INSTITUTE FOR LOCAL GOVERNMENT LAWYERS

SATURDAY, OCTOBER 3, 2015

LAS VEGAS, NEVADA

Presented by:

International Municipal Lawyers Association

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Bethesda, MD 20814

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INSTITUTE FOR LOCAL GOVERNMENT LAWYERS
Saturday, October 3, 2014: 8:00AM – 4:30 PM
Las Vegas, Nevada

AGENDA

Institute for Local Government Lawyers
Registration Opens at 7:00am

Moderator: **Frank B. Gummey, III**
City Attorney
New Smyrna Beach, Florida

8:00am – 8:15

Opening Remarks

8:15am – 8:30am

You Have Just Been Appointed the City or County Attorney: Now What? You Gotta Serve Somebody!
Robert J. Alfton
Cummins and Cummins, LLP
Minneapolis, Minnesota

8:30am – 9:15am

Fundamentals of Municipal Finance and Borrowing
Eric Shytle
General Counsel, City of Sumter
Sumter, South Carolina

9:15am – 10:00am

Parliamentary Procedure: The Fine Art of Herding Cats
Norma Houston
Lecturer of Public Law and Government
UNC School of Government
The University of North Carolina at Chapel Hill

COFFEE BREAK (15 minutes)

10:15am – 11:00am
Sunshine Laws – Key Concepts and Hot Topics
Frayda Bluestein
Professor of Public Law and Government
Associate Dean of Faculty Development
School of Government
University of North Carolina
Chapel Hill, North Carolina

11:00am – 11:45pm
Personnel & Employment Law
Daniel Crean
Executive Director/General Counsel,
New Hampshire Municipal Lawyers Association
Crean Law Office
Pembroke, New Hampshire

11:45am-12:00pm
Morning Program Evaluation

LUNCH BREAK
12:00pm – 1:00pm

1:00pm – 1:45pm
Advising Contract Administrators
Richard Weintraub
Senior Assistant City Attorney
Durham, North Carolina

1:45pm – 2:30pm
Land Use Law 101
Dwight Merriam
Partner
Robinson & Cole, LLP
Hartford, Connecticut

COFFEE BREAK (15 Minutes)

2:45pm – 3:30pm
Negotiations
DeWitt "Mac" McCarley
Partner, Parker Poe
Charlotte, North Carolina

3:30pm – 4:15pm
Ethics and the Supervising Government Attorney
Phillip M. Sparkes
Director, Local Government Law Center, and
Assistant Professor of Law
Local Government Law Center
Highland Heights, Kentucky

4:15pm- 4:30pm
Afternoon Program Evaluation

FINISH

2015 Institute for Local Government Lawyers

Speaker Biographies

Robert J. Alfton served as the Minneapolis City Attorney for nearly two decades, advising all elected and appointed officers, department heads, and employees. As City Attorney, he also litigated numerous cases and served as labor relations and licensing counsel. In addition, Bob has served as President of the International Municipal Lawyers Association and the Minnesota Municipal Lawyers Association as well as an Administrative Law Judge for the State of Minnesota. In private practice, Bob has focused on both public sector and private sector labor and employment matters.

Eric Shytle serves as the General Counsel for the City of Sumter, South Carolina. He provides legal guidance to the City on local government matters, finance, contracts, land use, public records, open meetings, water and wastewater utilities, procurement, and other related matters. Eric rejoined the City in 2013 after previously serving as Chief of Staff for the City from 2006 to 2008. From 1999 to 2006, and again from 2008 to 2012, Eric was a public finance attorney in private practice at Haynsworth Sinkler Boyd, P.A., in Columbia. While in private practice, he served as State Bond Counsel for the State of South Carolina and also represented universities, school districts, counties, municipalities, and special purpose districts throughout the State. He received his Bachelor's Degree from the University of Georgia in 1991 and his Juris Doctorate from the University of South Carolina School of Law in 1996.

Norma Houston joined the School of Government in 2006. Prior to that, she served as chief of staff and general counsel to State Senate President Pro Tempore Marc Basnight. She has also served as Dare County attorney, assistant attorney general in the NC Department of Justice, and staff attorney for NC Prisoners Legal Services. Houston earned a BS in criminal justice and psychology and a JD from the University of North Carolina at Chapel Hill. She is a member of the North Carolina State Bar and serves on the boards of several organizations. Houston is an adjunct faculty member at the UNC-Chapel Hill School of Law and also teaches state government in the School’s graduate program in public administration.

