminal sanctions can make things take longer still. While public entities have the ability to use Garrity warnings[3] to compel testimony without criminal consequences, that does not end the conversation about what may be discovered and how long it will take. Where the interviewer does not want to extend the protection of Garrity to the subject of the enquiry, the assertion of the right against self-incrimination may slow or terminate the ability to get to the heart of the subject. Both the local counsel, and the investigator, and perhaps involving the governing body or at least senior leadership, need to weigh the competing needs for information, for clarity, and for closure to determine how long is too long. A simple spat between co-workers, while disruptive or even morale-killing is a far cry from evidence or allegations of sexual assault or other criminal behavior. In short, not all incidents are created equal and none are endowed with any inalienable rights.

What's to be done while the investigation is continuing to keep the media and public apprised of the circumstances, if not exactly satisfy them? No amount of information released during the pendency of an investigation will satisfy the media or, most times, the public. This is simply because not all of the answers are known—yet. At a minimum the decision-maker should ensure it maintains as many avenues of communication as possible and apprise all media outlets and concerned citizens that a thorough and comprehensive investigation is underway. No details

of the investigation should be revealed until the investigation is concluded; however, the community should know when the investigation is expected to be concluded and when they may have the results of that investigation. The public must be informed if the anticipated release date is changed and the reason for any such change. Any delays encountered will not be met with universal acceptance or understanding.

In addition to making sure avenues of communication with the public and media are open and well maintained, the Government should decide early on who will be authorized to communicate regarding the inquiry. A common question is whether the investigator will be made available or not. That answer should be made in conjunction and consultation with the investigator. Regardless of the investigator's direct involvement in communicating with the public or media, reasonable updates should be provided, at least through written press releases. Ideally, someone authorized to answer questions should give the updates. The appearance of openness and the flow of information are important to alleviating concerns the investigation is neither a cover-up nor a hatchet job.

Not only is the public kept informed, but a plea for their assistance can be made through the media and public communications channels, greatly enhancing the ability of the investigation to answer the questions posed by the particular crisis.

The situation actually played out in Seattle, Washington, which faced a scandal over its Regional Small Business Development Program within the local school district (allegations were made --which were largely substantiated--) that officials in charge of the program were taking improper payments and favors from entities awarded contracts). Special ethics counsel for the school district released their report on February 25, 2011, revealing that school district General Counsel Gary Ikeda had declined to be interviewed or otherwise participate in the inquiry. When the report, with its interesting and somewhat troubling revelation, was made public, Mr. Ikeda contacted the School System and requested to speak with investigators. The investigators then issued a supplemental report on April 14 detailing those conversations. It would appear Mr. Ikeda's change of heart could be traced directly to the Investigator's disclosure of his initial reticence to cooperate.

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VI. "And a Final Word..."

An outside investigation is useful in two circumstances: if the government is blindsided by allegations of misconduct by media reports; and when the political sensitivity of the allegations require distance from the fact-finding. In either circumstance, hiring a person from outside of the government to conduct the investigation has the potential to provide credibility to the inquiry and (let's be honest) political cover for those not directly involved.

In November 2009, hackers obtained e-mails from the University of East Anglia in the United Kingdom which some claim to cast significant doubts on the scientific veracity of global warming. Those e-mails implicated a researcher at the Pennsylvania State University whose research has been funded by the National Science Foundation. The NSF investigation took 2 years to complete.[4] Both the NSF and The University investigation concluded that Prof. Mann had done nothing improper or contrary to accepted scientific practices. Nonetheless, public skepticism remains.[5] A total of seven inquiries and investigations, including those in the United Kingdom, failed to conclude any researcher involved had committed any misfeasance. In fact, one of those seven included an outside investigation conducted by Sir Muir Russell which obtusely concluded, "We do find that there has been a consistent pattern of failing to display the proper degree of openness, both on the part of CRU scientists and on the part of the UEA."[6] A lack of openness is not the same as falsifying research data or drawing false conclusions based on available data as the initial "scandal" alleged. Nonetheless, public perception appears to continue that the researchers attempted to dupe the public and failed solely because the emails were made public (despite the fact the person or persons who hacked the University's email server have never been found, identified, or identified themselves, an interesting question itself in light of the News Corp. hacking scandal and cozy relationship which existed in 2009 between senior News Corp officials and officials at Scotland Yard, but I digress).

A middle ground between conducting an internal investigation in hiring a special outside investigator may be to retain or establish an independent ethics board or council. Many larger public entities, such as the Atlanta Public Schools, DeKalb County, the City of Atlanta, or the Seattle Public Schools in Washington State have either a citizens' ethics commission or lawyers specially retained to investigate allegations of ethics violations. Such systems can be effective in responding to allegations of financial or influence–related malfeasance. They are less effective, (like the Georgia Bureau of Investigation is less effective in investigating noncriminal conduct) in responding to other more generic claims of misconduct by employees or officials. Nonetheless, identifying in advance firms or individuals who may be candidates to conduct an investigation can save an entity time and expense when the crisis actually occurs.

Any investigation may be subject to claims of bias or incompleteness. After all, it is the governmental entity which is paying for the investigation and which

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hires the investigator. Is there an existing relationship between the government and the investigator (either personal or professional)? For publicly traded companies, either could result in the Securities and Exchange Commission deeming the investigation incomplete or rejecting the findings completely. Similar relationships could doom even a competently performed investigation to irrelevance if the public does not believe the findings or accept the recommendations.

An investigation should never be subject to a charge of incompetence. Care and attention to detail must be the watchwords of any professional inquiry. If there are unanswered questions, the report should say so. If there were impediments to full fact-finding the report should say that as well. If there are complaints of bias or that the investigation was "a hack job," those assertions should be met head on and not allowed to sully the efforts of the investigator to reach a supportable conclusion. Even if an outside investigator is retained, the governing body must not appear to be disengaged from the process. Maintaining credibility and accountability is, or should be, the first responsibility of elected officials.

Even if the ordinance or charter delegates final decision-making authority to the County manager or other full-time official, elected officials should not be seen as disengaged or acquiescent in the alleged misconduct. They should insist on receiving the report and on its timely and appropriate release. Where the investigation is conducted behind closed doors (as a ticket-fixing scandal in New York City that began in 2008 is being done), the public's reasonable quest for knowledge is frustrated, and their only recourse is greater and greater outrage over the lack of information as described by Professor Martin in Australia.

An internal investigation is as much about public relations as it is about finding the truth and protecting the public's trust. Like marriage, it should never be entered into lightly or flippantly, but with due consideration of all the competing concerns and challenges presented by the events. ML

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ed the Golan Heights for a geopolitical update on the Syrian Civil War and its impact on Israel provided by Captain Ilan Schulman, former IDF paratrooper and intelligence officer, then continued on to Jerusalem, with an overlook of Jerusalem from the Mount of Olives and a visit to the City of David, the historic nucleus of the ancient capital of Jerusalem established 3000 years ago by King David, with time to explore the excavations and recent archaeological developments, a visit to the Western Wall, and a dinner that evening with Anat Hoffman, CEO of Women of the Wall.

The group visited the Temple Mount on the fifth day and viewed the Dome of the Rock and al Aqsa Mosque, an area that since 1187 has been under the rule of Waqf, an Islamic religious trust, followed by a lunch meeting with the Chief Legal Officer of the Movement for Quality of Government in Israel, and a visit with Batzion Ben-David Gerstman, a representative of the Ministry of Foreign Affairs, who led a discussion on Israel, Gaza and the Law of Armed Conflict. The group enjoyed a tour of the Israel Supreme Court and informative meeting with Justice Daphne Barak-Erez, who provided helpful insights into the work of the appellate court and its unbelievable case load, and led a discussion of internal procedures, court practices and a practical look into the work of the Court. Uniquely, in addition to its appellate work, the Supreme Court sits as a court of first instance in human rights cases involving the government. There are 15 justices who usually sit in panels of three, although there are larger panels in some of the more controversial cases.

The IMLA group heard a presentation on the sixth day by Ran Bar-Yoshafat, Deputy Director of the Kehelet Policy Forum Research Institute, who discussed the Law of Return as a Just Law and provided very conservative but clear viewpoints on national issues and the multiple sides of the difficult and unbelievably complex policy issues faced by Israel. This was followed by a memorable visit and comprehensive tour of Yad Vashem, including the Historical Museum, the Children's Memorial and the Hall of Remembrance. Lunch that day was a multicultural tasting tour of a fresh produce market, Machne Yehuda, with scores of ethnic market stalls and sampling of diverse cultural tastes from Morocco, Yemen, Iraq, Ethiopia and many more cultures. The group then met at the tomb of Samuel with Shaul Arieli, one of Israel's leading experts on the demarcation of the future Israeli-Palestinian board and the route of the separation barrier, former head of the Peace Administration of the Barak Government and a leading negotiator in the process that led to the Geneva initiative in December 2003. Following a tour of Bethlehem, the group enjoyed a Shabbat dinner with the family of the former Israeli Ambassador to the United Kingdom.

On the seventh and final day of the trip, the IMLA group traveled to Masada and took the cable car to the top of this historic mountain where 960 men, women and children were the last to resist the Romans during the great Jewish revolt 2000 years ago, a tragic, ancient story that has become synonymous with Israel's quest for freedom and independence in modern times. This was followed by lunch and a swim at the Dead Sea, the lowest place in the world.

The IMLA Mission to Israel was a memorable experience for the IMLA local government attorneys and their guests.

