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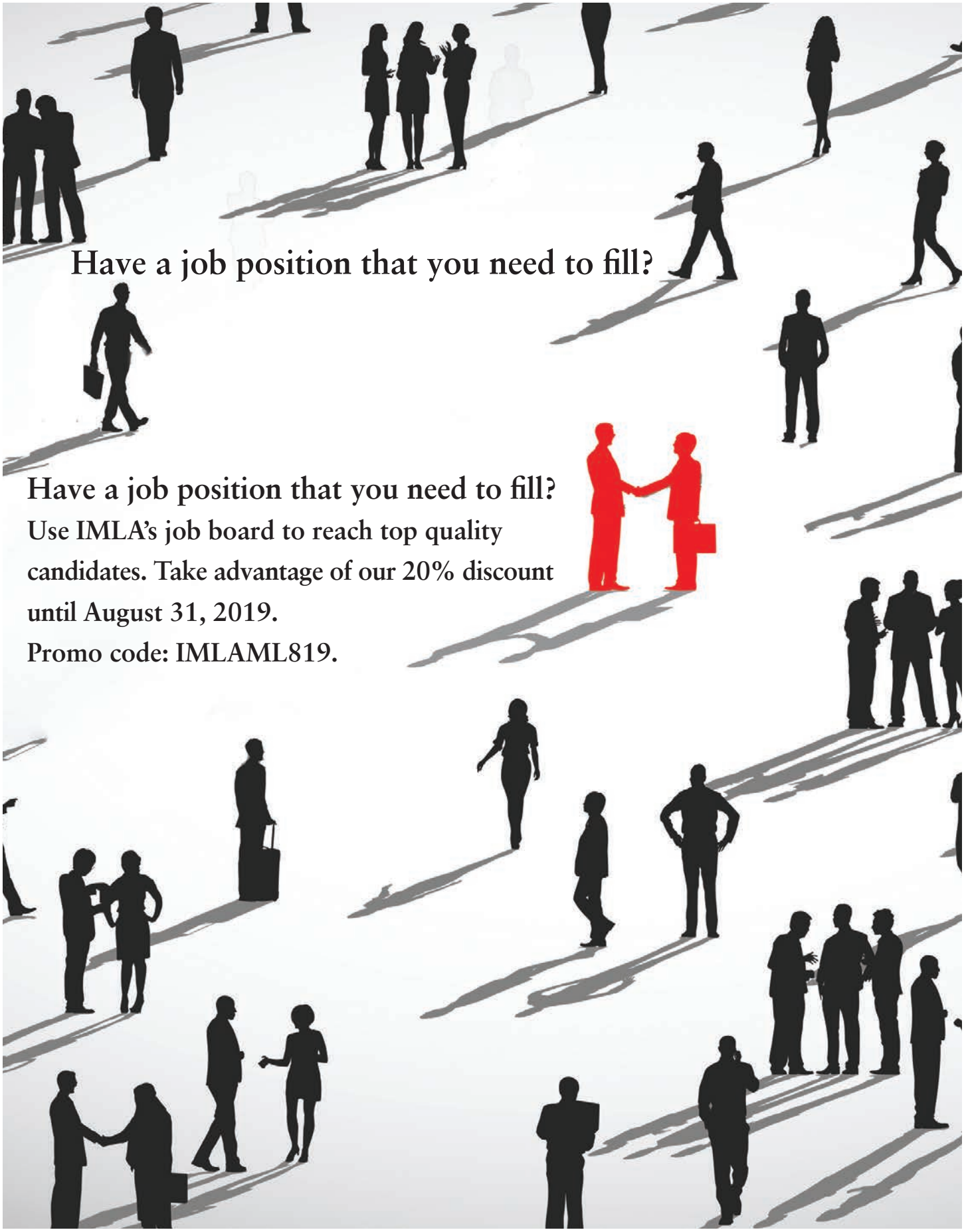
Ransomware and Local Governments: Do Not be Held Hostage!



THE INTERSECTION OF SAFETY AND EXPRESSION: INJUNCTIONS IN CROWD CONTROL MEASURES

THE PROFESSIONAL AND ETHICAL OBLIGATIONS OF MUNICIPAL ATTORNEYS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EDITOR'S NOTE



BY ERICH EISELT
IMLA Assistant General Counsel

Keeping Pace at City Hall

Riviera Beach, Florida may be familiar to IMLA members after two high-profile Supreme Court decisions involving the town's bellicose real estate developer, Fane Lozman. In the more recent dispute, the Court found that the municipality transgressed Lozman's First Amendment rights when arresting him as he disrupted a city council meeting. He has offered to settle his ongoing civil action against the town if it pays him $650,000. The council has declined.

Less than ten days before this July-August 2019 *Municipal Lawyer* went to print, Riviera Beach was again in the media. This time the locality of 35,000 agreed to authorize a similar amount--$600,000, in Bitcoin, paid by its insurer—but for an entirely different purpose: to pay cyber-hackers. In late May, the town's computers were overwhelmed by ransomware that entered through an innocuous email attachment, shutting down water pumping systems, freezing online utility payment screens and requiring paper-based ledgers and hand-signed payroll checks. Last week, Lake City, Florida announced that its insurer had paid cyber-criminals $460,000 to restore incapacitated municipal computer systems. As that payment was announced, Key Biscayne revealed that it too was dealing with a suspicious online invasion.

As our lead story indicates, Florida towns are hardly unique in falling prey to unseen high-tech extortionists. Atlanta, Baltimore and numerous other municipalities have been hit, in many cases deciding not to pay ransom and instead devoting the considerable time, money and manpower to neutralize the malware. The inconvenience to city hall and its constituents can be devastating, even with insurance and preventive protocols in place. Local governments need to be vigilant and prepared for this new species of threat.

IMLA will continue to follow ransomware developments and the larger issue of municipal cyber-security generally, not only on these pages, but through our listserv, webinars and conferences.

While we address this darker side of technology, we'll also report on the many positive and transformative innovations on the horizon that hold great promise for our communities—and create ever-more interesting challenges for municipal attorneys. As Indepenence Day approaches and the American electoral drama again begins to take center stage, we can celebrate democratic resiliency, whether technological or political. In the words of Thomas Jefferson: "as new discoveries are made, new truths discovered, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."

We join our Canadian colleagues in celebrating Canada Day and extend our best wishes for a Happy Fourth of July.

Best regards-

Erich Eiselt

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PRESIDENT'S LETTER



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

As we mark the official start of Summer and I pass the halfway point in my term as President of IMLA, things are heating up and starting to get busy at our organization.

First, with most of the expenses and reviews now in, our Seminar in late March appears to have been one of the most successful in IMLA's history. Participants apparently like our CLE offerings of traditional municipal law topics combined with a focus on civil rights defense. This approach appears to be filling the gap in defending police liability claims that was created when Georgetown University Law School quit holding its seminar in tandem with IMLA's Spring Seminar in D.C. The evaluations prove IMLA offers relevant CLE on a very timely basis for its members.

Second, I got the good news recently from International Committee Co-Chairs Ben Griffith and Tyler Wallach that this year's mission to Berlin for the anniversary of the fall of the Berlin Wall may be the best attended event the Committee has had since the Cuba trip a few years ago. The time for signing up has now expired, but those who are going are in for several exciting days, filled with activities.

Third, June 14th marked IMLA's 2019 Top 50 meeting in Minneapolis, Minnesota, where we were hosted by Thomson Reuters at their headquarters in nearby Eagan, MN (which also boasts of being home to the Minnesota Vikings). One of the more specialized programs IMLA presents annually, the group was given a demonstration of how Artificial Intelligence is being used for Legal Research and Litigation Strategy. Other topics discussed were pertinent to larger jurisdictions, including economic and technology issues. Thomson Reuters has been a loyal sponsor of IMLA and I wish to thank them for arranging this program.

Next, IMLA will be holding its University Cities meeting in Columbia, Missouri on August 8, 2019. This specialized one-day conference will focus on issues unique to cities which are also home to a college or university. Plans call for a reception the evening before and a group dinner on the night of the 8th. Details on programming and registration can be found on IMLA's website under "Events," but hurry as August 8th is fast approaching.

If you have not already registered and secured lodging at the Atlanta Hilton for IMLA's 2019 Annual Conference, it's not too late, but again, do so immediately as some of the early registration discounts have expired and the conference hotel is filling up. I promise you, this Annual Conference will be a great one as the Atlanta Host Committee has been working hard to assure no one will be disappointed.

The dates for the Annual Conference are September 18th through 22nd, 2019 and the Hilton is a terrific venue, strategically located in the heart of downtown Atlanta near our event venues and the City's outstanding sports locations. Some of the highlights for this conference will be a VIP Reception for the IMLA Board and Past Presidents at the Center for Human and Civil Rights on Wednesday, a Thursday evening Welcome Reception at the World of Coke for all registrants, and on Saturday, outstanding land use tours to the Beltline, a fantastic, multi-use trail cutting through many historic Atlanta neighborhoods, utilizing old rail lines, and also to SunTrust Stadium (home of the Atlanta Braves) at The Battery. Thursday will be Georgia Day at which we anticipate approximately 250 Georgia local government attorneys from across the state to join with IMLA, the State Bar of Georgia's Local Government Law Section, and the Georgia Institute for City and County Attorneys, for concentrated CLE meeting annual Georgia requirements. State breakfasts will be held on Friday and WONK breakfasts on Saturday.

In addition to the annual golf tournament and softball game, Atlanta will be offering a new sports outlet, Soccer in the Streets, at one of its MARTA stations. We think you'll find this innovative and entertaining.

Located within an easy walk of the Hilton Hotel are many fine dining establishments that conference goers will want to explore, and also nearby is Atlanta's Centennial Park, built for the Centennial 1996 Olympics, which remains a focal hub for residents and visitors and forms a viable city center. Adjacent to the Park is the Georgia Aquarium, a popular attraction for visitors and the largest aquarium in the Western Hemisphere, and the College Football Hall of Fame. Nearby is Mercedes-Benz Stadium, home of the Atlanta Falcons and the MLS Champion Atlanta United. One of the most technologically advanced sports arenas in the world, the Stadium offers tours when events are not scheduled.

Atlanta is truly a city of rich history, first-class attractions, Southern charm and world-class sophistication. I'd encourage you to take a look at www.atlanta.net prior to attending the Conference. The Host Committee is working with the Hilton's concierge to assist with dining reservations during the Conference and hopefully will have more information available for registrants before their arrival.

Keep in mind that September in Atlanta is generally quite warm, so plan to dress accordingly. The Atlanta Host Committee expects this to be a great Conference and one I'm sure IMLA members will be talking about for many years to come. ML

Ransomware and Local Governments: Do Not be Held Hostage!

BY: LAWRENCE LEE AND CHRISTOPHER JOHNSON
Jones & Keller, PC, Denver, Colorado



ILLUSTRATION:TRUJILLO DESIGN

Introduction:

Municipalities are in the cross-hairs of an accelerating threat, as malefactors develop ever-more inventive mechanisms to pierce data security regimes and wreak havoc on governmental operations. These unseen criminals may then seek to extort compensation in exchange for restoring functionality. While the following article describes a mythical locality, it is drawn from actual instances of cyber-attacks and demands for ransom. It is intended to assist local government attorneys and officials in anticipating and defending against future intrusions.

The Municipality:

The City of Techville has a population of approximately 250,000 residents. Techville is situated in the state of North Techsylvania, on the Lazy River, which forms the border between the states of North Techsylvania and South Techsylvania. Several suburbs of Techville are located across the Rocky River in South Techsylvania, and citizens of those suburbs commute to work in Techville.

Techville's payroll includes 1,100 employees, a City Council, Mayor, and City Manager. Almost all City employees are provided with Techville-issued computers. The City's largest departments include the Police and Public Works Departments. Techville also maintains its own Department of Information Technology. Kurt Monitor has been the Chief of Information Technology for 12 years and has three reporting employees. Monitor is recognized as one of the better I.T. Chiefs in North Techsylvania. The City operates a wide area network (WAN) that spans its own state and four neighboring states as part of an inter-governmental agreement. The City has three "super" servers that possess last year's technology in processing power. All drafts, which are saved and non-deleted as well as entered data, by all City workers and managers are automatically saved in Techville's servers. Depending on the department or City official, connections are primarily wireless, in its peer-to-peer and general server services networks.

Last Saturday, a volunteer librarian at the Techville library was using a library branch computer to check her personal email when she received a message containing a link to what purported to be a ranked list of "Best Potato Salad Recipes." Overcome with curiosity and a desire to regain the title of "Best Potato Salad" at Techville's upcoming Dog Days of Summer Festival, she clicked the link. Unfortunately, the link was not to a curated list of potato salad recipes, but to an infected website that began downloading malware onto the library computer.

The Attack:

Within a couple of hours, the City of Techville became the unfortunate victim of a relentless cyberattack, which encrypted the City's computer files across all departments, essentially freezing City employees out of the data held on the City's network. The devastating effects of the tsunami-like cyberattack on Techville's network include:

- Techville's Police Department's incident reports and crime reports are inaccessible;
- The Department of Public Works' online payment portal is offline meaning residents are unable to pay their utility bills;
- All City departments' employee personnel files and work schedules are inaccessible and compromised;
- Citizens' birth certificates and marriage licenses are held hostage;
- 750 pending home sales have been delayed, damaging

Techville's real estate market; and
- Confidential information about Techville residents held by the City's Department of Community and Economic Development and Finance Department is compromised.

The perpetrator is part of a hacker collective called "BluMidnite" with domestic and international affiliates. BluMidnite developed a ransomware cryptoworm called "LaterAlligator," which targets computers running the Microsoft Windows operating system. BluMidnite typically uses LaterAlligator to attack corporations, large municipalities and police departments during weekends and holidays when staffing is light.

Using LaterAlligator, BluMidnite sent a ransom note to Techville through Techville's computer system demanding $500,000 in ransom, payable in Bitcoin, to decrypt the City's data. The citizens of Techville are clamoring for a speedy resolution of the incident. Some employees as well as a numerous citizens from a city watchdog group have called for the City to pay the ransom demanded by the cybercriminals, citing the comparatively low amount of the ransom as compared to the anticipated direct, indirect, and consequential costs to remediate the damage to the system recover from the associated effects of the attack. As seen below, Kurt Monitor, the City's IT Director, has a backup plan for consideration.

Considerations for Paying Ransom:

One of the first decisions Techville's leaders will need to make is whether they will give in to BluMidnite's ransom demands. Given the devastating disruption to Techville's operations, the inclination of Techville's city leaders might be to pay the ransom demand in order to restore access to the data; however, there are important reasons why this may not be the best course of action.

In general, industry experts and law enforcement, including the FBI's Cyber Division, advise against paying ransom demands in response to a ransomware attack.[1] Despite the sophistication with which BluMidnite attacked Techville, it is important to remember that the cyber attackers with which Techville is dealing with are criminals, and there can be no assurance that access to the stolen data will be restored upon the payment of a ransom. Indeed, a 2016 survey conducted by Kaspersky Lab and B2B International found that one in five respondents failed to receive access to its data after paying a ransom.[2]

Additionally, the FBI Cyber Division discourages paying ransom to cyber criminals because it reinforces and rewards criminal behavior, thus perpetuating the cybercrime problem. Paying the ransom may even make Techville a ripe target for future attacks, because it will demonstrate to other would-be cyber criminals that Techville is a soft target that is willing to pay up in response to such an incident. Finally, it should be noted that paying the ransom demand would be legally and ethically controversial because Techville will use taxpayer funds to pay the ransom, and the ransom will likely provide financial support for other illegal activity engaged in by BluMidnite and the terrorist groups and rogue-states who may provide them support.

Despite the consensus against paying ransom to end a ransomware attack, the simple cost-benefit analysis between paying a definite amount in ransom today versus the potential of expending significantly larger amounts over weeks and months ahead in an effort to remediate the fallout has caused some victims of cybercrime to pay their assailants in order to restore their data.