Frayda Bluestein joined the School of Government (then the Institute of Government) in 1991. Prior to that time, she worked in private law practice, focusing primarily on municipal and land use law, and for one year in the Legislative Drafting Division of the North Carolina General Assembly. Her publications include books and articles about local government structure and authority, public contracting, conflicts of interest and transparency laws. She is a frequent contributor to the School's Coates' Cannons Local Government Law Blog, writing on topics including North Carolina local government authority, annexation, public records, open meetings, conflicts of interest, and First Amendment issues affecting local government. She was awarded the School of Government's two-year professorship for outstanding junior faculty achievement in 1998, the two-year professorship for teaching excellence in 2004, and the David M. Lawrence

Distinguished Professorship in 2014. Bluestein earned a BA from the University of California at Berkeley and a JD from the University of California at Davis.

Daniel D. Crean, Pembroke, New Hampshire, has concentrated in municipal law since 1976 and has taught at the University of New Hampshire Law School and Graduate School. He is Executive Director of the N.H. Municipal Lawyers Association. For IMLA, he is N.H. State Chair, Personnel Section Chair, an IMLA Fellow and recipient of the 2012 Thornton Faculty Award. Dan has written for Municipal Lawyer and the NH Bar Journal, and contributed to ABA's Town and Gown: Legal Strategies for Effective Collaboration. He has served as a Selectman and in sundry other local government positions, currently including budget committee member, trustee of trust funds, and chair of the Pembroke, NH, energy committee. He graduated from Yale and Wisconsin Law School.

Richard Weintraub is a Senior Assistant City Attorney for the City of Durham, NC. He graduated from Brandeis University and Duke University School of Law. Before joining the City Attorney's Office, he was in private practice. Among his areas of concentration are contracting, street vending and solicitations, and eminent domain.

Dwight H. Merriam, FAICP, of the law firm of Robinson & Cole LLP, is a Fellow and Past President and of the American Institute of Certified Planners and Past Chair of the ABA Section of State and Local Government Law. He teaches land use law at UConn Law School and Quinnipiac Law School, and has published over 200 articles and nine books. UMass BA (cum laude), UNC MRP, and Yale JD.

DeWitt "Mac" McCarley is a Partner at Parker Poe Adams & Bernstein in Charlotte, NC. Prior to joining Parker Poe Mac worked at the NC League of Municipalities, then as City Attorney in Greenville, NC and finally as City Attorney in Charlotte. He concentrates his practice on local government representation and sports facilities. He is a past president of IMLA and a recipient of the Charles S. Rhyne Award.

Phillip M. Sparkes is the former director of the Local Government Law Center at NKU Chase College of Law. After receiving his J.D. from DePaul University College of Law, he joined the New York State Department of State. At the department, he served as counsel to several of its offices and divisions on both the local government and business sides of the agency. In addition, he served as an administrative law judge, as managing attorney in the office of counsel, and as an advisor to the Governor's Special Fire Safety Task Force and two gubernatorial commissions on local government reform. Before moving to NKU Chase, Professor Sparkes earned an LL.M. in comparative law at Notre Dame Law School's London Law Center. Professor Sparkes is a past chair of the ethics section of IMLA and a recipient of the William I. Thornton, Jr. Faculty Award.

IMLA 80th ANNUAL CONFERENCE
2015 – Las Vegas

Institute for Local Government Lawyers

Overall Program Evaluation

Please complete this evaluation form as carefully as possible, and return it at the back of the room at the conclusion of the Institute. You may also return the evaluation at the registration desk. Your comments will help us improve similar Institutes in the future.

1. Has this Institute been
   ( ) Very helpful ( ) Moderately helpful ( ) Not very helpful

2. Was the Institute, taken as a whole,
   ( ) Too simple ( ) About right level ( ) Not simple enough

3. Was the instruction, taken as a whole
   ( ) Too detailed ( ) About right level ( ) Not detailed enough

4. What is the most important benefit you have gained from attending this Institute?

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5. Please list your suggestions for topics and speakers for future Institutes.

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6. Please give us your comments on the Program's topics:

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You Have Just Been Appointed the City or County Attorney: Now What? You Gotta Serve Somebody!
Robert J. Alfton

1. The topic is important to me professionally; it was a good topic to include on the program.
   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

2. The presentation itself was skillfully done.
   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

3. Overall, I think the information in this session will be very useful to me in my work.
   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

4. Comments:
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Fundamentals of Municipal Finance and Borrowing
Eric Shytle

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Parliamentary Procedure: The Fine Art of Herding Cats
Norma Houston

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Sunshine Laws – Key Concepts and Hot Topics
Frayda Bluestein

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   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

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4. Comments:
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Personnel & Employment Law
Dan Crean

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   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

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Advising Contract Administrators
Richard Weintraub

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   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