For those of you who seek the luck of the Irish, please stay tuned for an announcement concerning a potential trip to Ireland in 2020. ML



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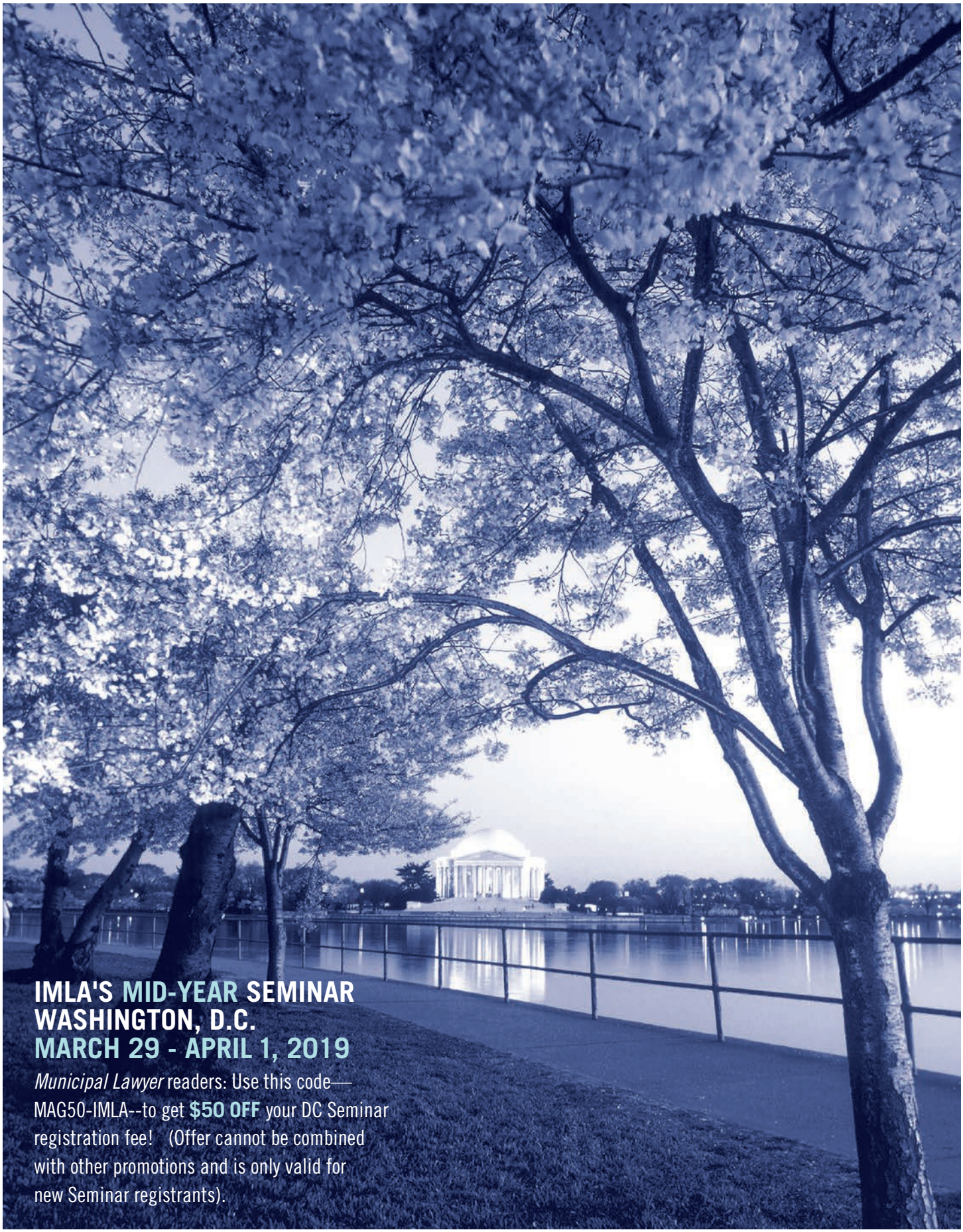
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LISTSERV

BY: BRAD CUNNINGHAM
Municipal Attorney, Lexington, South Carolina

The Roads Less Travelled

As the story so often goes, I ran into an old friend the other day who I hadn't seen since law school. Larry, like me, received his law degree somewhat later in life and became a lawyer as a second career. As many of you already know, I was in the banking business before the legal business. Larry, believe it or not, was a medical doctor before getting his J.D. (and is still licensed as a practicing physician). We were members of the old folks club in law school, born a decade earlier than most other students.

Larry and I did as much catching up as you can while shopping at Target, before moving along. Larry now works as a consultant and expert witness on medical malpractice cases. I told him I had been in the municipal attorney's office essentially since law school. He observed how great a job I have, and I agreed…. No hustling for clients…. No billable hours… Retirement plan… Health plan…. "Relatively" low stress… He said he envied my "easygoing" lifestyle. We exchanged our cards and said our goodbyes. Yes, I thought… I have a pretty good job. BUT, I also thought, it is not without its moments…

We often exchange stories on the Water Cooler about excitement in our daily jobs. There are the disruptive citizens, police incidents, sewer explosions, council bickering, and so on, as we have often discussed. This month I was able to add another adventure to the list.

Without giving away too much identifying info, we are currently in litigation with a large company. The issues are among the most significant we have litigated in my nearly 16 years in this office, and the proceedings to date have been very complex. We recently hit a snag in the litigation, as a critical witness from the opposition had left employment with the company and was nowhere to be found. We knew nothing about the circumstances of his departure but engaged in an exhaustive search which resulted in our locating him in a tiny little town deep in the swamps of Florida.

I drew the short straw and had the honor of making the drive south for the deposition. Of course, the rental car company did not have my vehicle upon arrival, so I was rewarded with a Cadillac Escalade for the journey. It proved to be so large that I can swear I heard my own voice echo a time or two during phone calls.

At any rate, I set off for the day-long drive to Florida in my cavernous conveyance, feeling very much like a character in a John Grisham novel: dark suit, sunglasses, Cadillac SUV, rock and roll on the radio, sufficiently loud. I was headed into parts unknown for a deposition with no idea how it was going to turn out, or if the deponent would even show for sure. If he did show, would I have to chain him to the desk to keep him there? Would he even answer the questions? Would I get the Oliver North treatment? Ronald Reagan?

Despising I-95, I took as many back roads as I could without falling too far behind schedule. Other than seeing a good-sized deer which had unfortunately met a vehicle, my "off interstate" portion of the trip wasn't too eventful. I stopped at a few small businesses along the way, loving to patronize those places that were essentially destroyed by the creation of the Interstate System.

If you haven't done it, you need to travel America by the back roads some time. There you will meet people like "Paul," a Korean War veteran who used to be in the restaurant business but shuttered the place when the Interstate came through and took all the traffic out of towns like Branchville, SC. Paul operates a fruit stand now, selling peaches and whatever else he can grow.

I sipped iced tea and ate one of Paul's peaches and then went on the way. I got to the unavoidable I-95 portion of my trip and prepared for the white knuckling ordeal. Not long after I got onto the Interstate, a baseball sized object flew up from the tractor trailer truck in front of me and smacked the windshield right in my line of sight. It sounded like a rock had hit the glass, and it happened so fast I couldn't tell what it was. I pulled off at the next exit and examined the windshield. Nothing… I still don't know what hit me, but apparently nothing happened to the Caddy. Regardless, the incident was not exactly calming.

Next, one of the many automated features in my option-laden luxury vehicle decided to engage itself, and the rear hatch window opened for some unknown reason as I traveled down I-95 at 72 miles per hour. (Slow lane, of course) Once again, a quick stop; getting out to shut the back window even provided a brief chance to stretch my legs on the endless flat tarmac to South Florida.

After what seemed like days, I finally reached the point where I could leave the highway behind and headed into the wetlands in search of my destination. Two lanes of road with little shoulder, surrounded by swamps on

both sides. Loving it, I thought… a far cry from the hustle and bustle and 90 mph pace of I-95. At the first possible opportunity, I stopped for a break and partook of a fresh Florida orange, purchased from Monty and his wife--retired New Yorkers who long ago moved south.

Continuing further down the backroads, past pickup trucks and fishing boats, I no doubt looked seriously out of place in my black suit and sunglasses as I drove the glitzy Cadillac SUV with New York plates past pickup trucks and fishing boats New York plates. I finally reached the site of the deposition, which was roughly the size of a walk-in closet. the site of the deposition, which was roughly the size of a walk-in closet. proceeding (instead of deposition) was not until the next morning, so I set off in search of dinner and a beer. The closest inhabitable place was about twenty minutes away. I parked, walked in and immediately felt curious stares. The looming darkness had caused me to shed the sunglasses, but these folks just didn't see too many strangers, especially those wearing black suits.

"Burger and a beer," I said to the bartender. The patrons were friendly, much to my comfort. Questions ensued. "You here on business? … Are you a cop?" said one guy." I responded, "Yes and no."…. "IRS?" "No." "Process Sever?" "No" You a lawyer? "Yes!" … "Ain't too much legal business goes on around here," another guy said. "You looking for someone?" We exchanged a few bits of trivial information, and after a while I paid the bill and headed out. I couldn't help but laugh at the dog standing on the bar eating his dinner and drinking water out of a beer mug as I left this fine AAA establishment. Good food… Good conversation, I thought. Twenty more minutes to the Hampton Inn, and I was in for the evening.

A rumbling train awakened me around 5:30 the next morning, and I was up for good. The early breakfast was palatable. Then the swampy drive to the walk-in closet for the deposition. No cell phone service, no internet. The court reporter had a Verizon hot spot which managed a signal and we all latched onto it. She used one of those little black machines I have never figured out--you know, one with about five keys on it on which somehow produces precise testimony at a ridiculous speed.

After about a half hour, the deponent showed up in overalls and a striped shirt. It was fun, interesting and after almost seven hours of "I don't knows" and boring numbers testimony we adjourned. I had accomplished what I set out to do, and I high-tailed it out of those swamps in my black suit and sunglasses.

Once back on the Interstate and after gaining a phone signal, I called the office and reported in, discussed a few other items and also called home. I spent most of my time all the way up to Jacksonville on the speakerphone doing business. Dark was ensuing, so I stopped in the city, grabbed a hotel and "Ubered "out to get some Shepherd's Pie and a Guinness. Fate struck me again, as I quickly discovered my dinner spot was the site of a Harley riders meeting. Once again, I Once again, I was clearly out of place among among a room full of beards and leather jackets, as I downed a pint and ate dinner. No problems though, as everyone was just there to have a good time.