There are several recent examples of municipalities holding firm on their decision not to pay a ransom demand in connection with a ransomware attack, despite public pressure to pay up. For example, in March 2018, hackers attacked Atlanta's computer systems using a program called SamSam, shutting down essential city services and causing an estimated $17 million in damage.[3] In that instance, the hackers demanded $51,000 via Bitcoin, and city officials refused to pay.[4] Similarly, in May 2019, Baltimore was crippled by an attack using the ransomware RobbinHood. In that attack, city officials publicly weighed whether to pay the $76,000 ransom demand, ultimately deciding against acceding to the hackers' demands.[5] As of the writing of this article, about 65% of Baltimore's city employees had regained access to their computers and emails and the total cost of the attack was estimated at $18.2 million.[6]

Despite the consensus against paying ransom to end a ransomware attack, the simple cost-benefit analysis between paying a definite amount in ransom today versus the potential of expending significantly larger amounts over weeks and months ahead in an effort to remediate the fallout has caused some victims of cybercrime to pay their assailants in order to restore their data. Indeed, there are plenty of examples of government organizations who choose to comply with a ransom demand in response to a cyberattack. The Westmoreland County Pennsylvania Housing Authority paid hackers $6,500 in Bitcoin in order to restore computer and telephone access in 2018, and the Allegany County Pennsylvania District Attorney's Office paid $1,400 in Bitcoin to resolve a similar situation in 2016.[7] Based on the nuisance value of these payments, clearly the small payment provided to the hackers in exchange for resolution of the attack in both scenarios outweighed the negative perception associated with paying ransom under a cost-benefit approach.

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How Techville can avoid paying ransom:
Unfortunately, the alternative to paying the ransom (and hoping, without any tangible supporting evidence, that BluMidnite will make good on their promise to restore access) is a lengthy and costly process. Luckily for Techville, Kurt Monitor, being one of the best Chiefs of I.T. in the state, has provided Techville with contingency plans in the event of a ransomware attack.

When Kurt Monitor was informed of the attack his first action was to report the incident to local and state law enforcement, the FBI's Internet Crime Complaint Center, and the Department of Homeland Security. Next, Monitor convened a meeting of the Department of Information Technology's Incident Response Team. The Incident Response Team is a group of Department employees and resources who are responsible for providing timely, organized, informed and effective response to information security incidents in order to avoid loss of, or damage to, Techville's I.T. systems, network, and data, and to minimize economic, reputational and other harms to Techville. In connection with these responsibilities, the Incident Response Team is charged with managing internal and external communications regarding information security incidents and providing updates and reporting findings to City leadership.

The Incident Response Team immediately began analyzing the ransomware attack and its effects and began to formulate and implement a response plan to remediate and recover from the incident. One of the first steps in the response plan was to take all backups offline from the City's network. The Incident Response Team then mobilized all resources within the Department of Information Technology and engaged a third-party consultant to begin efforts to contain, remediate, and recover from the incident. Concurrently with these efforts, the Incident Response Team worked with the City's Legal Department to assist it with the capture and preservation of evidence related to the incident. The Legal Department provided advice to the IT Department's staff on establishing appropriate evidence handling and preservation procedures to ensure that those responsible for LaterAlligator would be held to account for their crimes.

The Incident Response Team quickly prepared internal and external communications regarding the incident. The internal communications explained the background for the incident and the City's efforts to contain and remediate the incident and provided talking points for City employees to reference while interacting with the general public. The external communications were focused on providing consistent and accurate information to the media and the public regarding the incident. The Incident Response Team also maintained continual contact with various law enforcement agencies.

The Incident Response Team collaborated with the Legal Department to review implications of the incident under state data breach notification laws. Both North Techsylvania and South Techsylvania have laws requiring the notification of individuals who have been affected by a data breach, though North Techsylvania's data breach notification law is notably more stringent than that of South Techsylvania. Legal Department officials were required to analyze both data breach notification laws and formulate a compliance plan addressing their different notice requirements.

North Techsylvania's data breach law was implicated because a large amount of personally identifiable information belonging to both Techville residents and Techville employees was compromised in the incident. South Techsylvania's data breach notification law, while containing less stringent definitions of "data breach" and "personally identifiable information" was nonetheless implicated due to the compromise of information belonging to Techville employees who reside in South Techsylvania and commute to work in Techville. South Techsylvania's data breach notification law only required notice to the affected persons within 45 days after the incident. North Techsylvania's data breach notification law required immediate notice to the North Techsylvania Attorney General due to the size and scope of the incident. It also required the City to provide notice to the affected persons within 30 days after the incident, along with credit monitoring services and identity theft education and assistance, all at the City's expense.

As a firm believer in the importance of carrying cyber insurance, Kurt Monitor had previously convinced the City Manager and City Attorney to take out a cyber insurance policy that provided first party coverage for data restoration, security breach notification and remediation expense, crisis management services, business interruption, and extortion expenses. The Incident Response Team and the Legal Department collaborated on reviewing the terms of Techville's cyber insurance policy in consultation with the insurance carrier and submitted an insurance claim.

Ultimately, Techville was able to restore its computer systems to 100% functionality within a month after the incident. The total cost to the City was estimated at between $2 million and $3 million, including the costs of the third-party consulting firm that provided additional resources to supplement the I.T. Department during the response. The City's cyber insurance policy covered much of this exposure, but the City was required to pay out of pocket for credit monitoring and identity theft education and assistance for affected residents of North Techsylvania. As the City Attorney recently told the Mayor, "the premiums on the cyber insurance policy were pennies on the dollar for covering most of the damage that was caused by the 'LaterAlligator' ransomware attack."

Once the incident was contained and core systems were returned to functionality, Kurt Monitor called a meeting of the Incident Response Team, key officials from each City Department, and internal and external resources who participated in the response to debrief. Based on the in-

formation collected in the debrief, the Incident Response Team reviewed the City's Information Technology policies and procedures and strengthened them where appropriate. The I.T. Department is now developing a training module that will be rolled out to employees and volunteers city-wide in order to educate them on how to recognize and report potential information security threats.

The I.T. Department will conduct periodic testing exercises to assess compliance with these policies and procedures and awareness around information security.

Develop and cultivate an advanced workplace culture that prioritizes cyber security. All employees should receive mandatory training on the threat landscape, expectations with respect to compliance with policies and procedures, and what their role in a potential incident response may entail.

Takeaways:

Public entity employers face an ever-increasing threat of becoming the victim of a cyber security attack. Ransomware assaults are the latest example of an employer's electronic storage systems being susceptible to sabotage when proper protections are not in place.

All it takes is a single cyber-adverse incident to wreak havoc with a local government by adversely affecting the operations of those working to serve the public good. Municipal attorneys should be collaborating with decision-makers in giving serious thought to the following affirmative steps:

- Adopt thorough policies and procedures for consistent application of information security that will be periodically reviewed and monitored. Compliance should be tested regularly.
- Create and implement an incident response plan with clearly defined roles and responsibilities for those who will be tasked with responding to a cyberattack incident.
- Schedule an initial risk assessment and then have subsequent periodic risk assessments to help identify weak points in the workplace network and policies.
- Encourage and ensure that the I.T. Department stays educated and apprised of developments in the cybersecurity threat landscape. Membership in information sharing consortiums, such as the Multi-State Information Sharing & Analysis Center (MS-ISAC), should be considered.[8]
- As an aside, MS-ISAC receives programmatic support from and has been designed by the Department of Homeland Security as the cybersecurity information sharing and collaboration program for state, local, tribal, and territorial governments. MS-ISAC provides services and information-sharing intended to enhance state, local, tribal, and territorial governments' ability to prevent, protect against, respond to, and recover from cybersecurity attacks and compromises.[9]
- Require that the Director of Information Technology or delegate regularly updates the City Manager and all relevant municipal officials on the threat landscape and emerging trends.
- Develop and cultivate an advanced workplace culture that prioritizes cyber security. All employees should receive mandatory training on the threat landscape, expectations with respect to compliance with policies and procedures, and what their role in a potential incident response may entail.
- Make aware through training and execution the appropriate due diligence on avoiding the cybersecurity risks presented by third party vendors.
- Work with the City's coverage broker or risk manager to obtain cybersecurity insurance. Typical "commercial" insurance policies do not provide coverage to address the many risks presented by a cybersecurity incident; however, such cybersecurity insurance may be available as a separate insurance policy.
- Work with in-house or retained employment counsel knowledgeable in cyber-issues to review or prepare the relevant policies, procedures and plans for implementation and protection of the local government's electronic stored information and database.

Conclusion:

No municipality is immune from an attempted cyber-attack. As rapidly as local governments implement policies and install technology to optimize security, malicious actors develop more sophisticated means to thwart protective measures. When they succeed, a demand for ransom may follow. As the foregoing illustrates, localities can take steps to minimize this risk and resist the demand for payment. ML



Lawrence Lee is a partner in the Denver office of Jones & Keller, PC.. He has 20+ years representing the public sector in trial, federal circuit court of appeals, and administrative employment hearings. He also has extensive experience advising employers on avoiding future claims under federal and state wage and hour laws, Sections 1981 and 1983, federal and state Constitutions, and federal and state anti-discrimination and anti-retaliation laws. He has been named as a super lawyer for the last three years. Larry has a recent history of protecting employers as well as going after third-party hackers of employer's servers and data.



Christopher R. Johnson is an associate with Jones & Keller, P.C.'s Business & Corporate and Banking, Lending & Financial Institutions Practice Groups. Mr. Johnson represents public and private companies and financial institutions on a wide range of transactional and regulatory matters. Mr. Johnson also served as Assistant General Counsel at a publicly traded company where he advised on a number of legal issues including data protection. He is a frequent author and speaker on the topics of data protection and cybersecurity.

The Intersection of Safety and Expression: Injunctive Relief in Crowd Control Measures

BY: DANIEL E. PETERSON AND DEWITT F. MCCARLEY
Parker Poe, Charlotte, North Carolina



Introduction:

All mass demonstrations can present unique issues for law enforcement agencies, but the demonstrations that turn to rioting are peculiarly dangerous. Public participation rights—particularly practiced in the public streets and sidewalks by picketing and parading—are as enshrined in the American ethos as part of what makes us… well… 'us.' What happens when a peaceful demonstration devolves into a violent riot? When tensions spill over into violent rioting, law enforcement agencies must be able to respond, and have confidence that they are responding in accordance with the First, Fourth, and Fourteenth Amendments.

All municipal attorneys should be prepared to defend their law enforcement agency's crowd control tactics in court. In this article, we will focus on what happens when a plaintiff files a complaint and motion for preliminary injunction against a municipality over common crowd control tactics. (We will stick to federal court proceedings, as the allegations are almost always of a constitutional nature.)

In many ways, the municipality's response is a conflation of trial techniques and motion practice, and it occurs over a dramatically reduced time period and without the benefit of discovery. It is critical to avoid an overly broad injunction, which can have deleterious effects on law enforcement's ability to use professional judgment in responding to riotous conditions during the pendency of the judicial order. As such, being prepared to thoroughly, accurately, and quickly tell your client's story serves an important public safety purpose.

Social media has become an unavoidable part of that story. With the proliferation of smart phones and social media, conclusions are drawn by the crowd, based, in many cases, on incomplete facts and raw emotions. Social media can be used to gather both peaceful demonstrators and chaos-seeking rioters from miles around with little notice. As lawyers, we are used to drawn-out processes and deliberative discovery. As the municipal litigator responding to a motion for preliminary injunction, time is not your friend. Therefore, the very same sources—*i.e.*, live social media posts—can be used by you to paint a picture in your briefing and argument to the court that emphasizes the intense circumstances encountered by your police officers on the ground.

We will make suggestions on how to craft such a response efficiently and effectively. We will explain the standard of review for both temporary restraining orders (TROs) and preliminary injunctions. There will be a section on using live video feed from social media as a real-time fact-checker for both the plaintiff(s) and the law enforcement agency. Finally, we will discuss what the case law says about the merits of common claims made against law enforcement in these situations – and provide practical tips for municipal lawyers based on that case law.

I. Standard of Review

a.Temporary Restraining Order

Rule 65(b) of the Federal Rules of Civil Procedure allows for a temporary restraining order to be issued to a party

"only if… specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss or damage will result to the movant *before the adverse party can be heard in opposition*…" (Emphasis added.) Therefore, under the plain language of the rule, the purpose of temporary restraining orders is to provide immediate relief from irreparable harm when formal notice to the adverse party is not possible.

That said, local governments are frequent defendants in TRO filings, so the chief judge in the jurisdiction will not be surprised if the city attorney periodically renews a request for notice and an opportunity to be heard any time a plaintiff seeks a TRO against the city.

If a complaint requests an 'emergency hearing' in the form of a TRO, but then does not obtain that immediate hearing, the plaintiff is really seeking a preliminary injunction. In practice, if you have time to brief a TRO, then the TRO should not issue, given the terms of the federal rule.

b. Preliminary Injunction

"Preliminary injunctions are extraordinary remedies," whose "traditional office… is to *protect the status quo* and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits," according to the U.S. Supreme Court's ruling in *eBay Inc. v. MercExchange*.[1]

The Supreme Court has also explained that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[2] All of these factors must be established for an injunction to issue.

Moreover, the Supreme Court is reticent to permit the imposition of injunctive relief against law enforcement agencies tasked with enforcing state laws:

> We decline the invitation… [in] recognition of the need for a proper balance between the state and federal authority counsels restraint in the issuance of injunctions against sate officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate.[3]

Municipal attorneys should come to court armed with evidence to support their own contentions—i.e., in an intermediate scrutiny of a time, place, manner restriction that the regulation… is 'narrowly tailored' to satisfy the government's legitimate interests.

As the language used in the foregoing case law demonstrates, a complaint seeking injunctive relief against a police department should face a rigorous review from any court.

The public policy reason for this steep climb makes sense. An inflexible judicial order interposed in place over the professional judgment of law enforcement official would have deleterious effects on law enforcement's ability to fulfill its mission of providing for the public safety and welfare. Such an order could invite individuals seeking to perpetuate mayhem by taking advantage of the perceived anonymity of the crowd.

It would also require the police to second-guess an otherwise lawful use of force in the midst of tense and evolving circumstances, with the risks of being held in contempt of court for a use of force later to be determined in violation of the order. Law enforcement agencies cannot be stripped of their authority to use such force as is reasonably necessary to quell a gathering riot.

c. Weight of Affidavit Testimony in Preliminary Injunctions

Though the approach we suggest in this article is similar to a rushed motion for summary judgment, the comparison should neither be taken literally nor too far. Crucially, the difference in weight given to affidavit testimony is distinct and favorable to the defense.

Plaintiffs seeking injunctive relief are not entitled to have their complaint, or any affidavits submitted in support of it, viewed in a light most favorable to their position. Rather, "the weight to be accorded affidavit testimony is within the discretion of the court, and statements based on belief rather than personal knowledge may be discounted."[10]

However, the ultimate burden of proof often lies with the government in cases challenging First Amendment restrictions. Municipal attorneys should come to court armed with evidence to support their own contentions—*i.e.*, in an intermediate scrutiny of a time, place, manner restriction (discussed further below), that the regulation is 'narrowly tailored' to satisfy the government's legitimate interests.[5]

II. How Municipal Lawyers Can Address Substance

Turning to the factual and legal substance of preliminary injunction requests in relation to mass demonstrations, the defense is put in the position

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of rapidly responding to a narrative without the luxury of 21-60 days to respond to an answer, nor likely will depositions and other discovery tools be employed.

Thus, harmonizing old school 'eyes on the ground' with new school 'eyes on social media' is imperative in preparing a quick response to the facts. On the legal response, nothing replaces old fashioned case law research, brief writing, and coffee—though electronic research services certainly make a more complete response much more feasible in a shorter turnaround.

a. 'Insta-Storytelling'

Plaintiff will obviously have the first opportunity to put their perspective of the events out into the public. Unlike a motion to dismiss, the defense practitioner is not confined by the pleadings in responding to a motion for preliminary injunction. Moreover, as many times mass demonstrations are covered by at least local media, placing forth the client's version of the facts quickly and coherently is essential, while also dispelling any mistruths in the plaintiff's retelling.