4. Comments:
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Land Use Law 101
Dwight Merriam

1. The topic is important to me professionally; it was a good topic to include on the program.
   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

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   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

4. Comments:
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Negotiation Skills
Dewitt "Mac" McCarley

1. The topic is important to me professionally; it was a good topic to include on the program.
   (strongly agree) 6 5 4 3 2 1 (strongly disagree)

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International Municipal Lawyers Association
80th Annual Conference 2015
Las Vegas, Nevada

Institute for Local Government Lawyers

You Have Just Been Appointed City or County Attorney: Now What?
Gotta Serve Somebody

Robert J. Alfton
Former City Attorney - Minneapolis, Minnesota
Of Counsel, Cummins & Cummins

This paper is intended for lawyers who have been recently appointed or elected chief counsel for a unit of local government. The lawyer's title may be City Attorney, County Attorney, Corporation Counsel, Law Director or something similar. The paper's purpose is to assist local government attorneys who are new and unseasoned in this field of the law, without regard to the lawyer's experience in other areas of law. This paper may also be useful to staff attorneys for units of local government.

I. **Starting Out.** Often, a lawyer will have a short period of time in which to consider an offer to become a local government lawyer. Or, after accepting the position, there may be time, before taking office, during which the new local government lawyer can find out more about the new job. Here are some things for you to do and questions to ask when starting out.

1. Find out how your position fits into the structure of your unit of local government.

   a) Is your position a full-time position or part-time? Will you be permitted to maintain a law practice on the side?

   b) Do you advise the government board directly? The mayor? The chairman?

   c) Are you expected to attend council/board meetings? If so, what role do you play at those meetings?

   d) To whom do you answer, i.e., who is your boss? Who are your clients?

   e) Does your office prosecute criminal cases and/or ordinance violations?

2. Determine the relationship of the chief legal officer to other parts of the administration.

   a) Where is the perceived line between giving legal advice and intruding into the management area?

b) What has been the prior relationship between the chief legal officer and the City/County Manager/Administrator?

c) Why was your predecessor not reappointed or reelected?

3. Find out about the employees who will be working with you. Will you have a staff? Is there an existing staff? Are there openings on the staff? Who has the ability to hire and discharge persons who will be working in your office? Do any of the staff serve at your pleasure? Is there a merit system with a civil service commission? Is there a union involved, a collective bargaining agreement?

4. Find out the budget process for your office.

   a) What does the local government budget staff expect?

   b) Who is the person who works closest with your office?

   c) Who have been the sources of governing board inquiry or debate concerning your office during recent budget deliberations?

   d) Are there regularly budgeted funds to cover the expenses of outside counsel when outside counsel are needed?

   e) What is the state of equipment/technology within your office? How do you go about getting new equipment or upgrading old equipment?

5. Arrange an early briefing from your liability insurance personnel.

   a) What risks are covered including motor vehicles, general liability insurance (slip and fall cases, etc.), workers compensation, law enforcement, section 1983 cases, and property insurance? Any retainage or deductibles applicable? Are there any umbrella policies?

   b) Is the unit of local government a member of a risk sharing pool? If so, how does the pool work?

   c) What has been the experience of the office in dealing with insurance company counsel? Is there feedback on safety issues? Suggestions on management issues? Are there regular reports from the insurance company to the unit of local government and, if so, to whom do the reports go?

   d) What are the hottest cases currently being handled by insurance company counsel? What local government departments are involved? Are there good communication channels between the departments and insurance counsel?

e) What's left, i.e., what will you be expected to handle, if anything, in liability cases?

6. Find out the hottest issues confronting your governing board. Are there persons in the community upon whom you can rely for help in identifying community issues (without regard to the perceived legal questions that may or may not be involved in those issues)?

7. Find out about your government unit's media policy.

   a) Is there an official media policy?

   b) Is there a staff person in the governmental structure with responsibility for press relations to assist you?

   c) What has been the prior relationship between the office and media?

II. **<u>Hitting the Books</u>.** Local government lawyers soon become embroiled in legal questions that are or may become the focus of intense media and public attention. Yes, the first thing you will do in the morning is read the morning newspaper to see if any hot issues have arisen overnight. You will also want to catch the local TV news, read neighborhood newspapers, and find any popular websites or blogs which relate to local politics. The quicker the local government lawyer becomes familiar with certain law and regulations, the better. Here are some to check early:

1. Public records. Does your state have statutes governing public access to local government records? Does your local government also have applicable ordinances, resolutions or policies?

2. Open meetings laws. Are there state statutes governing public access to local government meetings. Are there local ordinances or resolutions that apply? What is the scope, i.e., do they apply to all/some boards, commissions or committees of the local government? Do they apply to meetings of the local government administrative staff?