Having tired greatly of the Interstate grind, I set off for home the next morning through the back roads of Southeast Georgia. Right off the bat, the automated features of my Cadillac kicked in and a dash warning light came on. I pulled over in the metropolis of Folskton, Georgia, just across the Florida line. There was no owner's manual in the vehicle, and the light was undecipherable. I had to surf the net in the parking lot of an abandoned gas station, and finally found the perilous problem I had encountered: "ECONOMY FUEL MODE DISENGAGED." I cursed the automated system for nearly causing me a stroke and drove on through town. I stopped at the only drug store in town, bought a drink and jay-walked across Main Street to the one-windowed post office to mail my mother a birthday card.

Miles and miles of swamps, deer and Live Oak trees, and a leisurely drive ensued. There was the slight interruption at the prison in Glennville, when a football had escaped the prison yard and rolled into the street in front of my vehicle. Six inmates stared as I jumped out of the Cadillac and tossed the ball back into the yard in a manner befitting of a man who hasn't played football in a long, long time. As I departed, I deliberated as to whether I should have done that and wondered for miles whether I would soon be stopped, detained and frisked by the Department of Corrections. Fortunately, it did not occur.

I patronized a few more stands along the way, bought fruit for the folks back at the office and looked at a couple of live alligators. I struck up a conversation with Jimmy, who sold boiled peanuts on the side of U.S. 1 in the middle of nowhere in South Georgia. He made a living that way, saying there are many folks who prefer to take the route less traveled now as opposed to the boring interstate. We had a friendly talk for almost thirty minutes, before I decided to head out.

One has to stay on his toes on these roads, as speed limits often change with little notice. But, I enjoyed the peaceful ride through small, rural South Georgia discovering lands forgotten and forlorn since the creation of the Interstate. I enjoyed reading the homemade signs, and some of the names of businesses such as Pa's Diner, the Terminal Restaurant and especially the wrecker service called "Kamel Towing."

Reached Lexington around 6 p.m. Friday evening, just in time for dinner. It was no burger and beer like I'd had in the swamp down in Florida, but it sure was good to be back in Lexington. There is nothing like travel to make you appreciate home.

By the time you see this, we will be nearing our annual IMLA pilgrimage to DC. Hope you can join your moderator at an informal get together during the week. I'm not sure, though, that anything can top the rowdy time we had at Pete's Piano Bar in Houston. If you haven't heard about it, wait until the book comes out. Or, ask me over a cold one in DC!

The prosecution rests, your honor… ML

INSIDE CANADA

BY: MONICA CIRIELLO
Niagara Region

Arbitration Clauses, Peace Officer Powers, Access to Councilors' Public E-Mails and more

Appellant Failed to Perfect the Appeal: Audio Recordings are Costly and Time-Consuming
Segura Mosquera v. City of Ottawa (OC Transpo), 2019 ONSC 1023 http://canlii.ca/t/hxgw0

The Appellant, a resident of the City of Ottawa ("City"), brought an action against the City in small claims court after a series of incidents that occurred to her and her son on the City's transit. The Appellant presented witnesses, evidence and exhibits before the Deputy Judge in support of her allegations. Upon hearing the Appellant's arguments, the Deputy Judge provided oral reasons and dismissed the claim without the need foar the City to provide arguments. The Appellant appealed

HELD: Motion was dismissed.

DISCUSSION: The issue before the Court was whether the Appellant had perfected the appeal, as there was no transcript of the Deputy Judge's decision provided to the Court. Rule 61.09 of the Rules of Civil Procedure outlines the requirements to perfect an appeal; however, Rule 61.09(4) allows for Court discretion, if necessary, to vary the appeal book requirements. As outlined in Segura Moseuera v. Ottawa Catholic School Board, 2018 ONSC 2387, for a court to provide discretion and for the appellant to obtain relief, a variety of considerations must be reviewed and accepted by the Court. When considering whether discretion should be provided to the Appellant's claim despite a transcript, the Court could not accept the Appellant's submission that only one or two lines from the Deputy Judge's oral decision would be appropriate to provide a broad understanding of the decision. The Court cited KM v. Marson, 2017 ONSC 2972 to highlight how time-consuming and costly challenges of relying on audio recordings are for appeal. The Court held that to permit the appeal without a transcript would force the Court to incur unreasonable time and cos, and more importantly might be prejudicial to the City.

City Attempts to Dig itself out of a Hole it Dug Itself
Edmonton (City) v Amec Foster Wheeler Americas Limited, 2019 ABQB 24 http://canlii.ca/t/hx3wt

The City of Edmonton ("City") and Mobile Aguers ("Defendant") entered into a tender contract to perform soil drilling for the City. The Defendant completed the work, invoiced the City and was paid in 2014. The sufficiency of the work itself was not at dispute by either party; however, the City filed an action and sought damages of $16.5 million against the Defendant alleging that the work had caused substantial damage. The City also alleged that the Defendant failed to warn it of the potential risks of undertaking the work. The Defendant filed an application to strike based on the dispute resolution clause in the contract which stated that "if any disputes arise under the contract and the parties are not able to resolve it, the parties *shall* appoint a single arbitrator to conduct an arbitration in accordance with the *Arbitration Act,* RSA 2000, c A-43 that will be final and binding on all parties."

HELD: Application was allowed.

DISCUSSION: The City argued that the language in the dispute resolution clause was narrow and limited to a purely contractual dispute. The City's position was that the Court should find that the application for damages went beyond the context of the contract and therefore the action should proceed through the court system. The Court disagreed and observed that the City was attempting to pigeonhole the action as a tort despite the statement of claim clearly overlapping language that was described in the contract. The Court also determined that the City was attempting to escape the very dispute resolution clause it had drafted in its contract by indirectly doing what it could not do directly. In *Central Trust Co. Rafuse*, [1986] 2 SCR 147 it was held that "a claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract." Allowing the City to choose pursuing the matter as a tort over the contract would allow the City to escape the arbitration clause, and as a result the Defendant's application to strike was granted.

Time Consuming and Costly Collateral Matter is Not the Primary Legal Issue
Winnipeg (City of) v The Neighbourhood Bookstore and Café Ltd, 2019 MBCA 3 (CanLII) http://canlii.ca/t/hx50d

The Neighborhood Bookstore and Café Ltd. ("NBC") operates a food business in the City of Winnipeg ("City"). Following an inspection, the City issued an offence notice against NBC and required NBC to install a

grease trap within 60 days. NBC failed to comply within the timeframe, and the City issued a second offence notice that was served by a special constable. NBC pleaded guilty to the second offence. An application to quash the guilty plea was later entered on the basis that the offence notice was invalid, as it had been issued by a special constable and not a peace officer. In response, the City brought an application to remove the lawyer of record, arguing a conflict as he was formerly a lawyer at the City when both offences were issued to NBC.

The application judge relied on the leading case pertaining to in-house counsel *MacDonald Estate v. Martin,* [1990] 3 SCR 1235 and determined that the lawyer's prior employment at the City did not preclude him from working against the City. However, in this circumstance the judge held that the lawyer should be removed as NBC's lawyer. The application judge did not issue an order preventing NBC from using the lawyer's work product or to strike out the application to quash the guilty plea. Both the City and NBC appealed the decision to the Court of the Queen's Bench, which upheld the lower court decision to remove the lawyer and held that NBC's new lawyer could not use any of the lawyer's work product. NBC sought leave to appeal the appeal judge's decision.

HELD: Motion was dismissed.

DISCUSSION: The Court recognized that this was a second-level appeal that should only be utilized in exceptional circumstances, but noted that this matter had broad application to many lawyers moving from public to private practice. NBC argued that the application judge and the appeal judge misapplied the legal test to disqualify the lawyer. NBC argued that the application to quash the guilty plea was based on a legal argument from the language in the *Police Services Act*, CCSM c P94.5, which does not grant peace officer powers of service to special constables, not from any confidential information that the lawyer received from his time at the City. The Court agreed with appeal judge's decision, as the lawyer came with knowledge of the City's strategy and an understanding of his former employer's corporate philosophy. The City need not demonstrate that confidential information was used, only that there was a risk that it might be used. As a result, the Court found no legal error in the appeal judge's decision. The Court emphasized that the issue before it--the removal of the lawyer of record—was not the legal issue but had emerged as the time consuming and costly collateral matter. The true issue was whether it was legal for a special constable to serve NBC with an offence notice. Therefore, even if there was an error of law that would allow for leave to appeal, this Court would have denied it on prematurity. Motion for leave to appeal was dismissed.

Just Wanting to Take a "Gander" at Some Emails
Gander (Town) (Re), 2019 CanLII 4232 (NL IPC) http://canlii.ca/t/hx68s

The Complainant submitted a records request to the Town of Gander ("Town") pertaining to all emails sent and received by a Town Councilor's public email. The Town requested a 50-day extension to respond to the Complainant from the Office of the Information and Privacy Commissioner ("IPC"). The extension was granted. The Town failed to provide the records to the Complainant within the 50-day window. The Complainant then filed a complaint with the IPC. The IPC requested a response from the Town as specified under the *Access to Information and Protection of Policy Act, 2015* ("*ATIPPA")*. The Town failed to respond until 39 days after being made aware of the complaint--and still did not provide the records to the Complainant. The Complainant submitted his demand that the records request be fulfilled. The Town argued that it receives numerous record requests and it did not have the resources to obtain the records within the specified timeline.

HELD: Records must be provided.

DISCUSSION: The Information and Privacy Commissioner ("Commissioner") reviewed the actions taken by the Town in conjunction with the *ATIPPA*. The Commissioner determined that the Town's actions were contrary to section 16 of *ATIPPA* which specifies the period of time for responses to request records. Despite the Town knowing that it would be unable to satisfy the records request as it was at its operational capacity, it failed to request another extension. The Commissioner determined that, as a whole, the Town failed to cooperate with the IPC as required under the *ATIPPA*. Furthermore, the Town had a duty to assist the Complainant as outlined in *ATIPPA* section 13, and still had failed to do so as of the date of the decision. The Commissioner recommended that steps be taken to respond to the Complainant within 14 days and the Town be required to provide training to staff on the *ATIPPA*.