Reviewing real-time video feed from social media accounts is becoming an imperative in responding to many claims, but particularly claims involving mass demonstrations.[6] Many social media sites now allow for live video feeds to be broadcast from users' accounts and often remain posted after the event.[7] Many social media users—more than one might expect—leave their content completely open to the public. Relying too heavily on unauthenticated video in a prepared response for the court—even at a more relaxed (for evidentiary purposes) posture—can be a pitfall. However, video is a compelling medium for storytelling. This is particularly so if the plaintiff has posted live video on social media – and that video does not match the lawsuit's version of the facts.

Even if unused in briefing or before the court at a preliminary injunction hearing, social media video provides underlying context and can inform the defense's response to the motion for preliminary injunction.

If time can at all permit, obtaining an accurate and documented timeline in the form of an affidavit from a commanding officer provides a competing perspective—*i.e.*, a perspective of a dedicated law enforcement professional versus the perspective of the layman plaintiff. Rushed affidavits, however, can obviously hurt the case down the line if what is recalled by the witness is able to be impeached on cross-examination. It is critical that the affiant have a broad view of what happened on the night in question, how and when orders were given, as well as documentation and collective officer knowledge to corroborate the information provided.

b. Case Law on Responding to Riotous Conditions in Mass Demonstrations

As referenced above, the first and most substantive element of a motion for preliminary injunction is whether the plaintiff has a likelihood of success on the merits. What follows is sample case law from demonstration lawsuits that may serve useful in responding to common claims made by the plaintiff in these cases.

The First Amendment protects mass demonstrations but does not protect riots. Tear gas and other crowd control tactics are entirely constitutional uses of force, and the law does not require that police single each individual rioter out from a crowd that has become, on the whole, unruly and violent.[8] In addition, otherwise peaceful demonstrators have broken the law if they fail to obey a lawful dispersal order in the face of riotous conditions.

Generally, law enforcement officers are permitted to issue dispersal commands when they have reasonable belief that a riot or disorderly conduct of multiple individuals is occurring. Establishing the timeline of dispersal orders via affidavit—including whether and how they were amplified—provides a rebuttal to allegations that the plaintiff(s) could not hear the order(s).

When has a demonstration crossed the line from peaceful protest to a violent riot? In the oft-cited *Brandenburg v. Ohio,* the Supreme Court set the guideposts for when speech may be sanctioned as incitement to riot.[9] The so-called *Brandenburg* test is premised upon the principle that the guarantees of the First Amendment "do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[10] Broken down by the Sixth Circuit into a convenient summary, "[t]he *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech."[11]

The last of those elements is crucial because without it a widevariety of protected speech activities could be precluded based solely on the first two elements. Case law from just before and during the Civil Rights Era, juxtaposed against case law emerging thereafter, helps provide context and set specific parameters. Before and during the Civil Rights Era, some of the cases where so-called 'riots' or 'disturbances of the peace' were broken up with police force were farcical. In those cases, the police—typically in the Jim Crow South—were clearly and unambiguously the aggressor.

As introduced briefly above, decisions of the U.S. Supreme Court from the 1960's relating to the unconstitutional breaking up of peaceful demonstrations provide vivid contrast to cases where demonstrations have become infested with violence and mayhem.

In *Edwards v. South Carolina*, the Supreme Court held that law enforcement violated the First Amendment rights of African American students engaged in a peaceful demonstration who were arrested for breach of the peace.[12] The demonstration numbered about 187 protestors marching on the state capitol grounds "in an orderly way."[13] There were approximately 200-300 onlookers that gathered over the course of over about a half hour. "There was no evidence to suggest that these onlookers were anything but

curious… There was no obstruction of pedestrian or vehicular traffic…"[14] Police presence was sufficient. After about 45 minutes, the demonstrators were advised "they would be arrested if they did not disperse in 15 minutes."[15] The demonstrators did not disperse and they were arrested. The justices noted that, "There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was ample."[16]

In *Cox v. Louisiana*, the Supreme Court was presented with the question of whether a group of supposedly threatening bystanders warranted the discharge of tear gas by law enforcement to break up a peaceful demonstration and to arrest the demonstrators.[17] In a resounding 'no,' the Court noted that "[i]t is virtually undisputed… that the students [*i.e.*, demonstrators] were not violent and threatened no violence. The fear of violence appears to have been based upon the reaction of white citizens looking on from across the street…" and said citizens were separated by dozens of police officers.[18]

Indeed, at the close of the decade, the Supreme Court issued its opinion in *Brandenburg,* officially ushering in a new era in free speech jurisprudence. This new era cast aside a pure 'clear and present danger' test of the bygone era. Ironically, in doing so, the Court in *Brandenburg* encountered the opposite factual circumstances that it encountered in *Edwards* and *Cox*.

In *Brandenburg*, the appellant was the leader of a local Ku Klux Klan that had been convicted under a statute criminalizing speech that "advocate[es] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[19] The Court held that the Ohio statute was overly-broad in that it criminalized "the mere abstract teaching of the moral necessity for a resort to force and violence," because said conduct, the Court reasoned, "is not the same as preparing a group for violent action and steeling it to such action."[20]

However, in the post-*Brandenburg* era, courts have seemingly clarified the contours of *Brandenburg* with some significance in the application of its principles in active practice. Take this quote from *Washington Mobilization Committee v. Cullinane*:

> …[I]t is axiomatic however that the police may, in conformance with the First Amendment, impose reasonable restrains upon demonstrations to assure that they be peaceful and not destructive… And by the same token the First Amendment permits the police to contain or disperse demonstrations that have become too violent or obstructive.[21]

Cullinane is instructive because the D.C. Circuit examined the constitutionality of applied police mass demonstration procedures in the nation's capital—specifically mass arrests resulting from demonstrations that turned violent. Plaintiffs were peaceful protestors that were arrested as a result and sought to enjoin the D.C. Police from being able to disperse crowds in this way. The Court rejected the "unrealistic" expectation that police prune each individual bad actor from a crowd.

> It is the tenor of the demonstration as a whole that determines whether the police may intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit. 'Where demonstrations turn violent, they lose their protected quality as expression under the First Amendment…' Confronted with a mob the police cannot be expected to single out individuals; ***they may deal with the crowd as a unit*** (emphasis added).[22]

Similarly, in *Barney v. City of Eugene*, the Ninth Circuit concluded that, as a matter of law, the plaintiff was not entitled to relief under § 1983 for deprivations of her First Amendment rights.[23] Law enforcement deployed a tear gas canister at a peaceful protestor while participating in a growingly riotous protest.[24] At the conclusion of discovery, there was no material dispute of fact that the demonstration had turned violent and there was no forecasted evidence that "her exposure to tear gas and any effect on her First Amendment activities were anything other than the unintended consequence of an otherwise constitutional use of force under the circumstances."[25]

When possible, prior to the use of tear gas, providing notice is preferred, as the purpose is to gain compliance and not use force as an end in itself. That said, notice is not required. In *Dalrymple v. U.S.*, the use of a gas gun against demonstrators outside the home where INS agents were executing warrants to remove a child was found to be objectively reasonable when the demonstrators attempted to interfere and threw objects at the agents.[26]

Finally, a recent opinion from the U.S. District Court for the Western District of Virginia clarifies long-standing case law post-*Brandenburg,* which reasserts that "the First Amendment does not protect violence."[27] The opinion in *Sines v. Kessler* disposed of a motion to dismiss filed in a lawsuit brought in the wake of the Charlottesville, Virginia rioting by "the Ku Klux Klan, various neo-Nazi organizations, and associated white supremacists."[28] The plaintiffs—ten Charlottesville residents—brought the lawsuit alleging a conspiracy to violate their civil rights. Though the court's ruling did dispose of some of the plaintiffs' claims, much of the conspiracy claims remained.

In allowing the conspiracy claims to survive a Rule 12(b)(6) challenge, the court rejected the defendants' claim that the First Amendment immunized them from liability. Couching its holding in *Brandenburg*, the court concluded that the allegations in the complaint were "replete with specific allegations that extend beyond mere 'abstract' advocacy."[29] Illustrative allegations include "Defendants encourage[ing] the throwing of torches at counter-protestors,… ordered others to 'charge!'[,]… distributed shield fighting tactics, instructed members to wear 'good fighting uniforms,' and recom-

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The Professional and Ethical Obligations of Municipal Attorneys

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ILLUSTRATION: TRUJILLO DESIGN

Introduction

Not every issue that municipal lawyers confront will require an extensive analysis of ethical principles, but it is critical that we understand those duties and rigorously discharge them. This article is intended to review certain of those responsibilities. It cites New Jersey precedents and the New Jersey Rules of Professional Conduct, which closely follow the ABA Model Rules and should therefore be useful for most readers.

I. Municipal Attorneys – Who is our client?

How often are municipal attorneys asked by individual members of a governing body to provide them with advice on certain matters relating to the performance of their duties (or even matters falling outside the scope of their duties), and they say to us, "Now this is privileged, right?" The answer, of course, is that conversations with individual elected officials do not always fall within the attorney-client privilege. Because underlying that question is the assumption that each member of the governing body is also individually our client. That is, in fact, not the case. N.J.S.A. 40A:9-139 provides:

> In every municipality the governing body, by ordinance, shall provide for the appointment of a municipal attorney who may be designated as the corporation counsel or municipal attorney…

By statute, then, the attorney for the municipality is just that: the attorney for the municipality. He or she is not, by virtue of that status, also separately the attorney for each individual member of the governing body. A municipality is a municipal corporate body politic. N.J.S.A. 40:43-1. The governing body of a municipality is "the board or body having control over the subject matter in connection with which the term is used, and having the power and authority to legislate thereon…" N.J.S.A. 40:42-2. The distinction between representation of the governing body, and "being the attorney for the members of same." is important. It relates not only to defining the scope and duties of the statutory position of municipal attorney, but implicates other issues such as the application of the attorney-client privilege; disclosure obligations; recusal from certain matters, and the like.

The New Jersey Advisory Committee on Professional Ethics issued Opinion No. 655 on December 9, 1991. It wrote:

> It is well recognized that in carrying out his official duties, a municipal attorney represents the collective governing body and not the individual members. This is based upon R.P.C. 1.13(a) which states that a lawyer representing any organization represents the collective organization as distinct from directors, officers, employees, members and the like.

New Jersey R.P.C. 1.13(a) actually says:

> A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other

> constituents. For purposes of R.P.C. 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entities, but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that 'significant involvement' requires involvement greater, and other than, the supplying of factual information or data respecting the matter…

Under this Rule, the municipal attorney's duties are to the organization, and not to its individual "directors, officers, employees, members, shareholders or other constituents." The Model Rules do not include the language describing the "control group." Instead, the Model Rules simply encourage lawyers to make clear to an organization's directors, employees, members, shareholders, or other constituents, that when the organization's interests may be adverse to that individual, the lawyer's duty is to the client organization only.

Nevertheless, in the course of representing a public entity, as with any other corporation, the corporate attorney is often asked to give advice to individual governing body members, the manager/administrator, assessor, clerk, department heads, and staff. To the extent that they relate to the activities of the governing body, this advice would appear to be equally privileged, as those corporate officers would certainly fall within the entity's "control group." New Jersey R.P.C. 1.13(a); see also M.R.P.C. 4.2, 4.3; *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981), (where the United States Supreme Court recognized that middle level and lower level employees often have the relevant information needed by corporate counsel if (s)he is to adequately advise the client with respect to potential difficulties); and, New Jersey Evidence Rule 504(3)[11] (and N.J.S.A. 2A:84A-20), which provides:

> As used in this Rule a 'client' means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyers representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity...A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

Therefore, communications by such employees to corporate counsel are covered by the privilege. In contrast, Model Rule 1.13 does not include the language describing the "control group." Instead, the Model Rules leave the difficult issue of privilege for each state to decide, while encouraging lawyers to make clear to an organization's directors, employees, members, shareholders, or other constituents, that the organization itself, and not that individual, is the client. That, of course, is necessary and appropriate, because the client remains the municipal corporation. (This is not to say, however, that a municipal attorney cannot represent individual members of the governing body in matters not relating to municipal business. The municipal attorney can, for example, represent individual governing body members with regard to personal Wills and Estate issues, corporate matters in which the member of the governing body is a shareholder or member of a limited liability company, etc. Obviously, in such cases, the representation/relationship must be disclosed to the other members of the governing body; and it is suggested that the member who is represented by the municipal attorney, should not vote on the Municipal Attorney's appointment or re-appointment, payment of her/his bills, etc.)

The distinction between the municipal attorney's obligations to represent the municipal corporation, as opposed to individual members of the governing body, is underscored where issues arise that suggest some form of impropriety or misconduct by an individual member of the governing body.

The distinction between the municipal attorney's obligations to represent the municipal corporation, as opposed to individual members of the governing body, is underscored where issues arise that suggest some form of impropriety or misconduct by an individual member of the governing body. In *Bell Atlantic Corp. v. Bulger*, 2 F.3d 1304 (3d Cir. 1993), the court was confronted with an allegation of a conflict-of-interest of a law firm representing Bell Atlantic Corp., and certain individual defendants. The Circuit looked to the commentary under the Model Rules of Professional Conduct, R. 1.13(a), upon which New Jersey's R.P.C. 1.13 is based. The court wrote:

> We look to the Model Rules of Professional Conduct to furnish the appropriate ethical standard (cit. om.) Under R. 1.13(a), a lawyer's obligation runs to the entity. The commentary to R. 1.13 provides:
>
> > The question can arise whether counsel for the organization may defend [a derivative]

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> action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those instances, R. 1.7 governs who should represent the directors and the organization.
>
> We believe serious charges of wrongdoing have not been levelled against the individual defendants… There are no allegations of self-dealing, stealing, fraud, intentional misconduct, conflicts of interest, or usurpation of corporate opportunities by defendant directors…
>
> We have no hesitation in holding that - - except in patently frivolous cases - - allegations of directors' fraud, intentional misconduct or self-dealing require separate counsel. We recognize that corporate law has traditionally distinguished between breach of the duty of care and breach of the duty of loyalty, the latter being more great…[12]

In this regard, in the municipal context, Opinion 526 of the New Jersey Advisory Committee on Professional Ethic [113 N.J.L.J. 383 (April 5, 1984)] is instructive. The question posed in Opinion 526 arose where "an insurer filed suit against the municipality joining certain officials of that public body in a claim that the defendants made willful misrepresentations and committed fraud in seeking indemnity in excess of its lawsuit entitlement under contract." The Committee concluded that:

> The duty of the municipal attorney includes the need to exercise his professional judgment on behalf of his public body free from and independent of any interest or bias he may have for or against municipal officials with whom he or she is in continual day-to-day contact on the regular affairs of that municipality. If the professional contact with the co-defendant official is substantial and continuing, special counsel should be engaged to defend the municipality.

When that elected official asks you, "Now this is privileged, right?" the answer needs to be "Well, it depends"; but also caution that person: "Since I represent the public body as a corporation, what you tell me may be privileged as to the corporation, but it's not privileged in that I may have an obligation to tell the other members of the governing body what you are about to tell me. So think about that before you begin this confession!"

II. Privileged versus Public Communications

It is settled that the attorney-client privilege applies to public entities as well as private corporations.[13] In the public sector, however, not every written communication will be protected from disclosure by the privilege.

New Jersey statutory law defines "government record" or "record" to mean:

> Any paper, written or printed book, document, drawing, map...or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commissioner, agency or authority of the state or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commissioner, agency, or authority of the state or of any political subdivision thereof, including subordinate boards thereof...
>
> The terms shall not include inter-agency or intra-agency advisory, consultative or deliberative material.[14]

There is specifically exempted under the statute, however, "any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or involves except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege. . . ."[15]

In New Jersey, as in many states, municipal attorneys are "government officers."[16] Since our public entity clients, and their elected and appointed officials, "receive" our communications, the communications are public records. The question, of course, is whether the attorney-client privilege exempts them from disclosure.