3. Codes of ethics. Is there a state or local code of ethics that applies to members of the governing board? Other officials? Employees? You? Do financial disclosure requirements apply to your governing board? On what matters are they required to abstain?

4. Rules of parliamentary procedure. What procedural rules apply to your governing board? Has the board simply adopted Robert's Rules? Do they have their own rules? Is there an up-to-date copy of the rules? What role are you expected to play, i.e., are you expected to be the parliamentarian? Be mindful that in many jurisdictions the chief legal officer often becomes the de facto parliamentarian.

5. Public Hearings. On what matters of business are public hearings required before action by the governing board? What rules apply? What notice is required? What matters can be added to the agenda after notice of the meeting is published?

6. Charter/Local acts. Most cities have charters. Many counties and other local governments have local acts of the legislature that are applicable. It may not be necessary to read all of these acts, but finding out early how to locate them and getting a feel for the areas addressed will be very helpful.

III. **Check Your Ethics.** There are some rules that require careful examination because they may have a different impact on the government lawyer than on lawyers in the private sector. Here are a few of them. Reference is to the ABA Model Rules. The applicable parallel rules for your state, if any, should also be consulted.

1. Rule 1.11. Special conflicts of Interest for Former and Current Government Officers and Employees. This rule relates to successive government and private representation.

2. Rule 1.13. Organization as Client. This rule is usually applicable to local governments. It may help to resolve the question, who is my client?

3. Rule 1.6. Confidentiality of Information. How do you resolve the obligation to maintain confidentiality in the face of applicable open meetings or public records laws?

4. Rule 3.6. Trial Publicity. You are operating in the fish bowl now. It is important that you know the ground rules.

5. Rule 4.1. Truthfulness in Statements to Others. A useful rule when dealing with lawyers who appear at public hearings and make questionable statements.

6. Rule 4.2. Communications with Person Represented by Counsel. The usual rule that lawyers don't talk to other lawyer's clients does not always apply in the public sector.

7. Rule 8.3 and 8.4. Professional Misconduct. What it is and when/how to report it.

IV. **The Short Term.** So you have survived your first few weeks. Now what do you do? Here are some things to consider while getting ready for the long haul.

1. Make the commitment to learning. Most local government attorneys come to their jobs with little substantive knowledge of local government law. You will need that knowledge. Your state league, county association and IMLA are excellent sources for training, courses and publications about local government issues. Most of all, continue coming to IMLA seminars and conferences.

2. Establish a network of experienced local government attorneys and/or law professors upon whom you can call for advice. You can often save yourself time and grief with a phone call. Become active in your state league attorneys group.

3. Take CLE courses that cover areas of local government law. There may be a public law section of your state bar association that can help.

4. If your department is responsible for criminal and/or ordinance prosecutions, become familiar with the laws relating to DWI's, domestic assault, and gang violence. Take a ride-a-long in a police squad car. Stop by the courtroom and watch the proceedings.

5. Check out your clients, including the governing board, departments, and the appointed boards and commissions you will be representing.

    a) Is there a good communications flow? Talk to other staff employees, including city council administrative assistants, clerks and secretaries. Walk the hallways. Listen and ask questions.

    b) Do your clients think that your office is doing a good job for them?

6. Get a firm grip on your office.

    a) How much time will you need to be an administrator and how much time will be left for the lawyering you will need to do?

    b) If office administration will be an important part of your duties, then add some management courses to your CLE. Most attorneys have never had supervisory experience.

7. Do you have the equipment that you need to do your job?

V. <u>The Long Haul – a few random tips for survival</u>.

1. Set the tone with your governing board for how you plan to do business.

    a) Take the high ground. You will render advice that is intellectually honest and objective.

    b) Keep politics out of the office and the office out of politics.

2. Educate your governing board. Establish a sound working relationship with your board by setting up workshops for new board members and for old ones who need a refresher. The time between elections and when new board members take office is an ideal time to offer a short school for the new members. Cover at least the following:

a) Conflict of interest laws (gifts and favors), bidding laws, zoning laws, codes of ethics, use of confidential information, use of city/county property for personal use.

b) Rules of parliamentary board procedure, especially traps for the inexperienced board member and the mechanics of getting a resolution or ordinance introduced and passed.

c) Open meetings and public records laws. Having one's correspondence (and likely emails and voice mail messages) open to public inspection is a novel and often unwelcome concept for new board members to grasp.

d) Laws governing the privacy of city/county personnel records.

e) Your ethical position: Can you assure a council member of confidentiality as to other council members? What areas will you not discuss with an individual council member but may discuss with the Council as a whole (i.e., litigation)? What areas will you not discuss at all (i.e., personnel)?