No Bad Faith Where Municipality Establishes Administrative Monetary Penalty System for Parking Fines
Weisdorf v. The City of Toronto, 2019 ONSC 692 (CanLII) http://canlii.ca/t/hx75q

The City of Toronto ("City") passed a bylaw to establish an administrative monetary penalty system ("AMPS") for parking fines. The Applicant received a parking ticket and followed the AMPS process and requested a hearing, but the hearing was adjourned because the Applicant served a Notice of Constitutional Question ("Notice") on the Province of Ontario and the City, challenging the constitutionality of AMPS. The Ministry of the Attorney General held that the Notice was invalid. When the Applicant appeared in front of the Administrative Penalty Tribunal a fine was imposed. The Applicant brought an application to quash the AMPS bylaw for improper purpose to generate and maximize revenue, citing a breach of s. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and sought the reintroduction of the Ontario Court of Justice system for parking fines. The City did not dispute that it receives revenue from the payment of parking fines but did dispute the submission that City's primary

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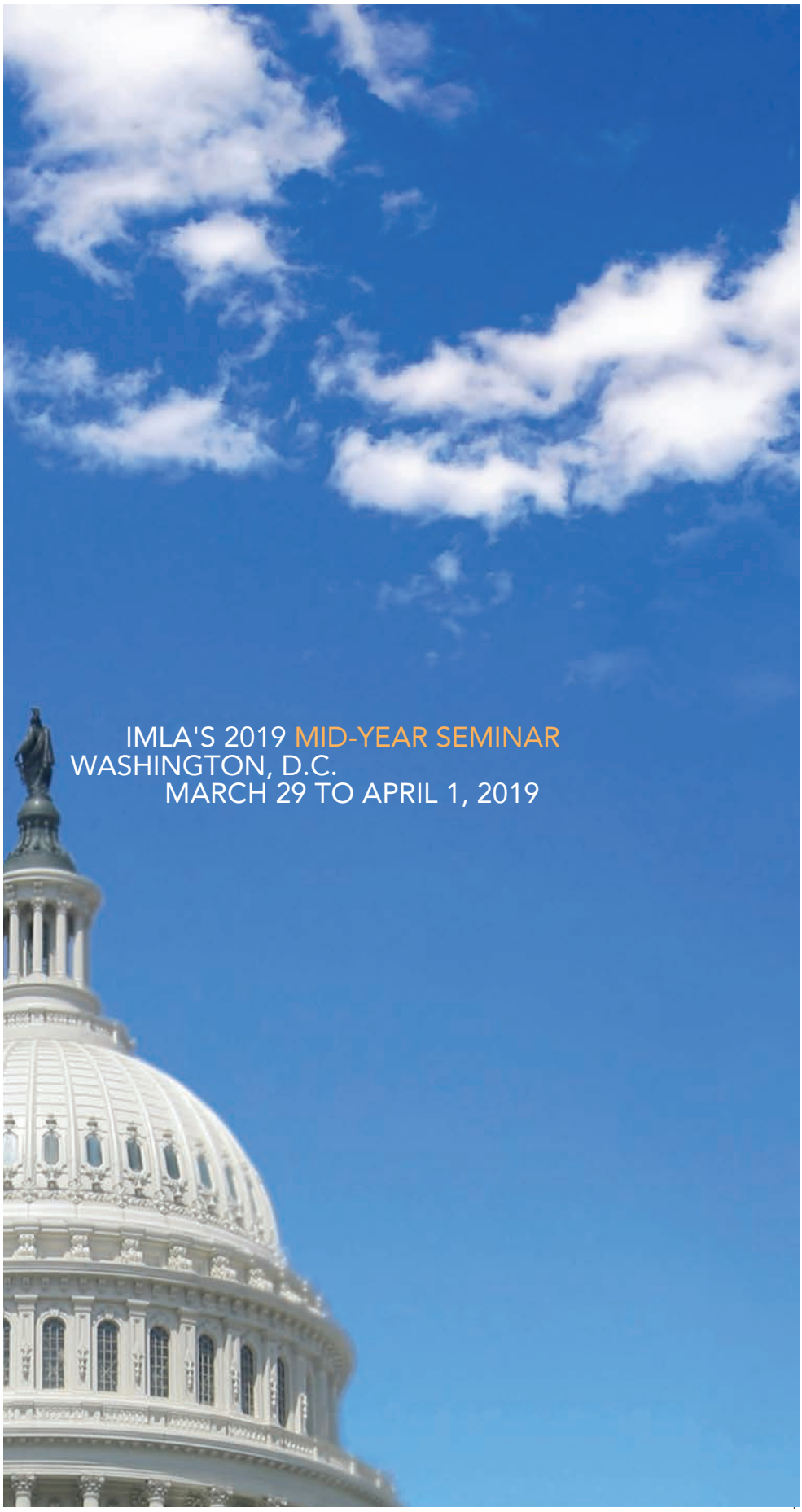
motive for establishing AMPS was to maximize profit.

HELD: Application is dismissed.

DISCUSSION: In reviewing the alleged *Charter* violation, the Court determined that neither s. 7 or 11(d) applied. The Court cited the Supreme Court of Canada decision *R. v. Pontes* [1995] 3 S.C.R. 44, which held that there is no s.7 violation when there is no risk of imprisonment. The City's AMPS bylaw had a maximum fine of $500, without any possibility of imprisonment, therefore there was no violation of s. 7. The Court further dismissed the alleged breach of s.11(d) because the *Charter* protection does not apply as the penalty for a parking ticket is not a criminal or a quasi-criminal offence. The Court proceeded cautiously in reviewing the Applicant's bad faith argument, because without bad faith a court may not quash a municipal bylaw. As stated in *Shell Canada Products Ltd. v. Vancouver (City)* [1994] 1 SCR 231 "a court must respect the responsibility of the elected municipal bodies to serve the people who elected them, and a court should exercise caution to avoid substituting its views of what is best for the citizens". To establish whether the AMPS bylaw was enacted in bad faith or for an improper purpose, the Applicant was required to demonstrate that the City acted in a manner other than in the public interest. The Court held that the Applicant failed to meet the requirement. The City not only had the authority to pass the bylaw under the *City of Toronto Act, 2006* and O.Reg 611/06, but it had held a robust consultation process with the public to ensure an open and transparent process before the recommendation went to City Council where it was ultimately approved. For these reasons the application was dismissed.

Notes

1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982 , c. 11.

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BY: NEGHEEN SANJAR
IMLA Director of Legal Research

Telecommunications-The Year in Review

2018 was an active year in telecommunications law, especially in terms of federal regulation and preemption of areas traditionally within the purview of local governments. The industry has been buoyed by a series of regulatory developments bolstering its bottom line, and municipalities are increasingly being confronted with complicated technical and legal issues, from small cells to cable franchising. This article provides a brief overview of some of the telecommunications challenges now plaguing local governments, as well as issues that have not yet come to full fruition.

I. Small Cells

Nothing the Federal Communications Commission ("Commission") did last year has set off quite a frenzy from the local government perspective as small cells. The Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment proceeding kicked off with a Notice of Proposed Rulemaking ("NPRM") in 2017 and culminated last year with a series of orders gutting local government authority to regulate in the public right of way, benefitting the wireless industry to the tune of billions of dollars according to the Commission.[1] These rules resulted in a series of lawsuits by cities and towns, many of which are IMLA members.[2]

Two administrative decisions promulgated by the Commission are of particular importance to local governments. In its Third Report and Order and Declaratory Ruling, known colloquially as the Moratoria Order, the Commission placed a ban on both express and *de facto* moratoria, forbidding states and local governments from halting the acceptance or processing of cell siting applications because they are inconsistent with 47 U.S.C. § 253(a)'s mandate that no state or local regulation or requirement can prohibit or have the effect of prohibiting interstate and/or intrastate telecommunications services, and does not fall within any exception under Section 253(b) or (c).[3] The Commission defined "express moratoria" as any regulation or written legal requirement that expressly prevents or suspends the acceptance, processing, or approval of an application or permit necessary for cell siting.[4] It is of no consequence whether the moratoria are of limited or permanent duration because both circumstances are prohibited.[5] *De facto* moratoria are defined by the Commission as any action that has the same effect as express moratoria.[6] An action crosses the line and becomes a *de facto* moratorium when "the delay continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications, or the action or inaction has the effect of preventing carriers from deploying certain types of facilities or technologies."[7]

In the Declaratory Ruling and Third Report and Order, the Commission further hindered state and local government's ability to regulate in the arena by imposing severe restrictions on requirements a local or state government may impose, fees, and "shot clocks" without exception for large batched applications meaning the shot clock remains the same based on the type of deployment regardless of whether the application contains 1 site or 100 sites.[8] The Commission explains that it interprets a requirement imposed by a state of local government to be an "effective prohibition" if the requirement materially inhibits the provision of wireless telecommunications services.[9] A few examples of "materially inhibit" include requirements that "render a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services, or the improvement of existing services."[10] Based on these examples, it seems to be the case that almost any action that does not result in the grant of a cell site lease could trigger a charge of "effective prohibition," though inevitable litigation may clarify when a requirement does not amount to an effective prohibition. This provision of the Declaratory Ruling and Third Report and Order regarding effective prohibition not only impacts 5G, but also comingled services and facilities.[11]

State and local zoning and land use requirements are subject to the above interpretation as well, because they can also prove to be an effective prohibition.[12] The Commission specifically discusses aesthetic, undergrounding, and minimum spacing requirements.[13] The common thread between these requirements is that they must be reasonable, non-discriminatory, objective, and published in advance so that carriers have notice.[14] Note that a local government's requirement that all facilities be underground constitutes an "effective prohibition" due to the propagation characteristics of wireless signals.[15] Also note that retroactive requirements or ordinances that change minimum spacing requirements of preexisting facilities or impact the collocation of new equipment on a structure already in use is an "effective prohibition" under the standards the Commission articulates.[16]

As far as fees, the Commission con-

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cluded that right of way access fees and fees for the use of government property in the right of way violate Sections 253 and 332(c)(7) unless (i) the fees are a reasonable approximation of state or local government cost; (ii) the fees are comprised of objectively reasonable costs; and (iii) the fees are no higher than those charged to similarly-situated competitors in similar circumstances.[17] The Commission goes on to identify particular fee amounts that presumptively do not constitute an effective prohibition under Sections 253(a) or 332(c)(7), and are presumed to be "fair and reasonable compensation" under Section 253(c).[18] Depending on the circumstance, these presumptively reasonable fees can range from $270 to $500 per application with various allowances should the situation or type of construction allow for it (e.g. collocation versus new pole).[19] However, the Commission recognizes that fees may exceed the presumptively appropriate amounts so long as they are cost-based and non-discriminatory.[20] What amounts meet that requirement will almost certainly be decided on a case-by-case basis, and likely through litigation between the carriers and local or state governments.