In determining whether a communication falls within the privilege, courts generally engage in a balancing test. Courts recognize that the attorney-client privilege is "limited to communications made to the attorney in his professional capacity."[17] In a New Jersey case, a plaintiff, who sued her employer under the State Law Against Discrimination, sought the results of an investigation into her pre-litigation claims, which investigation involved in-house counsel for the New Jersey Turnpike Authority. The Turnpike Authority asserted the attorney-client privilege and refused to release the report. The court wrote:

> Defendant maintains that the attorney-client privilege protects the entire investigatory process because attorneys employed by defendant participated in the investigation. We disagree with that blanket contention... While an organizational corporation like Defendant can be a 'client' for purposes of the privilege, NJRE 504(3), a fine line exists between an attorney who provides legal services or advice to an organization and one who performs essential non-legal duties. An attorney who is not performing legal services or providing legal advice in some form does

> not qualify as a 'lawyer' for purpose of the privilege. Thus, when an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable. That result obtains even where litigation may eventually arise from the subject of the attorney's activities.
>
> The key issue regarding the applicability of the privilege in this case is the purpose of the various components of the investigation that defendant initiated into plaintiff's allegations of sexual harassment. If the purpose was to provide legal advice or to prepare for litigation, then the privilege applies. However, if the purpose was to simply enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.[8]

Accordingly, if the nature of the lawyer's activities are not specifically related to the practice of law but involve some other assignment which, while presumably relying upon the attorney's general skill set, is not necessarily construed as "giving legal advice," any communications arising from same may not be protected by the privilege; and absent some other exception, could be subject to discovery and/or dissemination.

How are general communications from the municipal attorney to the municipal client treated, vis-a-vis, legal opinions? Often, we mark them "Personal & Confidential: Attorney-Client Privilege," because they do indeed constitute pure legal advice. However, it is often to the governing body's benefit to make that advice known to the public. Keeping in mind that the privilege is always waivable by the client, the governing body, as a whole (and not through any one of its individual members acting unilaterally), can vote to make the opinion/advice public.

[I]f the nature of the lawyer's activities are not specifically related to the practice of law but involve some other assignment which, while presumably relying upon the attorney's general skill set, is not necessarily construed as "giving legal advice," any communications arising from same may not be protected by the privilege; and absent some other exception, could be subject to discovery and/or dissemination.

Closed Session Minutes. The New Jersey Open Public Meetings Act[9] has two sections that come into play in this discussion of "public v. private" communications in the field of local government law. N.J.S.A. 10:4-12 requires all meetings of public bodies to be open to the public at all times. However, it provides a number of exceptions including the following:

> 10:4-12(b). A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> (7) any pending or anticipated litigation or contract negotiation other than in subsection b.4 herein in which the public body is or may become a party.
>
> Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

N.J.S.A. 10:4-14 requires that:

> Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12(b)(7)].

Accordingly, the question arises as to when and under what circumstances, can minutes of closed sessions, where the attorney-client privilege was invoked as the reason for going into closed session, be released. First, as indicated in § 10:4-12(b)(7), the matter falling within the attorney-client privilege can be discussed in closed session "to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." Thus, in the simple situation where we are often asked to give an opinion in public, and there is no particular confidentiality, privacy interest, or other reason not to give it publicly, we generally do so. However, there is often advice that we want to give to the governing body that we do not want to share with the general public. The courts have recognized this need:

> Although New Jersey has a notably strong public policy in favor of open government as evidenced by the Open Public Meetings Act, N.J.S.A. 10:4-6 to —21, and the Right to Know Law, N.J.S.A. 47:1A-1 to -4, the public's right of inspection is not unlimited....Thus, the Legislature recognized that matters falling within the privilege should be free from public review notwithstanding that a government entity is a client and despite the strong public policy favoring maximum access to government deliberations.[10]

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With regard to closed session minutes, the court in the Turnpike Authority decision referenced above stated:

> If a communication is covered by the privilege, then the public body may legitimately meet with its attorney in closed session. The minutes, part or all of which may constitute work product, then may be appropriately suppressed or redacted.[11]

The question then becomes: at what point do the minutes become subject to disclosure at a later date, after the matter is concluded? And, how long are you allowed to keep closed session minutes "closed"? The *Press v. Ocean County Joint Insurance Fund* court addressed these as well:

> The Court should also consider whether the requested documents pertain to pending or closed cases as the need for confidentiality is greater in pending matters. (Citing to Keddie v. Rutgers, 148 N.J. 36, 54 (1954). Nevertheless, `even in closed cases...attorney work product and documents containing legal strategies may be entitled to protection from disclosure.' Id. The attorney-client privilege 'recognizes' that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system... Moreover, there is a manifest potential for chilling the free flow of communications between attorney and client, if strategy, advice and evaluation are to be disclosed even upon the conclusion of cases. The possibility that settlements will be inhibited is clear. Feared disclosure of such privileged communications, even after the case is completed, could severely restrict a public entity's willingness to resolve litigation by settlement. That prospect contravenes the strong judicial policy favoring consensual resolution. The public interest in rapid and cost-efficient disposition of claims against government bodies, as well as the fundamental fairness of adjusting claimant's rights fairly and promptly, argues for the protection of that portion of the process that is most critical in accomplishing those goals.[12]

Similarly, this analysis should be applied not just to the settlement of lawsuits, but to negotiations regarding, for example: contracts with unions, so that the strategies, which likely will be the same in three years after the current contract expires, are not disclosed to the union; negotiations leading to an agreement to acquire real estate (you never want the seller of the property to know that you were really willing to pay more!); and similar matters that require full candor. Therefore, non-disclosure of the advice by an attorney to his/her clients, and of the client's questions and implementation of those strategies, is advisable.

III. Whistleblowing: The Duty to Report?

M.R.P.C. 1.6 provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
> (b) A lawyer may13 reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime of fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> (6) to comply with other law or a court order; or
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

N.J.S.A. 2A:84A-20(1) and Evidence Rule 504 both provide:

> Subject to Rule 530 and as except as otherwise provided by paragraph

> 2 of this Rule, communications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has privilege (a) to refuse to disclose any such communication and (b) to prevent his lawyer from disclosing it...

Finally, M.R.P.C. 1.4 provides:

> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The question presented is, what do you do when a member of the governing body, or, for example, the Township Manager or Administrator, or Municipal Clerk confides in you as the municipal attorney, that he or she has done something which may well be contrary to the interests of the municipality, and/or create an adverse relationship between that person and the Township? This, again, invites the recognition that the client of a municipal attorney is the municipality, and that while the individual officials may enjoy some claim of nondisclosure through the attorney-client privilege, none of them are "the client." A municipal attorney's obligation remains to the client: the municipality. Accordingly, if an individual member of the governing body, or a member of its "control group" brings such information to the municipal attorney, it appears clear that the municipal attorney has the obligation to keep his client informed to the "extent reasonably necessary to permit the client to make informed decisions regarding the representation." M.R.P.C. 1.4(b).

Caselaw also offers guidance:

> This appeal concerns the conflict between two fundamental obligations of lawyers: the duty of confidentiality, Rules of Professional Conduct (R.P.C. 1.6(a), and the duty to inform clients of material facts, R.P.C. 1.4(b)...Crucial to the attorney-client relationship is the attorney's obligation not to reveal confidential information learned in the course of representation. Thus, R.P.C. 1.6(a) states that 'a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized and ordered to carry out the representations.' Generally, 'the principle of attorney-client confidentiality imposes a sacred trust on the attorney not to disclose the client's confidential communication.' (*citation omitted)*. "A lawyer's obligation to communicate to one client all information needed to make an informed decision qualifies the firm's duty to maintain the confidentiality of a co-client's information. R.P.C. 1.4(b), which reflects a lawyer's duty to keep clients informed, requires that 'a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.' See, also Gautam v. DeLuca, 215 N.J. Super. 338, 397 (App. Div. 1987) (stating that an attorney has continuing duty to 'inform his client promptly of any information important to him'); Passanate v. Yormark, 138 N.J. Super. 233, 238 (App. Div. 1975) (attorney's duty 'includes the obligation of informing his client promptly of any known information important to him')...[14]

Accordingly, the municipal attorney is under an obligation to report to the governing body, matters brought to his or her attention, which would be important for the governing body to know in the furtherance of its duties on behalf of the municipal corporation. Presumably, if the information brought to the municipal attorney relates to some proposed act of a criminal or fraudulent nature, then the attorney would be allowed under M.R.P.C. 1.6(b), and obligated under the New Jersey Rules, to disclose that information to "the appropriate authorities."

IV. Representing Clients After Public Service

In New Jersey, most municipal attorneys maintain separate, private law practices, and generally do not devote full time to their position as municipal attorney. Obvious exceptions, of course, are found in the Cities of Newark, Jersey City, Trenton, Atlantic City, Camden and other major municipalities. While all municipal attorneys are considered "local government officers" (because N.J.S.A. 40A:9-139 creates the required position of "municipal attorney," and because Attorney General Opinion 91-0092, says so), most are appointed under New Jersey's Local Public Contracts Law, N.J.S.A. 40A:11-5, through the award of a "professional service" agreement. Under either scenario, however, one's tenure as a municipal attorney is not always long in duration. Given the nature of the position as a political appointment, "things often change." As a consequence "former municipal attorneys" are often sought by private clients to represent their interests "in front of," or against, the attorney's former client/employer. The question, of course, is whether an attorney who previously, and perhaps even "recently" served as a municipal attorney, can represent private clients in matters adverse to that public entity's interests; and, if so, under what circumstances may (s)he do so.

Under many state statutes, employees of state departments are required to wait a period of time, often one year, before taking employment that requires them to appear before, submit applications to,

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AMICUS CORNER

BY: *Amanda Kellar, IMLA Deputy General Counsel and Director of Legal Advocacy*

What Does "Because of Sex" Mean?

The title of this article presents a simple question with complicated and often conflicting answers. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII"), provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individua…l with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Since Congress passed Title VII in 1964, the term "because of sex" has been interpreted in conflicting ways by federal courts, with the Second and Seventh Circuits recently concluding that it proscribes sexual orientation discrimination, while every other circuit court to have considered the question has held otherwise.[1]

Similarly, the Sixth Circuit and Ninth Circuits have held that the term "because of sex" covers gender identity and therefore Title VII's protections extend to transgender employees, while the Eighth and Tenth Circuits have held that it does not.[2] To add another layer of confusion to the issue, the Equal Employment Opportunity Commission ("EEOC") has interpreted Title VII to prohibit discrimination based on sexual orientation and gender identity while the Department of Justice has recently overruled its own interpretation that Title VII covers sexual orientation and gender identity.[3]

As the foregoing underscores, the law is not at all settled in this area. In a trio of cases which will be sure to be among the most hotly contested and anticipated for the 2019 October Term, the Supreme Court will put the issue to bed and decide whether the term "because of sex" under Title VII prohibits discrimination based on sexual orientation and transgender status. The cases are *Bostock v. Clayton County* (sexual orientation), *Altitude Express v. Zarda* (sexual orientation), and *R.G. & G.R. Harris Funeral Homes v. EEOC* (transgender status).

Legal Background

An employee makes out a prima facie case of sex discrimination when the employee's sex was a "motivating factor" in the employment practice.[18] In the context of sexual orientation, two Supreme Court decisions provide important context: *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702- (1978) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Manhart*, the Supreme Court concluded that Title VII prohibits discrimination based on a trait, such as life expectancy, that is a function of sex.[5] A decade later, in *Price Waterhouse*, the Court held that a female accountant who was passed over for a promotion because she needed to walk, talk, and dress more femininely, wear more makeup and jewelry, and act less aggressively could bring a claim for sex discrimination under Title VII based on sex stereotypes.[6] Concurring in the judgment, Justice O'Connor explained that Hopkins had proved that her "failure to conform to the [gender] stereotypes …had been a substantial factor in the [employment] decision."[7] Indeed, as the Court pointed out, "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"[8]

Sexual Orientation Discrimination

Although the Second Circuit had previously concluded that sexual orientation was not covered by Title VII, the full en banc court decided to revisit the issue in *Zarda v. Altitude Express*.[19] The facts of the case are straightforward: Donald Zarda worked as a skydiving instructor for Altitude Express and claims he was fired for being gay. The full en banc court overruled its prior precedent and concluded that Title VII prohibits sexual orientation discrimination based on the text of Title VII, the entire statutory context, and Supreme Court precedent.[20] The Second Circuit noted that the critical inquiry in this case was whether "an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation."[21] The court concluded the most natural reading of Title VII's text is that it is. The court also noted that its textual reading was reinforced by considering the issue through the lens of sex stereotyping case law as well as through the perspective of associational discrimination.

In terms of the textual argument, the court explained that "one cannot fully define a person's sexual orientation without identifying his or her sex" and it therefore follows that sexual orien-

tation must be a function of sex and therefore a protected characteristic under Title VII.[22] Put in layman's terms: "firing a man because he is attracted to men is a decision motivated, at least in part, by sex."[23] The employer and its amici argued, in part, that Congress could not have had sexual orientation in mind when it enacted Title VII in 1964. However, the Second Circuit rejected this argument, pointing out that it should not matter if Congress had sexual orientation discrimination in mind when it passed Title VII given the fact that the Supreme Court has found sexual harassment and hostile work environment claims actionable, including "male-on-male sexual harassment," even though "male-on-male sexual harassment" was "assuredly not the principal evil Congress was concerned with when it enacted Title VII.[24]

The Second Circuit also explained that the Supreme Court's decision in *Price Waterhouse v. Hopkins* further reinforced its conclusion and demonstrates that sexual orientation discrimination is "almost invariably rooted in stereotypes about men and women."[25] Impermissible sex stereotyping occurs in the context of sexual orientation discrimination where an employer acts on the belief that men cannot be attracted to men but takes no adverse employment action against women who are attracted to men (and vice versa). Additionally, the court notes that associational discrimination claims, which have come up in the context of race discrimination where for example, a white employee is fired for being married to a black person, further support the court's conclusion. The court notes that the same logic holds for a female employee who is fired for being married or in a relationship with a woman.[26]

In *Bostock v. Clayton County*, the Eleventh Circuit, in conflict with the Second Circuit, rejected a claim of sexual orientation discrimination in a short, three-page decision.[27] Specifically, the court held that it was bound by the circuit's prior precedent rule, unless an intervening Supreme Court or full en banc decision is issued. Here, the Eleventh Circuit had previously ruled in 1979 that sexual orientation was not covered by Title VII and the panel in the case was therefore bound by that rule.

Transgender / Gender Identity Discrimination

R.G. & G.R. Harris Funeral Homes v. EEOC presents the question of whether Title VII prohibits discrimination against transgender individuals either because of their status as transgender or via sex stereotyping under *Price Waterhouse*. In this case, a funeral director named Aimee Stephens (formerly Anthony Stephens) was born biologically male. She had worked for the funeral home for five years and during that time, she had presented herself as male. In July 2013, Stephens told the owner of the funeral home, Rost, that she had struggled with "a gender identity disorder her entire life" and that she planned to have sex reassignment surgery to "become the person that her mind already is." She told Rost that she planned to take a vacation in August and then return as a woman, Aimee Stephens, and that when she returned, she would wear appropriate business attire. Just before Stephens left for vacation, Rost fired her and he later testified that he did so because Stephens "was no longer going to represent himself as a man; he wanted to dress as a woman."[28] Ross further testified that he "sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift…" and that his religious beliefs played a role in his decision.[29]

Stephens sued under Title VII, and the Sixth Circuit concluded that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex…" because "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." The court notes that the inquiry is simple: Would Stephens "have been fired if Stephens had been a woman who sought to comply with the women's dress code?" The answer according to the court, "quite obviously is no," which ipso facto confirms that sex impermissibly impacted the decision to fire Stephens.