3. Never surprise your board.

a) Keep your governing board up to date on anticipated and pending litigation, significant legal developments affecting your city or county, and work they have assigned to you (opinion requests, ordinance or resolution drafting, etc.).

b) Recognize the dangers of verbal opinions and the recollections of convenience that you may encounter from those who receive them. Put opinions in writing and, if possible, send them to all governing board members.

c) Invoke the 180 degree rule for horseback opinions, i.e., reserve the right to issue a completely different opinion whenever you are asked to give an opinion from horseback. Yes, an interesting challenge at council meetings.

4. Dealing with outside law firms.

a) First, recognize that you will probably need outside firms. For example, a bond firm where you need an independent tax opinion and conflict of interest situations where you and your office cannot serve as counsel.

b) The issues that are liable to generate public scrutiny and discussion will be the selection process for outside firms and the cost.

c) You as the chief legal officer should be the lead player in the selection process. If the governing board must make the formal decision, then you should be authorized to make a recommendation to them.

d) Consider a Request for Qualifications process (RFQ) for hiring outside law firms. It works like this:

i) First, make sure to brief the governing board on what you plan to do and get their approval if needed.

ii) Describe the engagement and solicit responses from interested law firms to questions that are designed to elicit information about the firm, its experience in the area, and its qualifications to do the work.

iii) Defer discussion of fees until later in process.

iv) Screen responses and select a small group of firms for interviews. Ask for fee information at this stage. Invite management personnel to participate in the interview stage.

v) Use the same interview format with each firm. Evaluate firms on the same criteria. Check lists are useful.

vi) Ask for commitments from each firm that they will not lobby your governing board, at least until after you have made your recommendation to the governing board. Tell the governing board that you are going to do this.

vii) Make written recommendations to the governing board. Consider selecting more than one firm with authority delegated to you to select from among approved firms according to the demands of each case.

viii) The RFQ process can be used for hiring outside counsel in different areas, e.g., bond counsel; risk management and liability; affordable housing; public/private ventures, etc.

ix) Explore partnering opportunities with outside firms to build up staff experience, contain costs and maintain communications.

e) Make sure someone is monitoring the cost of outside counsel and that you are kept informed about those costs.

5. Dealing with the Press.

a) If there is an official organizational press policy, try to follow it.

b) Know reporters' deadlines. Help them by returning phone calls before their deadline, if you can, even if you are not going to say anything.

c) Appreciate the value of silence.

d) Avoid letters to the editor unless it is really, really necessary.

e) Finally, remember that nothing is off the record, forever.

6. Working with Unions. Unions are largely membership driven. What are the most discussed subjects by the membership? Often labor and management approach subjects that are work force wide, i.e., health care, vacation and sick leave time, etc., through a panel with all unions and employers involved. Get to know the business agents of the unions representing your employees and talk regularly to the union steward in the office.

7. Working with your Government.

   a) Don't cross the line into management, unless invited, and don't invite crossings in your direction.

   b) Time: Keep track of it, put a value on it.

   c) Training: Establish good training programs for City/County Departments on the law and procedure applicable to each department's area of responsibility. It can save time and avoid litigation. Third party training for staff may also be available through area universities or community colleges.

8. Make the office hum.

   a) Good opinion and research files save time and promote accuracy and consistency of opinions. Save those IMLA papers, papers from other CLE courses and articles of interest, but make sure they are indexed. There are computer programs that are readily available that will facilitate this indexing and make your opinion and research files accessible and useful.

   b) Develop good form banks. It saves time and effort. But, remember that forms should fit the transaction and not the other way around. Forms should be updated periodically and revision dates should be noted on the forms.

VI. **<u>Finally, always use good people practice</u>.** The following Ten Rules of Good People Practice have been handed down, in a light hearted way, from one Institute session to the next. Do you have an amendment to suggest?

TEN RULES OF GOOD PEOPLE PRACTICE

1. Avoid people with more than two bumper stickers on their car.
2. Avoid people who write mostly in the passive voice.
3. Avoid people who are always late for meetings.
4. Avoid people who never say Yes, No, or I don't Know.
5. Avoid people who use the following words or phrases a lot: dialogue, scenario, proactive, prioritize, interface, facilitate, paradigm, empower, and share with you.
6. If these words or phrases fairly describe you, disregard rules 1 – 5.
7. Seek out smart people.
8. Seek out people whose writing can be understood by an eighth grader.
9. Seek out people who understand the value of silence.
10. When all else fails, seek out nice people.

GOOD LUCK AND HAVE A GOOD TIME SERVING!