The Commission took the opportunity to establish two new shot clock requirements under Section 332; a 60-day shot clock to review an application for collocation of a small cell facility on an existing structure, and a 90-day shot clock to review an application for attachment of a small wireless facility on a new structure.[21] These shot clocks apply to all authorizations necessary for the placement, construction, or modification of a personal wireless service facility.[22] The term "authorizations" includes, "all aspects and steps of the siting process including license or franchise agreements to access the right of way, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment."[23] For batched applications – multiple separate applications filed at the same time for one or more sites, or a single application covering multiple sites – the shot clock remains the same, treating the batched application the same as individual applications.[24] Only in extraordinary cases may a state or local government rebut the presumption of reasonableness for a shot clock period if a batched application causes "legitimate overload on the siting authority's resources."[25] Moreover, state and local governments may not refuse to accept batched applications.[26] Finally, the Commission established new remedies for violations of the updated shot clocks. State and local inaction by the end of the new shot clock period is not only considered a failure to act under Section 332(c)(7)(B)(v) but is also a presumptive prohibition of a personal wireless service under Section 332(c)(7)(B)(i)(II).[27] The expectation of the Commission is that failure by the state or local government to act will now result in expedited relief in court upon notification from the applicant to the siting authority of failure to act, and the siting authority's further failure to issue a decision either way.[28]

Note that the provisions discussed above are only some of the elements contained within the respective documents. For a full list of the new requirements and penalties the documents themselves should be reviewed in their entirety.

In addition to the Commission's regulations, Congress stepped into the arena with the STREAMLINE Small Cell Deployment Act in the Senate on June 28, 2018.[29] STREAMLINE seeks to amend Section 332(c), one of the provisions the Commission interpreted in the Declaratory Ruling and Third Report and Order.[30] The proposed amendment codifies many of the provisions the Commission announced in the Order, including the shot clocks, fees, and effective prohibition standard.[31] However, the amendment goes farther than the Commission did, by codifying a deemed granted remedy whereby a state or local government's failure to act within the shot clock will result in an automatic grant of the applicant's request.[32] Beyond Congressional action on the subject, roughly twenty states have themselves enacted small cell legislation to override local resistance and facilitate expedited deployment of small cells.[33]

II. Net Neutrality

In 2015, the Commission enacted the Open Internet Order, requiring "net neutrality" in the form of a ban on blocking, throttling, and paid prioritization of internet content.[34] It also introduced transparency requirements and implemented a general conduct standard to prevent misbehavior by Internet Service Providers (ISPs), to protect consumers, interconnection providers, and edge providers alike.[35]

Those protections were short-lived. In 2018, the Commission, under Trump appointee Chairman Pai, undid the Obama-era net neutrality protections through its deregulation order, effectively preempting state and local governments from regulating ISPs or providing net neutrality protections.[36] The Restoring Internet Freedom Order rolled back the throttling, blocking, and paid prioritization prohibitions, reduced the transparency standard, and eliminated the general conduct standard. Mozilla filed a lawsuit against the Commission in response to the Restoring Internet Freedom Order, and IMLA joined the amicus brief drafted by the City of New York advocating for net neutrality protections. Oral argument in the case is scheduled for early 2019.[39]

In response to the Commission's declining to protect net neutrality, California, Vermont, Oregon, and Washington enacted their own net neutrality protections,.[40] and there are net neutrality protections pending in Illinois, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Wisconsin.[41] Another 30 states are currently debating net neutrality measures, and governors in six states have signed executive orders affirming net neutrality.[42] In the wake of these measures, the Department of Justice proceeded to file suit against California for its net neutrality protections, and the broadband industry sued Vermont for its net neutrality protections..[43]

Cable Franchising

As the broadband industry succeeded on weakening regulatory controls, cable companies approached the Commission seeking similar benefits. The Commission's Second Further Notice of Proposed Rulemaking (FNPRM) proposed changes restricting local governments' ability to impose franchise fees, PEG (public, education and government) channel requirements, and other common cable-related obligations.[44] IMLA filed comments in the FNPRM proceeding.

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OP-ED

BY: LISA SORONEN
State & Local Law Center, Washington D.C.

The Academic Attack on Qualified Immunity Continues

In a recent op-ed for *Municipal Lawyer* I summarized three academic articles published in the *Notre Dame Law Review* in 2018 criticizing qualified immunity. In this article I summarize the five final articles which are now also available. I conclude this article by discussing how IMLA and the State and Local Legal Center are planning to respond to this attack. Before discussing the articles, I summarize the other important developments in the ongoing attack on this legal doctrine.

First, it is noteworthy Justices Thomas and Sotomayor, who often reside at polar opposite ends of the ideological spectrum, have recently cited to a 2018 academic article entitled *Is Qualified Immunity Unlawful?* by William Baude, which is not part of the *Notre Dame Law* Review articles. So, as of late, at least two Supreme Justices are interested in what at least one academic has to say about qualified immunity.

Second, in March 2018 the CATO Institute held a forum on qualified immunity where it announced that it was beginning an "*amicus* campaign" in lower courts to alert them to the "variety of problems" with the doctrine. As of this writing, CATO has filed *amicus* briefs in five qualified immunity cases, relying partially on the Baude article. More significantly, CATO recently filed an *amicus* brief supporting a *certiorari* petition asking the Supreme Court to overrule qualified immunity. Fortunately, this case settled. But a "cross-ideological" group of organizations joined an *amicus* brief criticizing the doctrine in that case.

Finally, and perhaps most troublingly, lower judges on and off the bench have recently criticized the doctrine.

Qualified Immunity: Time to Change the Message, Karen M. Blum, 93 Notre Dame Law Review 1887 (2018).

Karen Blum concludes that qualified immunity is beyond repair. Instead of trying to fix it she encourages the Supreme Court to reconsider *Monell v. Department of Social Services*. In that case the Court "held that Congress had rejected the suggestion that municipal corporations might be held liable on a respondeat superior basis for constitutional torts of their employees." Perhaps because she isn't confident the Court will reverse *Monell*, Blum offers three specific criticisms of the doctrine with accompanying recommendations.

First, according to Blum, the Supreme Court in *Pearson v. Callahan* has hampered the development of constitutional law. *Pearson* allows lower courts not to decide whether the Constitution was violated but instead to simply decide whether the legal right at issue was "clearly established." Blum notes the Court had seven legitimate reasons for ruling as it did in *Pearson*. But often these reasons "play little or no role in the exercise of discretion by courts under *Pearson*, or, if they do, are left unidentified by a court choosing to exercise its discretion not to decide." To remedy this problem Blum proposes that courts "be encouraged, if not required, to give reasons for their exercise of discretion under *Pearson* to decide or not decide the constitutional question."

In *Mitchell v. Forsyth*, the Court held that district court orders denying qualified immunity to government officials that turn on questions of law may be appealed immediately. According to Blum, *Forsyth* appeals have resulted in "expensive, burdensome, and often needless delays in the litigation of civil rights claims." "Given the infrequency with which defendants raise the defense at the motion to dismiss stage, and perhaps the greater infrequency with which the motion is granted," Blum would "eliminate the availability of the interlocutory appeal from a denial of qualified immunity at the motion to dismiss stage."

Blum's final point is that as much as the Supreme Court wants qualified immunity cases to be resolved as "pure issues of law" they often can't be. The result is "considerable disagreement about whether and when both trial and appellate judges are usurping the role of jurors by assuming facts or drawing inferences that are not favorable to the nonmoving party and by granting summary judgments based on their own findings and assessments of facts." Here Blum makes specific recommendations about how the roles of judges and juries should be sorted out in qualified immunity cases.

Qualified Immunity and Fault, John F. Preis, 93 Notre Dame Law Review 1969 (2018).

Preis's article "describes, critiques, and attempts to reform the role of fault in the defense of qualified immunity." His bottom line is that the doctrine does a poor job of assessing fault. While he suggest two reforms he admits that neither are "sufficiently compelling." According to Preis, an officer is "at fault" if, "prior to taking some action, she has actual or constructive knowledge that her action is wrongful, and yet takes the action anyway."

Preis writes that qualified immunity "immunizes the faulty and holds liable the faultless" because the defense comes only from appellate judicial

opinions. "Appellate opinions are, not surprisingly, rarely read by government officers and, even when their substance is communicated to officers, they only comprise one of many factors that affect the blameworthiness of an officer." Moreover, qualified immunity overlooks the "blameworthiness of officers who violate nonfederal law, and also overlooks the innocence of officers who had no way to know of the wrongfulness of their action."

To better align qualified immunity with a lack of fault, Preis suggest state law violations may be indicative of fault and could be added to the analysis. But according to Preis, this approach "only solves part of the fault problem, ignores (and likely impinges upon) state interests, and will be difficult to administer in many instances."

The solution that follows from the observation that officers don't read judicial opinions, according to Preis, is to "focus on the information that does inform officers' decisions"—the department's actual practices. While Preis notes this approach will better assess the blameworthiness of the officer, it still suffers from some drawbacks. "The two biggest problems with this approach are (1) that agencies will have an incentive to dilute policies and decrease training, and (2) that the tools that might be used to counteract these incentives (custom and policy actions) are not available against federal and state-wide agencies."

The Best Branch to Abolish Immunity, Scott Michelman 93 Notre Dame Law Review 1999 (2018).