In addition to transgender status being covered by Title VII's "because of sex" provision, the court also concluded that firing someone because of their transgender status also constitutes impermissible discrimination based on sex stereotyping under *Price Waterhouse*[30] The court explained that the decision to fire Stephens based on the fact that she wanted to represent herself as a female and dress as a woman "falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* … forbid[s]."[31]

Predictions

These cases represent the Court's first foray into LGBTQ issues since Justice Kennedy's retirement last June. It seems likely that the four liberal Justices (Justices Ginsburg, Breyer, Kagan, and Sotomayor) would side with the employees in these cases. Justice Kennedy was the perennial swing vote on the Court for many issues, but in particular, he provided the crucial fifth vote for many LGBTQ rights cases including *Obergefell v. Hodges,* the landmark case declaring that same sex couples have the constitutional right to marry on the same terms as opposite sex couples.

With Justice Kennedy's departure, common wisdom is that Chief Justice Roberts is now the "swing" Justice on the Court. However, LGBTQ advocates are unlikely to find that he is amenable to their arguments, particularly given his strong dissent in *Obergefell* wherein he likened the Court's decision to *Dred Scott v. Sanford,* a case which is universally considered one of the worst decisions in the Supreme Court's more than 200 year history.[32] It is worth noting that marriage and discrimination laws are quite different, and *Obergefell* required interpreting the Constitution while these cases present a statutory interpretation question, which may make them less controversial. Furthermore, although the Chief Justice is far more conservative than Justice Kennedy, he also sees himself as the institutional guardian of the Supreme Court as Chief Justice. He therefore may try to steer the Court away from 5-4 decisions that fall on ideological lines as much as he can so as to prevent the Court from appearing partisan in the eyes of the public and if a compromise can be brokered in controversial cases, he may attempt to do so.

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INSIDE CANADA

BY: MONICA CIRIELLO
Ontario 2015

Argumentative Speeders, Inventive Builders, and More

Appellant Tries to Pull a Fast-one on the Court
Kirshen v. York (Regional Municipality), 2019 ONCJ 313 http://canlii.ca/t/j08z6

The Appellant was charged with speeding in the Region of York ("Region") contrary to section 128 of the *Highway Traffic Act,* RSO, 1990 c. H8 ("*HTA*"). The Appellant requested a trial. At trial the police officer ("Officer") testified how the BEE III mobile radar device ("Device") was used to capture the Appellant's speed of 100km/hr in a 60km/hr zone. The Officer further testified how the Device had been tested before use and successfully tested after pulling the Appellant over. The Appellant was convicted and appealed, arguing that the trial court erred in finding that the Device had been operating properly. The Appellant challenged the reliability of the findings obtained by using the Device, given that the Officer testified that a step outlined in the Device manufacturer's manual had been omitted.

HELD: Appeal was dismissed.

DISCUSSION: Both parties agreed that the general ability to measure speed via radar is not at issue, and as a result the Device is generally a reliable mechanism. The issue before the Court was whether the Officer failed to use tuning forks to calibrate the Device as outlined in the manufacturer's manual ("Manual"). This may result in the Device being inaccurate or producing unreliable results. The Appellant relied on *R v. Niewiadomski* [2004] OJ No 478 to suggest that the requirements are published in the Manual for a reason, and any deviation from the Manual should raise concerns.

The Court noted that the Appellant had failed to mention the abundance of case law, including from the Court of Appeal, that "departures from recommended practice may, not must leave a reasonable doubt." *R v. Xu* 2012 ONCJ 278, *R v. Lam* 2016 ONCA 850. The Court found that the failure to follow a step in the Manual did not have any effect in this instance, because the Officer indicated that tuning forks were only needed to calibrate earlier versions of the Device, not the version used by the Officer during this occurrence. The Manual is useful for some features of the Device, but the failure to follow a step that no longer applies has no impact on its accuracy or reliability.

Justice of the Peace has Limited Discretion to Alter Speeding Fines
Greater Sudbury (City) v. Balli, 2019 ONCJ 364 http://canlii.ca/t/j0qr4

Three separate defendants (collectively "Defendants"), were charged with speeding under section 128 of the *Highway Traffic Act,* R.S.O. 1990, c. H.8 ("*HTA*"). The Defendants proceeded to participate in an early resolution process under section 5.1 of the *Provincial Offences Act,* R.S.O. 1990, c.P.33 ("*POA*") and had reached settlement agreements with the prosecution, including a joint proposed fine. The Justice of the Peace ("JP") noted that the joint proposed fines exceeded the "set fine" or "fixed fines," and expressed concern that the Court did not have the authority to impose the joint amount of the fine submitted.

HELD: Joint submission was denied.

DISCUSSION:
The legislature has stated that the JP has limited judicial discretion for imposing speeding fines, *York (Regional Municipality) v. Winlow,* 2009 ONCA 643. Section 5.1, subsection 9(b) of the *POA* states that there are only two types of fines that are permitted to be imposed by a JP following an early resolution of a speeding offence. One is a 'set fine' which is a reduced fine that is available when a matter settles without a trial, and the second is a 'fixed fine' outlined in section 128(14) of the *HTA* which applies when the defendant is convicted through a trial or a guilty plea. *R v. Garwel*, 2016 ONCJ 217. The issue for the Court was whether there is judicial authority to impose a speeding fine that exceeds the applicable 'set fine' or 'fixed fine' when the fine amount is jointly proposed following an early resolution meeting.

The Court held that every fine, even one following a joint submission must be permitted at law. In this case, following an early resolution, the only lawful speeding fine is either the 'set fine' or the 'fixed fine.' As a result a statutory penalty against the Defendants cannot be created on consent. The only discretion available to the JP following the early resolution process for a speeding offence relates to the time granted to a defendant to pay. The Defendants' joint fine submissions were denied.

City Not Responsible for Actions of Third Party Contractor
R. v. Greater Sudbury **(City),** 2019 ONSC 3285 http://canlii.ca/t/j0tjh

The Ministry of Labour charged the City of Sudbury ("City") with actions contrary to the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1 ("*OHSA*"). The City entered into a contract with a third party to do water main repairs on a City street. As per the contract, the contractor assumed control over the entire road construction project as well as the responsibility to ensure that the requirements

of the *OHSA* were met. A resident died while attempting to cross a City street that was under construction where a fence was supposed to be erected between the public right away and the street, but was not. The City was acquitted on all six charges laid by the Ministry of Labour. After reviewing all evidence before it, the trial judge held that the City was not an employee or constructor as defined under the *OHSA* on the road construction project. The trial judge further stated that the Crown put this project under a microscope in order to find some instances where the City may have overstepped its role. However, the evidence suggested that the City did not over step its role as a constructor. The Crown appealed the decision, arguing that the trial judge made findings that were not supported by evidence.

HELD: Appeal was dismissed

DISCUSSION: The Crown maintained that the City acted as a constructor and that the trial judge erred by not finding the City responsible, despite its role overseeing quality control. The Court cited section 3 of the *OHSA* which indicates the limitation surrounding the definition of constructor, particularly that an owner does not become a constructor by virtue of the fact that it has engaged professional persons to oversee the quality control of a project. The Court held that the reasons put forward by the trial court were correctly found and interpreted based on the facts before the court. As a result, the Court found no error in the trial court's application of the definition of constructor. The appeal was dismissed.

Duplex Permit Denied: Not a Legal Non-conforming Use
***Elbasiouni v. Brampton** (City),* 2019 ONSC 3524 http://canlii.ca/t/j0v1t

The Appellant applied for a building permit from the City of Brampton ("City") to build a duplex on his property. The Chief Building Official ("CBO") at the City granted the building permit, but then promptly revoked it when it was noted that the zoning of the property did not permit duplexes. The Appellant appealed the revocation under section 25 of the *Building Code Act*, 1992, S.O. 1992, C. 23, ("*Act*"). The appeal was dismissed. The Appellant sought an order under Rule 59.06(2)(a) to set aside the dismissed decision and submitted a schedule that the Appellant claimed was included in the City's comprehensive zoning bylaw that permitted duplexes. Upon review, the motion judge determined that it was not a genuine schedule to the City's zoning bylaw and dismissed the motion. The Appellant put forward another motion to set aside the dismissal and brought forward another new ground for appeal. The Appellant suggested that the former use of the property as a multifamily dwelling was a legal nonconforming use and therefore a duplex should be permissible.

HELD: Appeals were dismissed.

DISCUSSION: In addressing the Appellant's first motion, the Court was to determine if the schedule provided by the Appellant was genuine. The City agreed that if the schedule was found to be a part of the zoning bylaw, the Appellant would be entitled to a building permit. When presented with the evidence from the City that no such schedule existed in City records or archives, paper or electronic, the Court had no option but to conclude that the schedule was not genuine. The second motion pertained to a legal nonconforming use, the Court determined that the Appellant was merely re-arguing his appeal from the decision of the CBO that the zoning bylaw permits multifamily dwellings and as a legal nonconforming use applies to permitting duplexes. The Court held that the Appellant was not entitled to a second appeal under the *Act* on the grounds that it was not argued the first time. Even if the argument was permitted, the Court held that the proposed use by the Appellant was an extraordinary intensification of use and was not protected by the legal nonconforming use status as outlined in the Supreme Court of Canada decision, *Saint-Romuald (City) v. Olivier,* 2001 SCC 57. The objective of the legal nonconforming use is to balance between the individual landowner's interest and the community interests. The appeals were dismissed.

All Internal Remedies Must Be Exhausted Prior to Proceeding under the *Judicial Review Procedure Act*
1114829 B.C. Ltd. v Whistler (Municipality), 2019 BCSC 984 http://canlii.ca/t/j115k
The Petitioner owns multiple vacation units in the Resort Municipality of Whistler ("Municipality"). The Municipality passed two bylaws outlining rental requirements for tourist accommodations in the Municipality. The Zoning Amendment Bylaw and the Tourist Accommodation Bylaw, collectively known as the "Bylaws" passed on July 18, 2017, required the Petitioner to be part of a rental pool, and obtain a municipal business license to operate. The Petitioner unsuccessfully challenged the validity of the Bylaws. A week after the decision was issued, the Petitioner submitted an alternative argument and sought a lawful non-conforming. At the time of the appeal the Petitioner had not applied for the required license.

HELD: Alternative argument was dismissed.

DISCUSSION: The Petitioner argued that the vacation units were available prior to the Bylaws being enacted and sought a lawful non-conforming use declaration from the Court under the *Judicial Review Procedure Act,* R.S.B.C., 1996, c. 241 ("*JRPA*"). In response, the Municipality submitted that the Petitioner erred in proceeding under the JRPA without applying for a business license from the Municipality, because the Petitioners failed to exhaust all internal remedies and allow for the Municipality to make a decision whether or not to issue a license. Relief under the *JRPA* can only be granted by the court on judicial review pertaining to the exercise or refusal of the Municipality's decision. The Court agreed that the non-conforming use issue was improperly brought in the petition under the *JRPA* as the municipality was not afforded the opportunity to make a decision on whether or not to issue a license. The Court went one step further to determine if there was a lawful non-conforming use of the property by the Petitioner. The Petitioner provided evidence that the vacation units were available prior to the Bylaws being enacted, and when deposed the Petitioner stated that the units were advertised as available on July 17, 2017. This was merely one day before the Bylaw was passed by the Municipality. The Court did not accept that advertising one day prior was sufficient to give rise to lawful non-conforming use under the *Local Government Act*. The Court determined that, as there was no actual rental, there was actually no use. ML

FEDERAL

BY: NEGHEEN SANJAR,
IMLA Director of Legal Research

The Trouble With Juul

In the 1980's, lawyers nationwide began filing lawsuits targeting tobacco companies for addicting consumers and for the subsequent health problems and deaths that arose from use of tobacco products.[1] The tobacco companies were alleged to have: misled the public about the risks of smoking and the dangers of secondhand smoke; misrepresented the addictiveness of nicotine; manipulated the nicotine delivery of cigarettes; deceptively marketed cigarettes as "light" or "low tar" while knowing that they were at least as hazardous as full flavored cigarettes; targeting youth; and failing to produce safer alternatives. After four states reached individual settlements with the tobacco defendants, in 1998 the remaining forty-six states, four territories, Puerto Rico and the District of Columbia signed the groundbreaking Master Settlement Agreement (MSA) with five national tobacco companies, in which the defendants agreed to pay a total of $246 billion in compensation over a 25-year period and cease their irresponsible marketing practices.[2]

The MSA was rapidly followed by the historic 1999 settlement agreement between the U.S. Department of Justice and various tobacco companies, who faced charges of acting in concert and violating the Racketeer Influenced and Corrupt Organizations Act (RICO).[3]

These actions have had their desired effect. In the decades since the initial recognition that cigarettes, pose a serious health risk to the user and bystanders,[4] the Centers for Disease Control and Prevention (CDC) reports that cigarette use has declined dramatically, from 65% of adults using cigarettes in 1965 to 14% of adults using cigarettes as of 2017.[5]

With the conventional wisdom that cigarettes are unhealthy or "bad," came the desire to find better innovations. Enter Juul Labs, a San Francisco-based $38 billion giant, who claims it entered the market with a product aimed at providing an acceptable alternative for traditional cigarettes, or as they pen it, "improving the lives of the world's one billion adult smokers."[6] Their product is a slim, battery-powered device, which looks like a USB drive. The device uses JUULPods (pods), which are plugged into the e-cigarette to provide liquid nicotine (containing proprietary nicotine salt formulations) that come in flavors such as mango, cool mint, crème bruleé, fruit medley, and Virginia tobacco.[7] Each pod delivers roughly 200 puffs and contains about 5% nicotine, which is the same amount of nicotine in a pack of traditional cigarettes, though the amount of nicotine contained in each pod is subject to dispute.[8]

Juul and similar products are increasingly popular with young adults, and with a more vulnerable group--teens and middle schoolers. In fact, the device is so pervasive among minors that various schools across the country find themselves embattled in a losing fight installing sensors in bathrooms which can detect the change in chemicals in the air and alert administrative officials that "juuling" or "vaping" is occurring.[9] According to the CDC, although the rate of high schoolers smoking cigarettes has dropped to an all-time low of 8.1%, the numbers are on the rise for e-cigarettes, with 20.8% of high schoolers reporting using the product.[10] Moreover, e-cigarette use has tripled among middle and high schoolers in the span of a year.[11]

With the rise in popularity of these products, especially among youths, potential health risks have become an overriding concern. The addictive properties of nicotine--a neurotoxin--are well documented. In young users, the tendency for nicotine to rewire adolescent brains and lead to lifelong addiction, has become a major cause of alarm.[12]

Researchers have attempted to understand the popularity of e-cigarettes, given the widespread common knowledge about nicotine addiction and the health consequences of that addiction.[13] One study that analyzed the addictive properties of e-cigarettes determined that their increased use among young adults and adolescents who never or rarely smoked traditional combustible cigarettes may be attributed to "the absence of clear, consistent public health warnings and messaging targeting relevant aspects common to all types of e-cigarettes."[14] Considering that the study reported 59% of Juul users having vaped in the prior month compared to 30% of those using other e-cigarettes, it raises an issue as to the particular addictive properties of Juul.[15] The study concluded that:

> use by adolescents and young adults of newer types of e-cigarettes such as pod-based systems is increasing rapidly, and adolescents and young adults report corresponding misperceptions and lack of knowledge about these products. Rapid innovation by e-cigarette manufacturers suggests that public health and prevention efforts appear to be needed to include messages targeting components common to all current and emerging e-cigarette products to increase knowledge and decrease

misperceptions, with the goal to try to ultimately reduce e-cigarette use among adolescents and young adults."[16]

Addictive properties aside, although e-cigarettes do not contain tar, there is still the question of whether these products are detrimental to the user's health and if they are, how so? The answer to this question is important not only as a public health matter, but also because Juul has advertised its offerings as a healthy alternative which can lead to cessation of traditional combustible cigarette use, despite a lack of substantiation or even registration of their products with the U.S. Food and Drug Administration (FDA) as required by law.[17]

Existing research points to numerous potential health problems warranting further inquiry. For example, studies show that when the liquid nicotine is heated and vaporized it can release carcinogens including carbonyls and other toxic chemicals.[18] Other health risks related to vaping range from respiratory irritation to heart disease.[19] As noted above, vaping can also have a negative impact on brain development in adolescents impacting behavior, mental health, and changing brain structure.[20]

Although the flavoring in e-cigarette pods may be considered safe to eat by the FDA the National Academies of Sciences, Engineering, and Medicine (National Academies) question whether the flavorings are safe to inhale.[21] In other contexts, some flavoring additives, when inhaled, have led to a rare condition known as popcorn lung.[22] Popcorn lung, or *bronchiolitis obliterans*, obstructs the small airways in the lung leading to progressively worse lung function, which is irreversible.[23] A lung transplant may be required to alleviate airflow issues.[24] Another study found flavor additives cause lung inflammation in cellular and animal models.[25] Users also risk inhaling toxic heavy metals from the metal coils in vaping devices which are essential to the heating process, as well as other toxic ingredients.[26]

Finally, there has been research comparing the basic health impact of e-cigarettes to that of traditional combustible cigarettes. The National Academies concluded that switching from traditional cigarettes to e-cigarettes reduces certain of the health risks of smoking, but by no means definitively determined that e-cigarettes are healthy.[27] The study noted that e-cigarettes expose users to new or unanticipated risks, including inhaling toxic chemicals, carcinogens, and formaldehyde.[28] There is also evidence that, like traditional cigarettes, second-hand smoke from vaping products is harmful because the product releases nicotine, aluminum, and other heavy metals into the air.[29]

To be sure, more study is required since the product is new and there is much scientists do not know, such as the risk of cancer as a result of vaping, or even the effect of vaping while pregnant on the fetus.[30]

Legal and Regulatory Responses to E-Cigarettes

With Juul's rise in popularity and the overarching health concerns has come federal and state-based lawsuits, calls from local governments to restrict or even ban the product outright, and investigations from the FDA and state governments.