EPILOGUE

This paper was first written and presented as a topic by Bill Thornton in the early years of the Institute for Local Government Lawyers (ILGL) and then put on hold, or "sidetracked" to use Bill's terminology. As many of you know, Bill was the central player in the creation of the ILGL. Bill recruited Henry Underhill, past IMLA Executive Director/General Counsel, to become a member of the Institute faculty and he resurrected, updated and used the paper at his first presentation. I have reworked the paper to some extent – edited portions of it, while inserting some of my own thoughts and observations on the general subject, but the core of the paper remains as Bill first wrote it with Henry's revisions. I am thankful to both Bill and Henry for the use of their work as the vessel for my voyage as an ILGL faculty member.

Bob Alfton

Fundamentals of Municipal Finance and Borrowing
2015 Institute for Local Government Lawyers
October 3, 2015 • Las Vegas, NV
Prepared and Presented by Eric Shytle (General Counsel, City of Sumter, SC)

I. INTRODUCTION

Municipalities are creatures of state law. For the most part, state governments afford a limited degree of autonomy to municipalities (e.g., "home rule") to address local finance and borrowing issues. Significant constitutional and statutory restrictions, however, curtail this autonomy. These restrictions vary from state to state, and every municipality faces at least some locally unique issues.

In this presentation, then, I make no attempt to "survey" the detailed substantive context from state to state. The point is instead to identify finance and borrowing issues that municipal lawyers must address under their own state and local legal systems.

In many cases, I use examples from my home state of South Carolina to illustrate the issues. The laws, rules, standards, and practices in your state may be (and probably are) different. On the other hand, the underlying issues should be sufficiently similar to at least identify the questions that you should be asking in your own municipality.

I do address two major substantive areas (disclosure and tax) for which the primary rules are federal. These areas are presumably the same in every state, subject to perhaps some additional local wrinkles.

In short, this presentation probably contains lots of information that is inapplicable, incorrect, and perhaps even wrongheaded when applied to your own municipality. So you'll have to use this information cautiously and at your own risk. Sorry. But, I do hope that simply identifying issues and raising questions will give you a significant head start in addressing your own municipality's finance and borrowing activities.

II. SOURCES OF MUNICIPAL REVENUE

TAXES. Taxes are, of course, an essential source of local revenue. There are three major sources of tax revenue – property taxes, sales taxes, and income taxes. The degree to which these sources are available to your municipality, the relative mix of these sources, and the uses to which a particular source may be put will vary from state to state.

In some states, municipalities receive revenue from a combination of two sources, most commonly property and sales taxes. Some states assign a portion of state tax revenues to those municipalities with a substantial share of the state population (New York City, St. Louis, and Kansas City, for example). In still other states, municipalities rely on only one tax.

In South Carolina, the major municipal tax is a property tax on real and personal property. The asset classes and assessment ratios are set by the State Constitution, and the state requires uniform apportionment and allows virtually no discretion in exemptions or credits. On the other hand, municipalities

historically could set their own millage rates, subject only to political considerations. Recently, the state imposed a "millage cap" that restricts annual millage increases to a percentage determined by combining population growth in the municipality and the CPI. The state also requires a "rollback" in reassessment years such that the new millage rate will generate the same amount of revenue from the presumably higher reassessed value as the prior millage rate did before the reassessment.

South Carolina municipalities receive no sales taxes (other than certain local option sales taxes, discussed below) or income taxes. There is a "local government fund" contribution to counties and municipalities from state general revenues, but the amount of the contribution has dwindled to nearly insignificant levels in recent budget cycles.

REVENUE FROM OTHER SOURCES. There are a number of other available revenue sources that also vary from state to state. A major source is utility revenue from water, wastewater, natural gas, or electrical systems. These revenues are booked in a separate "enterprise fund" for accounting purposes, in order to separate those revenues from general government revenues. Many municipalities transfer enterprise fund revenues to the general fund, either through a "franchise" fee, a direct transfer, or indirect cost recoveries. State governments, rating agencies, and general fiscal prudence require restraint in the magnitude of the transfer.

Other sources of municipal revenue may include:

- Local option taxes, which may be imposed at the county or municipal level by ordinance. Often, the enabling law requires voter approval. Major local option taxes in South Carolina include a local option sales tax (a 1% sales tax that is used primarily to reduce property taxes on owner-occupied residential property); a capital project sales tax (a 1% sales tax that is used to fund a voter-approved list of specifically identified capital projects such as roads, government buildings, recreation facilities, and so on); hospitality taxes (an additional sales taxes on prepared meals, the proceeds of which must be spent to encourage tourism); and accommodations taxes (an additional sales taxes on hotel stays, the proceeds of which also must be spent to encourage tourism).