Michelman proposes that the Supreme Court, not Congress, is the best branch to fix qualified immunity because the Court created and developed the doctrine and the *stare decisis* factors weigh in favor of judicial intervention.

Michelman first traces the history of qualified immunity. In short, the doctrine was created, "fleshed out and tinkered with," and revised by the Supreme Court and only the Supreme Court. "[T]he fifty years of qualified immunity jurisprudence have been characterized by repeated judicial revisions, both small and large, to the substance and the procedural framework of qualified immunity. Throughout these revisions and reversals, Congress has remained silent on the question of qualified immunity, and the Supreme Court has modified the doctrine based on its own policy judgments."

Michelman next examines the factors the Supreme Court considers when deciding to modify or overrule precedent. Normally the Court is more hesitant to overrule cases involving statutory interpretation than the constitution because Congress can overrule statutory interpretation cases relatively easily. Michelman argues the "special statutory *decisis* rule" shouldn't apply in the case of qualified immunity because "the history and quasi-constitutional context of qualified immunity render it an exceptional doctrine. Unlike most statutory fields in which the Court and Congress engage in an active dialogue over the content and application of the law, constitutional tort law has been dominated by the Supreme Court."

Finally, according to Michelman, all of the ordinary *stare decisis* factors weigh in favor of revising or eliminating the doctrine. First, relying on the work of Joanna Schwartz and others, Michelman opines that the factual assumptions underlying qualified immunity—such as the proposition that it protects police officers from paying money damages—are "almost certainly wrong." Michelman admits it is difficult to show legal erosion "in the face of the Court's repeated application of qualified immunity and insistence on lower courts' adherence to it." But, "[t]he courts' difficulty in applying the doctrine to the Supreme Court's satisfaction and in a consistent manner . . . points to the inherent instability of the rule." For this same reason Michelman deems qualified immunity unworkable. Finally, according to Michelman, states and local governments can't "legitimately" rely on qualified immunity to escape financial liability for violating constitutional rights.

The Horror Chamber: Unqualified Impunity in Prison, David M. Shapiro and Charles Hogle, 93 Notre Dame Law Review 2021 (2018).

Shapiro and Hogle write that "legal and situational barriers clothe prison officials" in what they call "practical immunity." The combination of practical immunity and qualified immunity leads to the present regime which they claim "borders on de facto absolute immunity." Such a regime, they opine "cannot serve as a credible check on individual or systemic abuse in prisons and jails."

Their article first examines about twenty-five cases which illustrate the "horrifying abuse in American prisons and jails." Then it examines the factors making up "practical immunity." These include the following legal barriers: (1) constitutional doctrine that is extremely deferential to prison defendants; and (2) the Prison Litigation Reform Act, especially its administrative-exhaustion and physical-injury requirements. Situational barriers in the prison environment also contribute to practical immunity including: "(1) the difficulty of finding counsel to represent prisoners; (2) the difficulty of conducting legal research and collecting evidence while incarcerated; (3) procedural and doctrinal minutiae that act as traps for even the most well-prepared prison litigants; and (4) prisoners' vulnerability to retaliation from correctional staff."

Shapiro and Hogle note that data illustrate that "[i]n combination, practical and qualified immunity provide prison and jail officials with an ironclad defense in nearly every case." "In fiscal year 2012, prisoners won their cases only fifty-seven times, and the total damages for all prison conditions cases litigated to judgment in fiscal year 2012 barely broke $1 million. The average award was $20,815 and the median was $4,185. By way of comparison, consider police misconduct cases. Between 2004 and 2014, the Chicago Police Department alone averaged $66 million in yearly payouts."

Shapiro and Hogle don't suggest specific reforms for qualified immunity in the prison context. Instead, they point out that the Supreme Court "has never considered the combined effect of practical and qualified immunity on the landscape of prison officials' liability. This is a problem." They don't explicitly advocate for getting rid of qualified immunity in the prison content. But

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PRACTICE TIPS

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The Appeal Killers –Avoiding the Traps That Can Doom Your Appeal Before It Begins

INTRODUCTION

I'm an appellate lawyer. Although I sometimes draft dispositive trial court motions, I spend most of my time handling writ petitions and appeals in federal and state courts. That means I've reviewed the records for dozens, if not hundreds, of trial court proceedings. The content of those records dictates what issues I can raise for my clients on appeal. Many potentially strong appellate arguments have fallen to the wayside because they were not properly preserved below. The danger of waiver arises frequently with respect to particular issues, with wide variation among state courts as to how particular issues need to be preserved in order to pursue an appeal.

The purpose of this article is to share the lessons I've learned from appeals where I couldn't make our client's best argument because the issue was not preserved below—or where I was able to defuse the other side's argument because *they* failed to preserve it below. The tips below will help create the best possible record, and the broadest possible array of issues, for you, or appellate counsel, to work with on appeal.

Many of the things I discuss will be obvious to some experienced practitioners. But I know that preserving appellate issues is not at the forefront of all litigators' minds during the heat of battle, and that with fewer and fewer cases going to trial, it's easy to forget technical points. Hopefully, this article will serve as a refresher course for those who frequently practice in the appellate courts, as well as an introduction for attorneys new to the field.

TRAP 1: AN INCOMPLETE OR UNCLEAR RECORD.

A basic mantra of appellate practice is that if it isn't in the record it didn't happen. As one court summed up: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." *Protect Our Water v. County of Merced*, 1 Cal. Rptr. 3d 726 (2003).

This rule has many implications. They include:

• *Proceedings need to be reported*

Most appeals require a written transcript of the relevant trial court proceedings. In most jurisdictions, it used to be a given that all proceedings were recorded/transcribed. Budget cuts have changed that in some jurisdictions. For example, in California's civil courts, the parties now have to provide their own reporters—and the appellate courts have summarily affirmed appeals by appellants who could not provide a transcript because there was no reporter present.

Tip: Find out in advance whether your court automatically provides a reporter for all proceedings. If it doesn't, follow the local procedures for arranging a private court reporter.

• *Everything important must be on the record*

Some judges have a practice of discussing jury instructions, verdict forms, and other issues with counsel in chambers, or resolving objections in sidebars. If there is not a reporter present for these conversations, the appellate court will have no way to know what happened.

Tip: Make sure all your objections are on the record, and that the record reflects which jury instructions and verdict forms you proposed and objected to. If anything notable happens during an unreported sidebar or in chambers, paraphrase it on the record once the reporter is back.

• *Witness testimony should be clear to someone outside the courtroom*

Descriptions of events that make sense when the jury is watching the speaker—"about this big," "coming from that direction," "please compare that document to this one"—are unintelligible to someone who wasn't there.

Tip: Use words, tell your witnesses to use words, and if they don't, add something: "Let the record reflect that the witness is indicating about two feet." "Do you mean moving from left to right?" "Please compare exhibit 23 to exhibit 42." If the witness is pointing to a diagram or other exhibit, have them physically mark up a copy, and describe on the record what the markings indicate. ("Draw an X where you exited the theater." "Draw a green line along your path," etc.)

• *Video depositions and other sound recordings played at trial*
Court reporters generally do not transcribe video depositions or other recordings played at trial. Unless the party playing the recording puts a separate transcript of the recording in the record, the appellate court will have no way of knowing what was played—and, depending on the standard of review, may infer that it supported the judgment.

Tip: Some jurisdictions have rules requiring the parties to lodge transcripts of video depositions, showing which excerpts were played. *E.g.*, Fed. R. Civ. P. 32(c) ("Unless the court orders otherwise, a party must provide a transcript of any deposition testimony that the party offers, but may provide the court with the testimony in nontranscript form as well"). Even if the court rules in your jurisdiction does not *require* a transcript, providing one is good practice.

TRAP 2: INVITED ERRORS.

Under the doctrine of invited error, appellants cannot complain of an error they created or invited. *See, e.g.*, *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (A party may not complain "of errors below for which he [or she] is responsible"); *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 476 (5th Cir. 2015) ("'A party cannot complain on appeal of errors which he himself induced the district court to commit'"). This means that on appeal, you generally will not be able to challenge a jury instruction you requested or acquiesced to, a verdict form you proposed, a procedure that you stipulated to, or evidence to which you said you had no objection.

There is generally an exception to this principle that permits making the best of a bad situation. If the court has definitively ruled against you on an issue, you do not have to dig your heels in and refuse to take any further action on the issue. For example, if you argued that a particular legal theory is inapplicable to the case but the court definitively rules that the theory applies, you may propose a jury instruction on the theory without forfeiting your appellate argument that the theory does not apply. (You could not, however, argue on appeal that your instruction was defective.)

Tip: Carefully check everything you propose to the court; approach stipulations with caution; and if you are relying on the making-the-best-of-a-bad-situation principle, be sure the record reflects the adverse ruling.

TRAP 3: JURY INSTRUCTIONS ISSUES.

Jury instructions are one of the most frequent sources of appellate reversal, in both state and federal courts. Although trial courts have latitude in how to phrase jury instructions, the legal substance of instructions is a question of law and, as a result, has a favorable standard of review for appellants: de novo, with no deference to the trial court's ruling. In many jurisdictions, an erroneous jury instruction concerning a fundamental claim or defense carries with it a presumption of prejudice. In others, reversal is required if it is reasonably probable—viewing the evidence in favor of the *appellant*—that a different verdict might have resulted.

Verdict forms present similar issues—special verdict forms in particular are susceptible to reversal because of the possibility of inconsistent findings; incorrect wording on verdict forms may also be an appellate issue.

Here are some guidelines for preserving jury instruction and verdict form arguments for appeal.

• *Submitting and advocating for your instructions/verdict form*
Parties are entitled to legally correct, non-argumentative instructions on their theories of the case that are supported by evidence. But that standard requires the parties to propose such instructions. Pattern instructions do not always meet this standard—due to delays in updating the pattern instructions, they may not accurately capture evolving law.