I. The FDA Response

In response to the rise in underage use of e-cigarettes, specifically Juul products, the FDA announced a large scale, undercover crackdown on retailers, resulting in violation letters and partnerships with online retailers to prevent illegal online sales.[31] The FDA has also sent a request for documents and other information to Juul Labs.[32] The FDA is seeking information about product marketing; health, toxicological, and behavioral research into the effects of Juul products; data about product design, ingredients, or other specifications that appeal to different age groups; and youth-related consumer/customer complaints associated with the products.[33]

The goal of this exercise is to understand the popularity of the vaping products and to develop a plan to curb underage use.[34]The FDA is investigating and planning enforcement actions against companies it finds are marketing their products to children, and those who are generating misleading advertisements and marketing.[35] The FDA has also stated that it is looking to develop federal product standards and regulations for electronic nicotine delivery systems.[36]

That step would be quantum leap from the currently regulatory environment. Today, the FDA does not regulate nicotine levels in e-cigarettes nor does it regulate the flavors available--or to whom they may be sold and marketed—but this may change given that one focus of the FDA investigation is e-cigarette flavorings.[37]

II. The Lawsuits

Mounting concerns from parents, schools, and public health advocates over the negative health implications of vaping has resulted in multiple lawsuits.

Juul in particular has been the target of litigation from users. There have been at least three complaints against Juul alleging subsequent addiction to nicotine after using Juul products.[38] In general, the suits assert a variety of claims including negligent design and marketing, and various products liability claims including inadequate warning, manufacturing defect, and defective design.[39] As evidence, the consumer complaints reference Juul's early marketing campaigns, the patented nicotine delivery system employed by Juul, a study demonstrating Juul delivers higher levels of nicotine than advertised, and a study demonstrating that Juul profited from marketing by social media influencers.[40]

In the first consolidated case filed in the U.S. District Court for the Northern District of California, *Colgate v. Juul Labs, Inc.*, plaintiffs allege that they purchased Juul products in 2017 and subsequently became addicted to nicotine salts.[41] Colgate specifically alleges he purchased Juul products to help him quit smoking, but due to the high dosage of nicotine salts, his nicotine addiction actually increased, resulting in even greater consumption.[42]

The second case was filed in San Francisco Superior Court.[43] Plaintiff Carl Cooper claimed that he began "juuling" because it was advertised as a smoking cessation product, but his use resulted in increased nicotine addiction.[44] Cooper's complaint al-

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leges that he went from being a smoker on the weekends to a daily habitual smoker due to the use of Juul products.[45]

Rounding out the individual consumer lawsuits is a case from the U.S. District Court for the Southern District of New York where 15-year-old D.P. alleges Juul designed its product to contain more nicotine than necessary to satisfy even an adult smoker, causing addiction.[46] D.P. alleges he became heavily addicted, making him emotionally unstable and leading to poor performance in school.[47] To deter D.P.'s use, his parents switched him to numerous schools in an attempt to find an environment where Juul use was not pervasive, and had to alter their home by removing doors and locking rooms in the house.[48] Despite these efforts, the complaint alleges, D.P. is still unable to kick the habit.[49]

Aside from individual consumer suits, there are also two class actions pending against the company, one in the U.S. District Court for the Northern District of California and the other in the U.S. District Court for the Middle District of Florida.[50] Both class actions make substantially similar allegations such as products liability (defective design, defective manufacture, and inadequate warning), negligence, breach of implied warranty of fitness for a particular purpose, misleading consumers, and deceptive marketing practices.[51] Generally, these class actions maintain the following: the purpose of Juul products is to foster nicotine addiction in a new generation and the company has done so by creating a product with extremely high levels of nicotine, deceptively marketing the product as a cessation device when it is in fact more addictive than conventional cigarettes, for deceiving customers as to nicotine content and subsequently addicting them to nicotine salts, using deceptive marketing practices and unfair business practices, and of using candy- and fruit-flavored pods coupled with forbidden advertising practices straight out of Big Tobacco's playbook to create a new generation of lifelong nicotine addicts.[52] The class action in the Middle District of Florida further accuses the company of various RICO violations as well as purposefully getting teenagers hooked on Juul products, securing their financial success for years to come.[53]

Finally, the state of North Carolina has filed suit against Juul alleging deceptive marketing and advertising practices in violation of North Carolina law.[54] The state alleges that Juul knowingly created a product that would appeal to minors and knowingly marketed that product to them,[55] while downplaying the health risks associated with the use of e-cigarettes.[56] The complaint also alleges Juul not only failed to properly disclose the strength of nicotine in their products, but also falsely advertised the product as a smoking cessation device which actually contains equivalent, if not greater levels of nicotine as conventional cigarettes.[57] In its prayer for relief, the state requested a preliminary and permanent injunction against the company.[58]

III. State and Local Regulatory Action

Both state and local governments have stepped in to preserve public health, focused on protecting consumers—and minors in particular. States have taken different approaches to combatting the issue. In North Carolina it is illegal to "distribute, or aid, assist, or abet any other person in distributing" e-cigarettes to minors.[59] As mentioned above the state has sued Juul for deceptive advertising and marketing practices in violation of North Carolina law.[60] The Attorney General for Massachusetts has launched an investigation of Juul for its marketing practices and for failure to prevent minors from purchasing their products.[61] California increased the minimum age to purchase tobacco products from 18 to 21 with the intent of making it difficult for minors to gain access to the products via their older friends.[62] A bill in Arizona to raise the minimum age for purchase of tobacco products from 18 to 21 is currently being considered.[36] States nationwide are debating whether to ban the sale of flavored e-cigarette pods entirely.[64] California is the closest to banning flavored pods with the California Senate Health Committee passing SB38.[65]

On the local side, in 2018, a majority of San Franciscans voted to put a city ordinance into effect which prohibits the sale of flavored tobacco products in the city.[66] The ordinance aims to prevent youth consumption of tobacco products by removing appealing candy and fruit flavors from sale.[67] There is evidence that efforts to regulate the flavors of e-cigarettes and similar tobacco products can be effective. In 2009, the FDA banned all flavors except menthol in combustible cigarettes; as a result, adolescents were 17% less likely to become cigarette smokers after the ban was put into effect.[68] Additionally, this year, San Francisco unanimously banned all sales of e-cigarettes from both brick and mortar retailers as well as all online sales.[69] The ban will remain in place at least until 2021, which was the original deadline the FDA imposed for e-cigarette companies to submit a premarket tobacco application (PTMA) which will allow them to obtain FDA approval for their products.[70]

Finally, Colorado has passed legislation granting local governments the authority to prohibit sales of e-cigarettes to minors, possession of tobacco products by minors, to impose stricter regulations on such products than those provided by state law, to raise the minimum age of purchase for such products to 21, and expressly authorizing a statutory or home rule city or town to enact ordinances regulating the sale of tobacco products to minors.[71]

The measures taken by state and local governments alike provide a roadmap for how local jurisdictions may approach vaping regulations to protect consumers, underage users, and the health of the general public. Reworking the restrictions placed on traditional cigarettes such as indoor bans, regulations on the sale of flavored products, and the like, then adopting them to fit all tobacco products such as e-cigarettes will allow local governments to stay ahead of future product innovations. ML

LISTSERV

BY: BRAD CUNNINGHAM
Municipal Attorney, Lexington, South Carolina

A Toast to Dad!

A recent discussion on the Water Cooler took place just before Father's Day. Participants sent in stories and examples of wit and wisdom from their dads. I would like to share those stories, and the common bond the participants had regarding their dads as Father's Day approached.

I will start the ball rolling and introduce you to my dad.

Dad was born at home in the mountains of Western North Carolina, as he used to say "right smack dab in the middle of the depression." My grandfather was a timber worker and a millworker. Grandma was nineteen when she delivered dad, so she was at home caring for him. Dad attended the same high school I eventually attended. He was the oldest of six children, and decided he wanted to go to college but, like many, had to figure out how to pay for it. He ultimately chose a U.S. Naval ROTC scholarship over a chance to play baseball for the Cincinnati Reds.

After college and the Navy, dad attended law school and graduated in the top ten of his class, serving as the Editor of the Law Review. His first job was as a bond attorney in Florida, but after a couple of years, he returned home to serve as Group Counsel at the mill where my grandfather worked and which both my dad and grandfather had participated in constructing.

Dad worked hard at this job for thirty years right up until his death. He served many charitable and civic causes as well, and passed away in the wing of a hospital where a room was dedicated in his honor. As I nearly tear up writing this article, I recall some things I knew about my dad, and some that I learned at his funeral.

Dad was a successful lawyer. He could have given us anything we wanted. While he was always willing to help, he used to say "The worst thing I can do is to take away your incentive." I had no idea how correct he was until I later had to make my own living. By the time I got to that point, I had already learned that things aren't given to you on a silver platter.

Dad taught me to always do the right thing. He lived by the creed that "character was what you do and how you act when nobody is watching." I have not forgotten that. I lost my dad early in life. At his funeral, I learned that the reason he disappeared every year on Christmas Eve was not that he was doing last minute shopping for his family, but because he was out buying toys to deliver to a local children's shelter. I found out, at his funeral, that my dad was a real-life Santa Claus!

On to the responses of our readers… As indicated, Water Cooler participants were eager to share in the toast to dad, and recount their "dad tales" and pearls of wisdom. I share a few herein anonymously…

"My father had a kind heart and was ready to help everyone who needed it – he was the guy that played Santa Claus for the neighborhood. One of his sayings, not an original, but one that would help so many these days – "Don't judge a person until you have walked a mile in their moccasins."

He was also very smart and had a very strong belief in working hard and being honest . My advice: If you are lucky enough to celebrate Father's Day with your Dad, give him a hug!...

My father was a farmer and raised cattle. He taught me about hard work and how to live an honest life. He only had a high school education, but I always felt he could have been an engineer because he could see any mechanical issue and figure out a way to fix it or make it work better. The best advice he gave was to get by with what you have until you can buy with cash. Live your life in the way you believe is correct and don't let others dictate what that is….

My father served in the Navy during World War II, came home to complete law school and then took over my maternal grandfather's law practice in a small North Carolina town. A couple of stories that always stick in my mind:

1) While attending law school as a married couple the walls in the place they could afford were so thin they woke up one morning with snow around their bed. They were so strapped for cash that dinner consisted of sharing a can of tomato soup (my mother never ate another can of tomato soup for the duration of her life);

2) He was a part time municipal judge for a while and was known as the "walking judge." If you couldn't pay your fine, he required you to walk to the next town and back on your own schedule. Once you reported back, the case was closed. Not sure how legal that was, but he thought if you couldn't pay your debt with cash, you still had to make it right with the community;

3) During the course of his real estate and estate practice, my father would often grocery shop, run errands and sometimes do yard work to the delight of his elderly and often widowed clients. I often accompanied him on those Saturday grocery runs and to make the deliveries. On one specific Saturday delivery, we found one of his 90+ year old clients on the roof. As he was helping her down the ladder, she promptly informed my dad that she was perfectly capable of taking care of herself, including cleaning off the roof! He said "of course you are" and proceeded to take in her groceries and put them away.

My father always told me that it was a privilege to be granted a law license, and it was the lawyer's responsibility to set a higher example of how to conduct yourself in the community. I believe those Saturday

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errands and his relationship with these clients made the practice of law more meaningful for him. He was a "your word is your bond" kind of man and I miss him every day…

My dad was an awesome Godly role model and very hard worker –from a very financially poor upbringing in upstate New York, he was number eight out of fifteen children, but his childhood was bathed in love and early on he was taught to work for a living -NOTHING was handed to him--and he raised his daughters in that same manner.

A strong work ethic and the need to stand for what you feel is right was always front and center in his life –and he instilled that in my sister and I – and others – the church was packed for his funeral last year which serves as a testament to his impact on many people's lives.

We didn't always see eye-to-eye, but you knew where he stood on issues and you knew there were no hand-outs from him, but he always had a wide grin, a corny joke or statement to the waitress (that would still embarrass me even as an adult!) and you knew he loved you. This is my first Father's Day without my father – so, like others have probably commented, my story would be to hug your Dad and talk to him throughout the year, but especially on Father's Day…

Dad was ever the proud Navy man. When I began to develop a taste for coffee, he advised: "Son, learn to enjoy your coffee black because you may find yourself in a situation where there is no cream or sugar, but you can still enjoy your cup." He was ever the pragmatist.

One evening at the dinner table, when I was about thirteen, I spoke disrespectfully to my mother. I honestly have no recollection of just what I said to her. But I have never forgotten my father's clinched jaw reaction: "Young man, don't you EVER speak to MY WIFE like that again. Do you understand me?" That was the only time I ever feared my father. I had never before considered that my mom was also dad's wife, for whose honor he would stand to defend. I never again spoke a cross or coarse word to or around my mother. It was a good lesson…

My dad, whom I lost to leukemia in 2010, was a small town lawyer and city attorney, and he was my hero. He was also extremely funny. Two of my favorite Dad-isms:

"There are more Baptists here than people." (We were Methodists.)

"The outdoors makes a fine place to put golf courses, and the indoors, otherwise, I don't have much use for it." (A sentiment with which I wholeheartedly agree.) ……

The story I always tell about my late father: He stopped on a city street to buy a newspaper, put the quarter (or dime, or nickel) in the machine, took out the paper, and closed the door. I said "How come you couldn't take all of the newspapers?" He didn't answer "Because you only need one newspaper." He answered "Because that would be stealing."