- Service Charges (for example, garbage collection, plans processing fees, building inspection fees, and so on).

- Business Licenses, which are imposed on the gross revenues of the business subject to a credit for business license fees paid elsewhere. This is a major source of municipal revenue in South Carolina. Recently, the South Carolina courts held that the rate classifications in a business license ordinance must bear a rational relationship to the relative profitability of the class, which required municipalities throughout the state to update their business license classifications.

- Tickets, fees, and fines.

- Special Tax Districts; Assessments. State law may allow the creation of special tax districts or assessment districts for projects or services that benefit the specially taxed or assessed area.

- Tax Increment Financing Districts. Many states allow the creation of redevelopment or tax increment financing districts to improve or redevelop certain areas in the municipality. These districts generally do not change the amount of taxes paid from the perspective of the property owner. Instead, they divert incremental property taxes from other taxing districts to the municipality.

III. LIMITATIONS ON SPENDING; OTHER ISSUES

Public Purpose. All government expenditures must serve a public purpose. The definition of public purpose varies from state to state and has evolved over the years. Economic development (at least, large-scale industrial economic development) is almost universally considered a public purpose. What about commercial development? Large-scale residential development?

Corporate Purpose. All government expenditures must also serve a "corporate purpose" of the government. For municipalities, which are almost invariably general purpose governments, this restriction is unlikely to be meaningful.

Statutory Restrictions. In many cases, the statute authorizing the collection of the revenue will limit the permissible uses of proceeds.

Taxes v. Fees. Often, it is important to determine whether a certain charge is a "tax" or a "fee." A common view is that the proceeds of a fee are segregated from general fund revenues and may be used only to pay the costs of the service or good for which the fee was imposed. So, for example, a "road user fee" on all cars in the municipality, if it is in fact a fee, may be applied only to improve roads.

Constitutional Issues (e.g., equal protection).

Procurement. Before procuring most goods or services (subject to locally determined exemptions), the municipality must follow applicable bidding or request for proposal procedures.

Appropriation and/or Budgeting. Municipal expenditures must comply with state and local laws specifying how an expenditure is "approved," either through appropriations, budgeting, or both.

Funds on Hand: Investing and Lending. State law limits the investments that may be made by municipalities, and may also prohibit or at least restrict the making of loans as well.

Lending of the Public Credit. Many state constitutions provide that the "credit" of the government may not be "pledged or loaned" for the benefit of any private entity or individual. These provisions were originally a response to local government guarantees of debt of (and equity investments in) the railroad companies. The provisions are harder to interpret now, but there is certainly an argument in many states that local governments cannot guarantee private debts, provide reserve funds for private parties, or otherwise allow tax revenues to become involved in private "risk."

IV. BORROWING IN GENERAL; TYPES OF BONDS

The borrowing ability of a municipality is a product of state constitutional and statutory law and judicial decision. In any event, however, a municipality cannot simply go to a bank and borrow money by signing a promissory note. Instead a municipality issues bonds. The major types of bonds are:

- General Obligation Bonds. Secured by taxes. They are commonly described as involving a pledge of the "full faith and credit" of the municipality, which means the municipality could be forced to levy taxes to retire the debt. The issuance of general obligation debt is subject to a "debt limit" and/or to voter approval. Because these bonds implicate the taxing power, they are generally the most restricted in terms of purposes, amount, term to maturity, public approval processes, method of sale, etc.

- Utility Revenue Bonds. Secured by revenues of a utility system or systems. Utility bonds are not subject to a legal debt limit but do contain coverage requirements in the issuing instrument (i.e., the indenture). Common requirements are an "earnings test" (net revenues must be at least 110% of expenses and debt service) and an "additional bonds test" (the issuer cannot issue additional bonds unless net revenues are at least 120-150% of expenses plus debt service including the proposed new issue).

- Lease-Purchase Agreements. In the form of a lease under which "lease payments" include a principal and interest component. At the end of the lease, the "lessee" owns the asset or can purchase it for a nominal amount. In effect, it is a financing lease, and the most common purpose to use this structure is either to streamline the acquisition of movable equipment, or to evade the debt limit. The lease will contain a "nonappropriation clause" allowing the lessee to fail to budget lease payments, thereby forfeiting the collateral. This feature is ordinarily interpreted to mean that the lease is not "debt" for constitutional purposes. Some states modify this interpretation by statute.

- Other "Revenue" Bonds. State law may allow the securitization of revenue streams other than utility revenues, for example hospitality or accommodations fees, special assessments, tax increment payments, certain types of sales taxes, etc. The common denominator is that the underlying stream of revenue is not a generally applicable "tax" that would implicate the full faith and credit of the issuer.