The principles discussed above regarding creating a clear record are key when it comes to jury instructions and verdict forms. Although some state and federal courts have very clear guidelines for submitting jury instructions and verdict forms, others take a much more casual approach, with instructions and verdict forms submitted and negotiated right up until the jury is instructed. In cases employing the more casual approach, it can be difficult to determine which party offered a particular version of an instruction or verdict form. This is particularly true where much of the discussion of jury instructions occurs informally off-the-record, so that the only document that appears on the record is the packet of final instructions eventually given to the jury. That lack of clarity is problematic because in some jurisdictions, if the appellate court cannot tell who proposed an instruction or verdict form, it will presume that the appellant did so (and therefore, is constrained by the doctrine of invited error). *E.g., Bullock v. Philip Morris USA, Inc.*, 71 Cal. Rptr. 3d 775, 793-94 (2008).

Tip: Propose a set of complete, accurate, *non-argumentative* instructions on your theory of the case. If the court refuses to give your proposed instruction or to use your proposed verdict forms, (1) object on the record before the case is submitted to the jury, and (2) do not say anything that could be construed as agreeing that the instruction/form was properly refused. And create a record reflecting who proffered which instructions and verdict forms by submitting your proposals in writing, keeping a conformed copy, and summarizing any off-the-record rulings on the record when the court reporter returns.

• *Objecting to the other side's instructions and verdict forms*
There is a wide variation among the states concerning the need to object, and manner of objection, to jury instructions. Some states deem the opposing party to have objected to any instruction submitted by the other side, without need to cite specific

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grounds. Other states—and federal courts (Fed. R. Civ. P. 51(c))—require a party to make a specific objection as to each contested instruction, or in some instances to offer a substitute, "correct" instruction in order to preserve the right to further review. In the latter case, there can often be a danger of invited error, in that the instruction offered by the objecting party may be just as deficient (albeit in a different way) as that submitted by an opponent. Many jurisdictions also require specific objections, on the record, to the wording of a proposed verdict form. *E.g., Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001).

Tip: If you disagree with a proposed jury instruction or verdict form, object *on the record* before the case is submitted to the jury. In most jurisdictions, objections to a jury instruction must "distinctly" state the matter objected to and the ground for the objection. *E.g.*, Fed. R. Civ. P. 51(c)(1). (Merely submitting an alternative instruction will not preserve an objection unless the district court is aware of the specific concern with the proposed instruction. *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152-53 (9th Cir. 1990).) Do not tell the court that an instruction is acceptable if you in fact disagree with it. *E.g., United States v. Silvestri*, 409 F.3d 1311, 1337 (11th Cir. 2005) (the phrase "'the instruction is acceptable to us,'" "waive[d] a party's right to challenge the accepted instruction on appeal"). If there is time, *written* objections filed with the court create the clearest record.

TRAP 4: EVIDENCE ADMISSIBILITY ISSUES.

Most trial court decisions concerning whether to admit particular evidence are subject to the highly deferential abuse of discretion standard of review, making them tough candidates for appeal. The more rigorous de novo standard applies to evidentiary questions that turn on interpretation of the law (for example, whether evidence falls within a particular privilege)—but such questions are the exception, not the rule.

Still, appellate courts do sometimes reverse even under an abuse of discretion standard, and so it is important to preserve evidentiary issues for appeal. Although jurisdictions vary in exactly what counsel must do to preserve an evidentiary issue for appeal, the general rule is that an appellant cannot challenge the trial court's admission of, or failure to admit, particular evidence unless the request or objection is clear from the face of the record. The pitfalls here generally involve asserting the *correct* basis for objecting to evidence, and in making an adequate offer of proof for evidence that the trial court refuses to admit.

• *Create a clear record of what exhibits were admitted*

The appellate court will want to know specifically what evidence was, and was not, admitted at trial. There can be trouble in this area when an exhibit is introduced for identification by a witness, but never formally moved into evidence. While some courts are good about entering minute orders each day, or at the end of the case, documenting precisely which exhibits have been entered into evidence, others are less formal.

Tip: Be sure to formally move for admission of documents that you are relying on, and that the record (either the transcript or minute orders) reflects the court's rulings on admission of exhibits.

• *Make an adequate offer of proof for evidence the court does not admit*

To make a credible appellate argument that particular evidence should have been admitted, it is essential that the appellate court understand what the evidence actually would have been, and why it would have made a difference. But that information can be hard to glean from the record, when the witness did not testify or the document was not admitted. For that reason, most jurisdictions require an offer of proof as to excluded evidence. *E.g.*, Fed. R. Evid. 103(a)(2).

Tips: Make an adequate offer of proof, *on the record*, as to any evidence that you seek to use but that the court excludes. An offer of proof should (1) describe the proffered evidence in detail (what the witness would testify to, what the document is, etc.) and (2) explain why the evidence supports your position and is necessary in light of other evidence.

• *Make specific, on-the-record, objections to the other side's evidence*

Many jurisdictions consider an evidentiary objection waived unless the specific ground for the objection is stated on the record. *E.g.*, Fed. R. Evid. 103(a)(1); *see also Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1003-04 (9th Cir. 2002) (evidentiary objections also must be preserved in summary judgment context). It is also critical to make certain that the court definitively rules on the objection. Motions in limine are a trap for the unwary here. Judges will commonly deny pre-trial motions in limine to exclude evidence without prejudice to the objecting party renewing the objection at trial. If the objection is not renewed when the testimony or exhibit is offered, and a ruling obtained, an appellate court might well conclude that the objection was waived. *E.g.*, *McCollough v. Johnson, Rodenberg, & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011); *Doty v. Sewall*, 908 F.2d 1053, 1056 (1st Cir. 1990). If the in limine ruling *is* definitive, however, the federal rules do not require renewing the objection or offer of proof. Fed. R. Evid. 103(b).

Tip: Timely object to an exhibit, or move to strike testimony, stating the specific ground—on the record. If you don't get an immediate, *definitive* ruling on an objection, make sure to follow up. If there's any question about whether the ruling is definitive, keep objecting. One objection to keep in mind, in any case involving experts, is foundation: Federal courts in particular tend to scrutinize this issue closely under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

TRAP 5: CHALLENGING SUFFICIENCY OF THE EVIDENCE.

Jurisdictions vary widely in what a party must do in the trial court to preserve an

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they do suggest that if a court were to acknowledge both practical and qualified immunity it might conclude "qualified immunity is unwise and unnecessary in the prison context because practical immunity already provides sufficient protection against unwarranted liability for good-faith mistakes."

Qualified Immunity at Trial, Alexander A. Reinert , 93 Notre Dame Law Review 2065 (2018).

In this article Reinert presents the first empirical study of how qualified immunity is raised and resolved at trial. In his study he looks at how qualified immunity "functioned at trial" for a three-and-a-half year period in all federal district courts.

Reinert's bottom line is while qualified immunity has been described as a "potent defense" at trial, it in fact rarely plays a significant role at that stage in litigation. But when it is raised it is often outcome determinative—in favor of defendants.

Based on his research Reinert reaches three conclusions. First, juries are rarely instructed on qualified immunity, and they are also not "routinely asked to resolve disputed factual questions that might bear on application of the defense." In more than eighty-five percent of civil rights trials where qualified immunity was raised at some point in the case, district courts gave no instruction on qualified immunity. Second, "when they do instruct on qualified immunity or ask jurors to resolve disputed factual questions that bear on the immunity defense, lower courts are not attentive to issues related to the burdens of proof, production, and persuasion." When lower courts do allocate burdens they are more likely placed on the plantiff. Finally, when juries are instructed on qualified immunity plaintiffs are much less likely to prevail at trial. Perhaps unsurprisingly, Reinert found plaintiffs' win rate nearly tripled where the jury was not given a qualified immunity instruction.

Reinert suggests some possible theories for while qualified immunity doesn't play a bigger role at trial. But, he acknowledges that his explanations require further research. He first speculates that "trial judges consider the facts central to a plaintiff's claim to overlap so closely with the facts relevant to qualified immunity that submitting special interrogatories to juries is considered duplicative or potentially confusing." He also suggests that lower courts may not instruct juries on qualified immunity because they treat it only as an immunity from suit and not as a defense from liability. Finally, he theorizes that lower courts may think that juries will be too confused by qualified immunity or that in some instances defense counsel makes the strategic choice not to request an instruction on qualified immunity.

Formalism, Ferguson, and the Future of Qualified Immunity, Fred O. Smith, Jr. , 93 Notre Dame Law Review 2065 (2018).

Smith critiques qualified immunity as not being aligned with the current trend of "formalism" and of causing "fragmentation." Unlike a number of his colleagues, Smith does not call for abandoning qualified immunity. Instead, he embraces two other approaches, a fault-based regime and expansion of respondeat superior, to "bring the law more in line with formalism and accountability."

Smith points out that the Supreme Court has increasingly embraced formalism, meaning it has become skeptical of "court-created causes of action and court-created limits on federal judicial power." Qualified immunity has been the exception but that may no longer be the case post-Ferguson. "There is a palpable sense that contemporary social movements are demanding greater accountability for violations of rights, especially on matters at the intersection of criminal justice and race." What qualified immunity needs, according to Smith, is more accountability.

More specifically, Smith endorses the approach of John Jeffries, Jr., which focuses on fault. Smith agrees with Jeffries that "something more akin to negligence" should trigger liability under Section 1983 rather than gross negligence or recklessness. Smith also discusses the multiple advantages of making local governments liable for the unconstitutional acts of their employees. But his "preferred approach would expand respondeat liability *only* when there is no other remedy available at law as a result of various individual immunities."

Conclusion: How Should We Respond?

CATO has wisely chosen to bring qualified immunity cases in the lower courts. With the additions of Justices Gorsuch and Kavanaugh it seems likely that qualified immunity is safe before the Supreme Court for the time being, no matter how many articles or briefs are written attacking it. Generally, liberal Justices are more skeptical of the doctrine than conservative Justices, Baude's historical objection to the doctrine notwithstanding, at least for Justice Thomas.

Given the volume of qualified immunity decisions, as a practical matter, the Supreme Court doesn't correct every erroneous lower court decision. So, lower court judges who rule against qualified immunity when they otherwise would not have because of these law review articles or the work of CATO and those ruling standing is a real possibility. Such rulings will create all kinds of problems for local governments. Some would say this is already the state of the law in the Ninth Circuit.