Dad taught me that just because you can get away with something doesn't make it right. It wasn't intended to be a "lesson," or a morality play. It was just his offhand answer to a little boy's question, that taught me something that sticks with me more than fifty years later…

My father owned a grocery store and the ice maker was freezing up. The manufacturer sent engineering experts to assess the situation. While they studiously discussed the issue, my father looked at them, told them the problem was that the ring to hold the ice cutter was not moving – he took a small piece of wood – shoved it in place – and the device worked perfectly thereafter…

My father gave up playing golf so he could afford to pay cash for my college education, saying he did not want me saddled with debt upon graduation like he had been. He also used his vacation time to follow me around to my ballgames, never missing one, home or away, for four years. When mom got sick he took a second job to help with expenses. He was a single bread winner, and always thought of us first. I didn't realize how much he did that until later in life…

My born-and-raised Ukrainian dad had a sense of humor, despite his toughness. He would often trick restaurant servers into thinking his espresso was too thick by secretly propping up the spoon below the surface with the lemon twist. The shock and laughs were tremendous! His greatest practical trick, however, was giving us a family Christmas gift where we had sixty seconds to write down whatever we wanted and he would grant our wish. The race was on!! But little did we know that he hid every single pen and pencil in the whole house! He made good on a trip to Hawaii, however--which is what I wrote with nail polish. (Never keep a good Ukrainian girl down!) I loved that tough guy!...

When I was in third grade, I was in Cub Scouts. They held Space Derby one day, and everyone was responsible for building their own rocket. I wasn't very good with my hands, so I had concluded I would not be participating. But my dad surprised me and came home from work early that day to help me build my entry. I was so excited. I came in fourth in the district that night. My troop was very proud of me.... However, all I could do was thank my dad because without his help I could not have participated…

There you have it, from our colleagues… A great personal testimony to dads. I remember once during a crisis point in my cousin's life, I was talking to her about what to do. My final piece of advice was "Go home and talk to your dad. He is the first man that ever loved you and he won't quit. He always has, and always will. That is what dads do."

I fully realize that perhaps not everyone is as fortunate in the dad department as I was, or as some of my colleagues were. However, Father's Day is a day to celebrate dad and I am truly thankful to my father. I close by reminding myself of the greatest lesson I learned from my dad, which he taught me in dying. Dad was only sixty-one when he died, and he left unfinished business. He never got to retire, or enjoy that beach home he had worked so hard for.

Maybe the greatest lesson I learned from him was not to procrastinate. Take that vacation now… Sure, you need to save for a rainy day, but don't be so busy doing so that you forget to have a life… If you have wronged someone, don't wait until later to make it right. Do it now!... If you have work to do, do it now. You may not get the chance later… You are not guaranteed tomorrow, so pay your debts today… Never end your day with cross words because you may not get a chance to make it up… If you love someone, let them know either through actions, words or both. They may never know otherwise… Visit elderly relatives, because they won't be there forever and you will miss them when they are gone… If you have a goal, start now before it is too late. There is <u>not</u> always tomorrow…

What if that rainy day never comes???

The prosecution rests, your honor…

CASES

BY: ERICH EISELT
IMLA Assistant General Counsel

Exposing the Opioid Trade and Reverberations from Ferguson

Public Records: Newspapers May Not be Refused Access to DEA's ARCOS Opioid Data
***HD Media LLC v. United States Department of Justice*, No.18-3839/3860 (6th Cir. June 20, 2019).**

Vacating the opioid MDL's Protective Order, the Sixth Circuit holds that the blanket denial of the request by intervenors HD Media and Washington Post for access to opioid plaintiffs' DEA ARCOS data is not supported by good cause and must be revised within more reasonable parameters.

Since December 2017, opioid cases filed by more than 1600 municipalities have been transferred to *In re National Opiate Litigation* in the Northern District of Ohio (17 MDL 2804). Among the more important evidentiary data sought by plaintiffs was the Drug Enforcement Administration's ARCOS ("automated comprehensive drug reporting system") database, which compiles required filings from drug manufacturers and distributors about drg shipments and includes supplier name, registration number, address and business activity; buyer name, registration number and address; as well as drug code, transaction date, total dosage units, and total grams. The ARCOS data provides an extremely detailed picture of which manufacturers' opioids were delivered by which distributors to which dispensing entities around the country.

Over the objections of the DEA, which claimed that release of the data would compromise ongoing enforcement actions, and the objections of the opioid defendants, who argued that the data would reveal sensitive competitive information, the MDL allowed plaintiffs access to the ARCOS data:

> Plaintiffs' request for [production of] the ARCOS data, which will allow Plaintiffs to discover how and where the virus grew, is a reasonable step toward defeating the disease. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) ("Sunlight is said to be the best of disinfectants.") (quoting Justice Brandeis, Other People's Money 62 (1933)).

But access to the data was severely circumscribed. The plaintiffs were subject to strict Protective Order provisions: "disclosure of the ARCOS data shall remain confidential and shall be used only for litigation purposes or in connection with state and local law enforcement efforts." Data was only produced for the period 2006 to 2014, thereby addressing any enforcement or competitive concerns.

HD Media then filed a West Virginia Freedom of Information Act request with Cabell County, West Virginia seeking the ARCOS data that the county received as a plaintiff in the MDL, and the Washington Post filed similar public records requests with plaintiffs Summit and Cuyahoga counties in Ohio. They were met with objections by the plaintiffs, the opioid defendants and the DEA. The district court denied the media requests and the media organizations appealed.

The Sixth Circuit (two members of the panel) saw things differently. It found the district court's original analysis of plaintiffs' ARCOS data demand to be probative:

> In the same order concerning disclosure to Plaintiffs, the district court rejected Defendants' and the DEA's arguments that there was "good cause" for nondisclosure. The court specifically rejected the DEA's arguments that disclosing the data would interfere with law enforcement interests. . . . ("[S]imply saying that disclosure of ARCOS records dating back to 2006 would detrimentally affect law enforcement does not make it so.") The court likewise rejected the argument that producing the data would cause Defendants competitive harm, explaining that "the assertion was conclusory and . . . market data over three years old carried no risk of competitive harm."

Given this posture, the district court's rejection of the media's ARCOS requests seemed unsupportable: "Between the time it ordered the DEA to produce the ARCOS data to Plaintiffs and the time it denied Intervenors' requests for the data, the district court seems to a complete about-face concerning the relevant interests at stake." The Circuit opined that if the ARCOS data benefited the plaintiffs, it served the public even more, citing HD Media's previous use of ARCOS data received from the West Virginia Attorney General in a prior unrelated litigation. That data included "hundreds of printed pages of ARCOS data spreadsheets that revealed the number of hydrocodone and oxycodone dosage units sold to every retail pharmacy in West Virginia from 2007 to 2012," and was used in the HD Media Charleston Gazette-Mail's extensive reporting on the opioid crisis, which was awarded a Pulitzer Prize for exposing the causes, context, and scope of the epidemic. That reporting also prompted a committee of the U.S. House of Representatives to investigate and issue a report on the opioid epidemic.

The Circuit therefore held that the district court abused its discretion

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in finding "good cause" not to permit disclosure of the ARCOS data pursuant to the media public records requests. It vacated the district court's Protective Order and remanded to permit the district court "to consider entering a new protective order consistent with the proper legal standards as set forth in this opinion." In that process, the lower court may entertain arguments by the DEA as to why particular portions of ARCOS data that relate to specific ongoing investigations should not be disclosed; however, "the district court shall not enter a blanket, wholesale ban on disclosure pursuant to state public records requests." And if the district court permits a pleading to be filed under seal or with redactions, it must explain "why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary."

DISSENT: Judge Guy disagreed. In his view, the DEA *had* provided credible good cause arguments during the original ARCOS request by the plaintiffs, because the so-called stipulated protective order had only been entered into after significant arguments between the parties. As he put it:

> When properly viewed, I do not believe, as the majority does, that the court's subsequent decision to prevent the press from obtaining the ARCOS data was "bizarre." (Maj. Op. at 16.) The district court balanced different interests, under different circumstances, and at different times. . . . The court ordered the DEA to turn over the data because Rule 26 entitled plaintiffs to acquire it, even if it carried a risk of harm to the DEA or defendants. The newspapers are not parties and thus are not entitled to the material. The bar for keeping discovery materials out of their hands is thus considerably lower. In my view, the court did not abuse its discretion in striking those balances.
> http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0133p-06.pdf

Seizure: No Seizure where Pedestrians are Ordered to Get onto the Sidewalk and Blocked by Police Car *Johnson v. City of Ferguson*, No. 16-1697 (8th Cir. June 17, 2019).

Reversing the district court's finding that a police officer was not entitled to qualified immunity where he ordered two men to "Get the f*ck on the sidewalk" and blocked their futher passage down the street with his vehicle, the Eighth Circuit majority holds that the facts do not depict either the necessary show of authority or submission to authority to constitute a legally cognizable seizure. A four-judge dissent follows.

Dorian Johnson ("Johnson") alleges that he and Michael Brown, Jr. ("Brown") were "peacefully and lawfully" walking down Canfield Drive in Ferguson, Missouri ("City"), at approximately 12:00 p.m. on August 9, 2014, when they were approached by Officer Darren Wilson ("Wilson") in his marked police vehicle. As he approached the pair, Wilson slowed his vehicle and ordered them to "Get the f*ck on the sidewalk." Wilson continued to drive his vehicle several more yards, then abruptly put the vehicle in reverse and parked it at an angle so as to block the pair's path. After stopping his vehicle just inches from Brown, Wilson forcefully opened his door, striking Brown. Wilson reached through his window, grabbed Brown, and threatened to shoot his weapon. As Brown struggled to break free, Wilson discharged his weapon twice, striking Brown in the arm. Both Brown and Johnson ran away from Wilson, who at no time ordered either of them to "stop" or "freeze," but rather fired his weapon at the two men, with several of the shots striking and killing Brown.

At issue was whether Wilson's actions amounted to an unconstitutional seizure. As the Circuit put it, "The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield."

The district court had found that an unconstitutional seizure had occurred and denied the officer's qualified immunity defense.

A majority of the Circuit found no seizure. "Whatever one might say about Wilson's expletive-expressed directive that Brown and Johnson move from the street to the sidewalk, Johnson's complaint concedes that neither he nor Brown was ordered to stop and to remain in place. Johnson's decision to remain by Brown's side during Brown's altercation with Wilson rather than complying with Wilson's lawful command to return to the sidewalk was that of his own choosing. That he was able to leave the scene following the discharge of Wilson's weapon gives the lie to his argument that the placement of Wilson's vehicle prevented him from doing so."

As the majority saw it, without submission, there could be no seizure: "Accordingly, in the absence of any intentional acquisition of physical control terminating Johnson's freedom of movement through means intentionally applied, as occurred in both *Brower v. County of Inyo*, 489 U.S. 593, 596-99 (1989), and in *Tennessee v. Garner*, 471 U.S. 1, 4, 7 (1985), we conclude that no seizure occurred in this case."

That determination necessarily led to a denial of plaintiffs' claim of supervisory liability against the Police Chief or the City. Consistent with other jurisdictions, the Eighth Circuit has "consistently recognized a general rule that, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim." Furthermore, to maintain an action for training or supervisory liability, a plaintiff must show the failure to train or supervise caused the injury.

The Circuit majority directed that the district court's order be reversed and the case remanded with directions to dismiss the federal claims.

DISSENT: Judge Melloy dissented, joined by Chief Judge Smith and Judges Kelly and Erickson.

He found that there had been a seizure: "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, 'by means of physical force or show

of authority,' terminates or restrains his freedom of movement through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254 (2007).

In claiming a seizure through a show of authority (rather than through physical force), the claimant must demonstrate both (1) a show of authority and (2) actual submission to that show of authority.

Show of Authority.
To determine whether there was a show of authority, courts apply an objective test: "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." The dissent viewed Wilson's actions with his vehicle and commands as communicating that Johnson was not at liberty to ignore the police presence and go about his business:

By crudely ordering Johnson to move and then abruptly reversing his vehicle and stopping it inches away and directly in Johnson's path, Officer Wilson communicated an intent to use a roadblock to stop Johnson's movement. Despite Defendants' (and amicus curiae's) argument that the roadblock did not foreclose all of Johnson's avenues of travel, a reasonable person would understand the roadblock's purpose was to serve as a "physical obstacle" conveying an order to stop—not an order to go around the vehicle and continue on one's way.

Amicus curiae The National Police Association argued that Wilson's order was nothing more than an order "simply for two pedestrians to get off the street and use the sidewalk" – a type of order is commonly referred to as a "move on" order and is meant to convey the message that a person is free to go anywhere else but cannot remain where he is. The parties had not cited, nor was the dissent aware of, any Eighth Circuit precedent addressing whether move-on orders qualify as seizures under the Fourth Amendment. Other circuits have split on the issue, with the analysis frequently (but not always) turning on whether there was physical contact.

The dissent faulted the majority and the amicus curiae for oversimplifying the factual account. After Wilson's initial "move on" directive, he escalated the encounter by abruptly putting his vehicle into reverse and parking his car at an angle blocking Johnson's path and within inches of Brown and Johnson. Officer Wilson then fought with Brown and threatened to fire his firearm. "These events, viewed in a light most favorable to Johnson, would communicate to the reasonable person that Johnson 'was not at liberty to ignore the police presence and go about his business.'" It was, in the mind of the dissent, a legally cognizable show of authority.

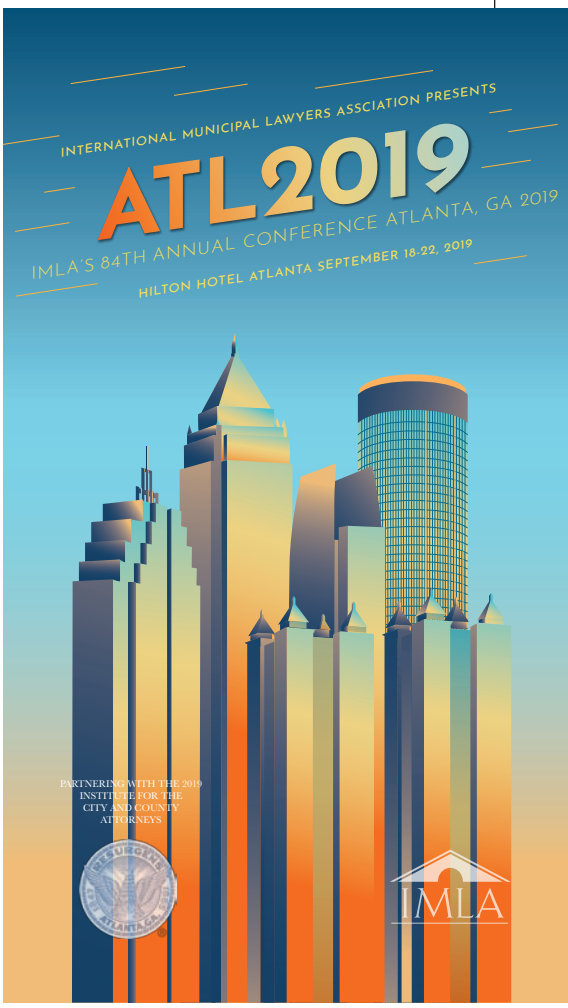
Submission to Authority.
While temporary stopping is not always sufficient to constitute a submission to authority (see *United States v. Baldwin*, 496 F.3d 215, 219 (2d Cir. 2007) (holding that, after a police vehicle with activated lights and sirens followed the defendant's vehicle, the defendant's "momentary stop did not constitute submission to police authority"), the dissent construed Johnson's behavior to be such a submission. "Johnson's stop was not a temporary, reactionary pause caused by the roadblock placed in his path. Johnson did not recommence walking and go around the vehicle." Instead, Johnson had remained throughout the time that Wilson reached through his window and grabbed Brown, threatened to shoot his weapon, wrestled with Brown who struggled to break free, and then twice fired his weapon.

To the dissent, the majority was wrongly focused only on Wilson's use of a weapon at Brown and incorrectly determined that while Brown may have been seized, Johnson was not. "I do not believe the complaint can be parsed that finely. . . . I do not believe that from the perspective of a reasonable person encountering Officer Wilson, it can be reasonably said Officer Wilson intended to seize Brown but not Johnson. If one of the two were seized, both were seized."