Beyond all the scholarly thought and writing one simple justification for qualified immunity remains ever strong which I think local goverenments must emphasize. In the real world without qualified immunity in life and death situations--which police officers face all too often--an officer might hesitate. In that hesitation the officer and innocent citizens might die.

"I Don't Want to Shoot You Brother" puts an interesting spin on the terrible choices police officers must make when confronted with dangerous situations. The article describes the long saga of Officer Mader who didn't shoot an armed black man in what looked to Officer Mader like a suicide by cop situation. Mader's colleague arrived at the scene after Mader and ultimately shot the armed man. Officer Mader was fired for hesitating.

I think the best first step is to meet fire with fire. If CATO has a canned *amicus* brief ready to go in select qualified immunity cases, local governments must be ready to gather *amicus* support as well. An *amicus* brief should address the arguments that CATO makes and affirmatively defend the doctrine as well (ideally by a cache of brilliant law review articles), including the very real life and death consequences at stake. Local governments seeking *amicus* support on qualified immunity should contact the State & Local Legal Center or IMLA for help. ML

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Post-Disaster Rebuilding Requirements

In 2012, the Obama-era Commission imposed regulations to protect customers after natural disasters in the wake of Verizon's attempt to avoid rebuilding wireline phone infrastructure in Fire Island, NY following Hurricane Sandy.[45] The Obama-era rules were repealed in 2017, justified by the allegation that such provisions prevented carriers from upgrading the old copper networks to fiber.[46] With the demise of these regulations, which were designed to prevent prolonged loss of service (or even permanent discontinuance thereof), carriers were no longer required to rebuild networks under threat of federal fines and penalties. Moreover, in 2018, the industry was further deregulated to make it easier for carriers to discontinue service after a natural disaster without federal oversight or direct federal regulatory power to prevent such discontinuance.[47]

The effect of these deregulatory efforts—coupled with state-based efforts in Florida of a similar vein—came to a head in the wake of Hurricane Michael, with both the Governor of Florida and Chairman Pai expressing their frustration with carriers for failing to repair and restore service quickly enough.[48] Communications were down for well over 72-hours in areas of the Florida Panhandle hard hit by Hurricane Michael, with localities other than Tallahassee experiencing a slow recovery effort. Many of these still did not have restored telecommunications services as of October 18th, eight days after Hurricane Michael hit.[49] This was especially problematic for a variety of local governments in the area that rely on Verizon as their carrier.[50] The delay in restoring telecommunications services is just one example of how the deregulation of disaster recovery requirements can impact a community. Other examples arose in the Northeast after Hurricane Sandy, where it took one week to approach full coverage, and after Hurricane Maria in Puerto Rico, where it took six months to approach full coverage.[51] This delay made it difficult to coordinate services and get the word out to the community regarding where food, shelter and other help was located.[52] Note that along with the Commission's deregulation removing direct regulatory oversight over the telecommunications industry, 37 states have followed suit in removing direct state and local oversight over telecommunications providers in terms of disaster recovery requirements and therefore do not have the ability to prevent issues like this when future disasters hit.[53]

Looking to the Future

In sum, 2018 was a year of mass deregulation in the telecommunications sector, with big wins for the wireless industry and attempts from the cable industry to receive those same benefits. This trend of deregulation and removal of power from local governments championed by Chairman Pai is likely to continue into 2019. However, that does not make local governments powerless to retain control over their public rights of way and to protect the health and safety of their citizens. Even though the Commission's rules (or lack thereof) impose serious impediments, there are still reasonable work-arounds for local governments to employ. Moreover, with challenges to both the *Auer* and *Chevron* doctrines heading to the federal courts, it stands to reason that the judiciary may yet create opportunities for local governments to assert greater autonomy in the telecommunications battle. IMLA will update members on the status of these proceedings via the Telecom & Tech Working Group and will continue to seek solutions to these difficult problems.

Notes

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5. *See id.* at 148.
6. *See id.* at 149.
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8. *See generally* Federal Communications Commission, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment Declaratory Ruling and Third Report and Order, FCC 18-133, 43-92, 103-141 (2018).
9. *See id.* at 37.
10. *Id.*
11. *See id.* at 36.
12. *See id.* at 82.
13. *See id.* at 84 – 91.
14. *See id.*
15. *See id.* at 90.
16. *See id.* at 91.
17. *See id.* at 50.
18. *See id.* at 78 – 79.
19. *See id.* at 79.
20. *See id.* at 80.
21. *See id.* at 105.
22. *See id.* at 132.
23. *See id.* at 132.
24. *See id.* at 113 – 114.
25. *Id.* at 114.
26. *See id.*
27. *See id.* at 118.
28. *See id.* at 18 – 120.
29. *See* Congress.gov, *S.3157 – STREAMLINE Small Cell Deployment Act*, https://www.congress.gov/bill/115th-congress/senate-bill/3157/text (last visited Dec. 18, 2018).
30. S. 3157, 115th Cong. §2 (2018); *see also* Federal Communications Commission, *supra* note 8.
31. *See* S. 3157, 115th Cong. §2 (2018).
32. *See id.* at §2(c)(iv).
33. *See* National Conference of State Legislatures, *Mobile 5G and Small Cell Legislation*, Oct. 9, 2018, http://www.ncsl.org/research/telecommunications-and-information-technology/mobile-5g-and-small-cell-legislation.aspx.
34. *See* Federal Communications Commission, In the Matter of Protecting and Promoting the Open Internet Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (2015).
35. *See id.*
36. *See* Federal Communications Commission, In the Matter of Restoring Internet Freedom Declaratory Ruling, Report and Order, and Order, FCC 17-166 (2018).
37. *See id.*

38. *See* Todd Shields & Andrew Harris, *Tech Startups Are Suing the FCC to Save Net Neutrality*, Time, Feb. 22, 2018, http://time.com/5171097/mozilla-vimeo-fcc-net-neutrality-lawsuit-ajit-pai/; Devin Coldewey, *FCC resorts to the usual malarkey defending itself against Mozilla lawsuit*, Tech Crunch, https://techcrunch.com/2018/10/12/fcc-resorts-to-the-usual-malarkey-defending-itself-against-mozilla-lawsuit/ (last visited Dec. 19, 2018).
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44. *See* Federal Communications Commission, In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 Second Further Notice of Proposed Rulemaking, FCC 18-131 (2018).
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46. Shiva Stella, *Hurricane Michael Aftermath 'Wake Up Call' On Deregulating Telecommunications Services*, Public Knowledge, Oct. 17, 2018, https://www.publicknowledge.org/press-release/hurricane-michael-aftermath-wake-up-call-on-deregulating-telecommunications-services; Harold Feld, *Hurricane Michael A Wake Up Call on Why Total Dereg of Telecom A Very Bad Idea*, Wet Machine, Oct. 17, 2018, https://wetmachine.com/tales-of-the-sausage-factory/hurricane-michael-a-wake-up-call-on-why-total-dereg-of-telecom-a-very-bad-idea/.
47. *See* Feld *supra* note 46; *see also* Federal Communications Commission, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Doc. No. 17-84, (June 8, 2018)
48. *See* Feld *supra* note 46; *see also* FCC Office of the Chairman, *Statement of Chairman Pai on Hurricane Michael Restoration Efforts*, Oct. 16, 2018, https://docs.fcc.gov/public/attachments/DOC-354581A1.pdf; Patricia Sullivan, *As Hurricane Michael recovery begins, telecommunications, electrical power still an issue in Florida Panhandle*, Wash. Post, Oct. 14, 2018, https://www.washingtonpost.com/national/as-hurricane-michael-recovery-begins-telecommunications-electrical-power-still-an-issue-in-florida-panhandle/2018/10/14/38f1f926-cffb-11e8-8c22-fa2ef74bd6d6_story.html?
49. *See* Sullivan *supra* note 48; *see also* Camila Domonoske, *FCC Chastises Cellphone Carriers Slow to Restore Service in Florida*, NPR, Oct. 18, 2018, https://www.npr.org/2018/10/18/658376591/fcc-chastises-cellphone-carriers-slow-to-restore-service-in-florida.
50. *See* Sullivan *supra* note 48.
51. *See* Domonoske *supra* note 49.
52. *See Id.*
53. *See* Feld *supra.*

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appellate argument that the judgment is unsupported by substantial evidence. Some states allow a sufficiency of the evidence appeal without requiring the appellant to have first moved for a directed verdict at the close of the other party's case, or moved for judgment notwithstanding the verdict (JNOV) after the verdict. Other states will not allow such an appeal unless a party filed a motion for directed verdict specifying the evidentiary failings in the opponent's case, and then filed a post judgment motion for JNOV, while others take the middle ground of requiring a motion for directed verdict, but not a motion for JNOV. Many states also will not allow an appellate challenge on the ground that damages are either inadequate or excessive, unless a motion for new trial or additur or remittitur was made in, and ruled on, in the trial court.

In federal courts, however, the Supreme Court has made the standard clear: Federal appellate courts will not review a claim that there is insufficient evidence to support the judgment unless the appellant *both* moved for judgment as a matter of law at the close of evidence under Federal Rule of Civil Procedure 50(a) *and* renewed the motion after the verdict pursuant to Federal Rule of Civil Procedure 50(b). *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011); *see also*, *e.g.*, *Parts and Elec. Motors Inc. v. Sterling Elec., Inc.*, 826 F.2d 712 (7th Cir. 1987) (reversing grant of JNOV because the defendant failed to "identify the point distinctly and specifically in a motion for directed verdict [i.e., a Rule 50(a) motion]"). Both motions are also necessary to preserve summary judgment arguments for appeal, *Ortiz*, 562 U.S. at 189, and to preserve a qualified immunity defense, *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1087-88 (9th Cir. 2017).

Tips: In federal court, move for judgment as a matter of law at the close of evidence, before the case is submitted to the jury, and *renew* the motion after the verdict, and move for a new trial. Fed. R. Civ. P. 50, 59. In state court, check your jurisdiction's rules.

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