As the dissent saw it, Johnson's stop was not merely "passive acquiescence" to a show of authority—he had stopped walking away. This was more than the passive acquiescence found to constitute an element of seizure by the Supreme Court in *Brendlin* where the defendant, a passenger, merely remained in his seat as the driver pulled over the vehicle.

Given the dissent's finding that a seizure had occurred, denial of the defendants' motion to dismiss followed; the defendants had not presented any argument that, assuming there was a seizure, the seizure and use of deadly force were nevertheless reasonable. They had therefore forfeited any argument on the reasonableness issue.

https://ecf.ca8.uscourts.gov/opndir/19/06/161697P.pdf



Crowd Control cont'd from page 13

mended attendees 'bring picket sign posts, shield, and other self-defense implements ***which can be turned from a free speech tool to a self-defense weapon should things turn ugly***."[30] While these examples share a bigoted ugliness with the remarks in question in *Brandenburg*, the *Brandenburg* speech lacked the imminent threat that the words of violence would be acted upon.[31]

This holding—assuming, obviously, that it withstands appellate scrutiny—has practical application for law enforcement as well. The sorts of activities listed in the opinion in *Sines* are outside the bounds of *Brandenburg*, and thus law enforcement officers should be able to intervene as they did in *Cullinane* and *Barney*, cited above.

c. Putting It Into Practice

Defending against a preliminary injunction ideally starts before the conflict arises at all, with a conversation between the municipal attorney and the police department about the intersection of modern policing practices and the contours of the historical case law, merely sampled above. In the event mass demonstrations in a city do turn riotous, the police department is then prepared to respond in a manner consistent with *Brandenburg*, *Cullinane*, and *Barney*, among others. Then, if an injunction is sought against the police department, the legal team is not scrambling to learn the basics of their client's response protocols.

This is important because there is already much to do to respond quickly and decisively. The plaintiffs will have the initial advantage in broadcasting their narrative. By leveraging the resources available to municipal lawyers—including law enforcement technology and public social media accounts—the legal team can quickly pull together the actual facts on the ground to demonstrate what the case law requires: that the police were not simply responding to some 'abstract' threat of violence, but rather a concrete threat to the community.

III. Conclusion

In conclusion, the defending municipality in a motion for preliminary injunction must draw the court's attention to the pragmatic limitations of an injunction. A judicial injunction is an extreme limitation to place on a police department tasked with responding to evolving circumstances on the ground. Law enforcement should not be tasked with hoping that cooler heads will prevail among the participants of the next demonstration, nor should they fear that, if they act to stop a riot in progress, they will be acting in contempt of a court order.

An undertone of this entire discussion is blackletter use of force case law: "The reasonableness… must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," as the Supreme Court put it in *Graham v. Connor*.[32] This notion of not relying on hindsight should be especially protected in the context of injunctive relief as a result of mass demonstrations. People's lives may depend on the intervention of law enforcement in that scenario.

Notes

1. In re Microsoft Corporation Antitrust Litigation v. Microsoft Corporation, 333 F.3d 517, 524-25 (4th Cir. 2003) (emphasis added), *abrogated on other grounds related to copyright law*, eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).
2. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008).
3. City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983).
4. Imagine Medispa, LLC v. Transformations, Inc., 999 F.Supp.2d 862, 869 (S.D. W.Va. 2014), *citing* Federal Practice & Procedure § 2949.
5. *See, e.g.*, Reilly v. City of Harrisburg, 858 F.3d 173, 180 (3d Cir. 2017).
6. Please note that there are ethical issues associated with obtaining non-public posts without a formal discovery request. This portion of the discussion assumes that the posting individual has left the post open for public consumption on the social media platform.
7. Though the focus of this paper is responding to a preliminary injunction, one should note that the user can take down a video post after the fact. Practitioners should be sure to ask plaintiffs during discovery whether they took a video and/or posted a video—live on social media or not—of the event in question.
8. "[T]here is no federally protected right to engage in a riot." Frinks v. North Carolina, 468 F.2d 639, 641 (4th Cir. 1972).
9. 395 U.S. 444 (1969) (per curiam).
10. 395 U.S. at 448.
11. Bible Believers v. Wayne County, Mich., 805 F.3d 228, 246 (6th Cir. 2015) (emphasis added), *cert. denied*, 136 S.Ct. 2013 (2016).
12. 372 U.S. 229 (1963).
13. *Id*. at 231.
14. *Id*. at 231-32.
15. *Id*. at 232.
16. *Id*.
17. 379 U.S. 536, 550 (1965).
18. *Id*.
19. Brandenburg, 395 U.S. at 444–45 (internal quotations and citations omitted).
20. 395 U.S. at 448.
21. 566 F.2d 107, 119 (D.C. Cir. 1977).
22. 566 F.2d 107, 120, *quoting in part*, Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).
23. 20 Fed. Appx. 683 (9th Cir. 2001).
24. *Id*. at 684.
25. *Id*. at 685.
26. 460 F.3d 1318 (11th Cir. 2011).
27. Sines v. Kessler, 324 F.Supp.3d 765, 802 (W.D. Va. 2018), quoting, N.A.A.C.P. v. Clairborne Hardware Co., 458 U.S. 886, 916 (1982).
28. 324 F.Supp.3d at 773.
29. *Id*. at 803.
30. *Id*. (Emphasis added.)
31. *Cf*., 395 U.S. at 446 ("…[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.")
32. 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). ML

Amicus Corner cont'd from page 21

The Chief Justice is not the only possible conservative who could join the liberals in concluding Title VII's definition of "because of sex" encompasses sexual orientation and transgender status. Justice Gorsuch is a textualist and may be less inclined to ask what Congress intended when it enacted Title VII in 1964. Such an approach could lead to a surprising move and it is not outside the realm of possibility that he could join the liberal Justices in these cases.[33] Indeed, in 2009, then-judge Gorsuch sat by designation on a Ninth Circuit case that held that under *Price Waterhouse v. Hopkins*, it is "unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."[34]

While *Price Waterhouse* may provide some insight, it would be premature to assume that it accurately predicts Justice Gorsuch's vote in the current pending Supreme Court cases given that it was a short unpublished decision of another circuit with almost no analysis. Further, in another case involving a transgender rights issue, then-judge Gorsuch ruled against an inmate arguing that the prison violated her Eighth Amendment rights for failing to provide her with adequate hormone therapy..[35] Granted, there is a greater chance that Justice Gorsuch will rule in favor of the employees in this case involving a statutory interpretation question than in a case having to do with the vindication of a constitutional right, but it is by no means a sure thing. Moreover, some would argue a strict textual reading would preclude finding for the employees in these cases because transgender and sexual orientation are conspicuously absent from the text of the statute.

We can try to read all the tea leaves we want to in these cases, but the only thing we know for sure is that we won't have our answer until sometime around June 2020.

Notes

1. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018); *Hively v. Ivy Tech. Comm. Coll. of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017); *see also* Petition for Certiorari, *Bostock v. Clayton County,* No. 17-1618, setting forth circuit split.
2. *Compare EEOC v. R.G. & G.R. Harris Funeral Homes,* 884 F.3d 560 (6th Cir. 2018); *and Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); w/ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding discrimination based on transsexual status not covered by Title VII); *and Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (accord). Other circuits have weighed in on protections for transgender individuals under different statutes such as under Title IX and courts in those circuits would arguably use the same logic to extend protections to transgender employees under Title VII. *See Doe by & through Doe v. Boyertown Area Sch. Dist.,* 893 F.3d 179, 199 (3d Cir. 2018) (holding that under Title IX, "discriminating against a transgender individuals constitutes sex discrimination."); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1047 (7th Cir. 2017) (accord).
3. *Compare* What You Should Know About EEOC and the Enforcement Protections for LGBT Workers, available at: https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm; *with* https://www.justice.gov/ag/page/file/1006981/download.
4. 42 U.S.C. § 2000e-2(m).
5. Manhart, 435 U.S. at 711.
6. *Price Waterhouse*, 490 U.S. at 235, 250.
7. *Id.* at 272.
8. *Id.* at 256
9. *See Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *see also* Dawson v. Bumble & Bumble, 398 F.3d 211, 217–23 (2d Cir. 2005).
10. *Zarda v. Altitude Express, Inc.,* 883 F.3d 100, 112 (2d Cir. 2018).
11. *Id.*
12. *Id.* at 113.
13. *Id.* at 114.
14. *Id.* at 114-15, *citing Onacle*, 523 U.S. at 79-80.
15. *Id.* at 119.
16. *Id.* at 124-28.
17. *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 Fed. Appx. 964 (11th Cir. 2008).
18. *EEOC v. R.G.,* 884 F.3d 560, 568-69 (6th Cir. 2018).
20. *Id.* Because the EEOC brought suit, rather than an individual employee, Rost is allowed to argue that his sincerely held religious beliefs would be substantially burdened under the Religious Freedom Restoration Act (RFRA) as a defense to liability under Title VII. The Sixth Circuit rejected this defense. *Id.* at 581.
21. *Id.* at 571– 75.
22. *Id.* at 572.
23. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616-17 (2015) (Roberts, C.J., dissenting).
24. Justice Gorsuch has joined the four liberal Justices in a handful of cases so far, including in *Sessions v. Dimaya,* which involved the question of whether the term "crime of violence" was unconstitutionally vague. 138 S. Ct. 120 (2018).
24. *See Kastl v. Maricopa County Cmty. College Dist.*, 325 Fed. Appx. 492 (2009).
25. *See Druley v. Patton,* 601 F. App'x 632, 633 (10th Cir. 2015). ML



Ethical Obligations cont'd from page 19

or act on behalf of clients on front of, the department in which they were previously employed.

No such specific statutory proscription applies to New Jersey's municipal attorneys. There is, however, helpful guidance available.

M.R.P.C. 1.9(a) provides that: "[a] lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing."

On the other hand, the New Jersey rules state that: "[a] public entity cannot consent to representation otherwise prohibited by this Rule." R.P.C. 1.9(d). The Model Rules do not have a corresponding exception.

M.R.P.C. 1.11, entitled "Successive Government and Private Employment", provides, in pertinent part:

> (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
>
> (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
>
> (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
>
> (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
>
> (1) is subject to Rules 1.7 and 1.9; and
> (2) shall not:
> (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
> (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
>
> (e) As used in this Rule, the term "matter" includes:
>
> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

M.R.P.C. 1.11(d) is simply the reverse of the above sections, and relates to an attorney now serving in the public sector, who was previously in private practice.

An application to disqualify an attorney under M.R.P.C. 1.9, or its state equivalent, requires a Court "to balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel."[15] However, in finding that balance, Courts must consider that "a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement."[16]

The burden of proof is upon[17] the former client seeking to disqualify the attorney from representing the new client. As the New Jersey Supreme Court held in *City of Atlantic City v. Trupos*, 201 N.J. 447 (2009), if that burden of production, or of going forward is met, the burden then shifts to the attorney sought to be disqualified to demonstrate that the matter or matters in which he represented the former client were not the same or substantially related to the controversy in which the disqualification motion is brought. "That said, the burden of

persuasion on all elements under R.P.C, 1.9(a) remains with the moving party, as it `bears the burden of proving that disqualification is justified."[18]

In *Trupos*, the Court fairly well ignored R.P.C. 1.11, focusing instead, on that clause of 1.11(a) which provides: ". . . and subject to R.P.C. 1.9. . . ." The *Trupos* court recognized its 2004 elimination of "the appearance of impropriety" standard in evaluating claims of attorney conflicts, and focused on the specific R.P.C.'s. It phrased the question before it as follows:

> In the shifting of allegiances that arises when lawyers `change sides' in their representation of new clients, the confidences of prior clients must be preserved. The propriety of a lawyer representing a current client adverse to the interests of a former client generates attention - between fealty to a former client and zealousness in favor of a current client - - that this court must address.[19]

In *Trupos*, the former city attorney had been retained to represent a number of taxpayers in tax appeals against the City of Atlantic City. The City urged that the attorney was privy to its confidential strategies regarding the defense and settlement of tax appeals, and therefore should not be permitted to represent the taxpayers against the City of Atlantic City, a mere year after leaving the City's employ. It sought to disqualify him from representing those taxpayers.

The court analyzed the matter under R.P.C. 1.9:

> The presence of two of the three necessary predicates to the application of R.P.C. 1.9(a)'s disqualification bar [which are] not in dispute: the law firm formerly represented plaintiff, and the interest of the law firm's clients in the 2009 tax appeals are materially adverse to plaintiff's interests in those appeals. Therefore, the only substantive open question remaining in this appeal is whether the 2006 — 2007 tax appeals - - where the law firm represented plaintiff - - and the 2009 tax appeals - - where the law firm sought to represent taxpayers adverse to the plaintiff - - are 'the same or substantially related matters.'

That inquiry must start from the now well established principle that whether the matters are the 'same or substantially related' must be based in fact, as we have rejected the appearance of impropriety as a factor to be considered in determining whether a prohibited conflict-of-interest exists under R.P.C.1.9.[20]

The New Jersey Supreme Court ultimately concluded that there were no confidential communications that the City had shared with the law firm that could or might be used against the City in the law firm's prosecution of tax appeals on behalf of the taxpayers; that there was no proof that the facts of the prior representation were relevant or material to the subsequent tax appeals three years later; and that, therefore, while there might be a "purely superficial similarity" involved in all of these tax appeals, they were not "the same or substantially related matters."

Trupos is great reading for municipal attorneys who are seeking to return to private practice, and specifically, who are asked to undertake matters adverse to their former public entity clients. As can be seen from *Trupos*, the determination is fact sensitive, and not subject to any general proscription.

CONCLUSION

The foregoing is a subset of the many ethical complexities facing local government lawyers. While a complete analysis of the subject would be a significant undertaking, it is hoped that the issues discussed here provide greater clarity and promote the professional excellence to which we aspire.

NOTES

1. F.R.E. 501 states: ". . . in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." A note clarifies that the rule is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). 2. Bell Atlantic Corp. v. Bulger, 3 F.2d at 1316, 1317.
3. See e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980); Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 621 (D.D.C. 1979); Detroit Screwmatic Co. v. United States, 49 F.R.D. 77 (S.D.N.Y. 1970); United States v. Anderson, 34 F.R.D. 518 (D. Colo. 1963).
4. N.J.S.A. 47:1A-1.
5. *Id*.
6. *See* New Jersey Attorney General Op. 91-2009, "Municipal Attorneys as 'Local Government Officers' Pursuant to the Local Government Ethics Law," Sept. 20, 1991.
7. In re: Teleglobe Communications Corp., 493 F.3d 345, 359 (3d Cir. 2007); Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).
8. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 550-551 (1997).
9. Each state has an analogue to the NJ Open Public Meetings Act. Of course, there is variation in the specific requirements of each state's sunshine law. The following website contains summaries and links to each state's open meeting statute: https://ballotpedia.org/State_open_meetings_laws.
10. Press v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 490-91 (Law Div. 2001).
11. *Payton, supra* note 8, at 558.
12. *Press, supra* note 10, at 391-392.
13. The New Jersey Rules of Professional Conduct, like many states, differs from the M.P.C. requiring disclosure by using the word *shall* in this rule.
14. A v. B 158, N.J. 51, 14-15 (1999).
15. Dewey v. R.J. Reynolds Tobacco Co, 109 N.J. 201, 218 (1988); Silver Chrysler, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753 (2d Cir. 1975); Hughes v. Paine, Webber, Jackson & Curtis Inc., 565 F. Supp. 663, 667 (N.D. Ill. 1983).
16. .*Dewey supra* note 15, at 218.
17. *Id*. at 221-222
18. City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2009) (*citing to* N.J. Division of Youth and Family Services v. V.J., 386 N.J. Super. 71, 75 (Ch. Div. 2004)).
19. *Id*. at 450-451.
20. *Id*.

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