- Special Source Revenue Bonds. Secured by payments or fees in lieu of taxes, for industrial projects that meet the state requirements for granting a PILOT or FILOT treatment to a project.

- Bond Anticipation Notes. Secured by the promise to issue a "take out" bond in the future. These are generally short-term obligations (one year or less) that serve a bridge financing until the permanent financing is put in place.

- Tax Anticipation Notes. Secured by the receipt of future taxes. Municipalities with cash flow challenges can use TANs to fund operations pending the receipt of taxes. For example, if tax receipts arrive in February for an entity using a June 30 fiscal year, a TAN can cover budgeted expenses during the period prior to February.

- Grant Anticipation Notes. Secured by the proceeds of a future grant. As with BANs, these notes can serve as a bridge financing prior to permanent financing solution.

- Conduit Bonds. Less commonly used by municipalities, at least in South Carolina, but generally secured by a loan agreement with a third-party that ultimately receives and makes use of the bond proceeds. For example, an economic development authority would issue bonds to the market, loan the proceeds to an industry, and pledge the revenues under that loan agreement to the payment of the bonds. As the name indicates, these bonds allow the government to serve as a "conduit" to raise financing for another entity.

V. PUBLIC OR PRIVATE?

Bonds may be sold to the public capital markets or to a private entity (e.g., a bank). Selling an issue to the public capital markets raises disclosure issues (discussed below), increases the relative costs of issuance, and requires greater effort by the issuer. On the other hand, the public capital markets generally offer more competitive interest rates. In addition, some issues cannot be placed with a bank because of their size, term to maturity, or complexity.

A commonly misused phrase is to use the term "bank qualified" to mean a bond that is placed with a bank. The term "bank qualified" is a tax concept that allows favorable interest treatment to the bank for certain types of issues and/or issuers. A bond may not be "bank qualified" and yet may still be sold to a bank.

VI. MARKET PARTICIPANTS

The issuance of bonds (particularly to the public capital markets) may involve a large cast of characters. The most common participants are:

- Issuer. The public entity issuing the bond or, as we would normally say, borrowing the money.

- Underwriters. In issues sold to the public capital markets, the entity that "purchases" the bonds from the issuer and then resells them to the public.

- Financial Advisor. An independent firm that assists and advises the issuer in structuring the bonds, selecting an underwriter, securing ratings, acquiring credit enhancement, etc.

- Credit Enhancer. An entity that "enhances" the rating of the bonds, either by insuring their payment or by supporting them with a letter of credit.

- Trustee. An entity serving in the interest of the bondholders to receive payments from the issuer, make payments to the bondholders, enforce rights under the bond documents, etc.

- Bond Counsel. Narrowly, the lawyer or law firm that opines that the bonds are legal, valid, binding, enforceable, payable from the pledged source of funds, and exempt from federal and state income taxation. In the traditional view, the bond counsel's client is the "deal," not the issuer. This distinction may be important.

- Issuer's Counsel or Local Counsel. Most likely, you. In any event, the lawyer or law firm that represents the issuer. Local counsel will normally opine on matters including the existence and legal authority of the issuer, compliance with open meetings laws, procurement, etc. A sample local counsel opinion is included in these materials.

- Underwriter's Counsel. Separate legal counsel representing the underwriter. The primary duties of the underwriter's counsel are to draft the Bond Purchase Agreement between the underwriter and the issuer and to coordinate the preparation of (and possibly opine on) the disclosure documentation.

VII. CRITICAL ISSUE # 1: THE LOCAL COUNSEL OPINION

Rather than catalog or itemize the innumerable little rules and wrinkles of a bond transaction, I will focus on three central issues that are (or should be) critical to the municipal lawyer: the opinion he or she will be expected to give at closing, the disclosures required after the issuance of the bonds, and the tax compliance requirements that attach after the bonds are issued.

The content of the local counsel opinion will vary according to the complexity of the deal, the firm serving as bond counsel, whether the issue is sold to the public or to a bank, whether the pledged revenues are subject to any peculiarities, and so on.

Therefore, critical point #1 is: Local counsel should ask early and often about the expected content of his or her opinion at closing.

It is not unusual to see local counsel surprised at the end of the deal when the form opinion is circulated. "What? I can't opine on procurement, the purchasing director handled that and I wasn't involved!", or "I can't opine on the meetings at which the ordinance was approved because I didn't go and the minutes aren't ready yet!"

So find out at the beginning.

Exhibit A is a sample local counsel opinion. You may be asked to provide much more, or much less, but this is a fairly standard opinion for a revenue bond transaction.

VIII. CRITICAL ISSUE #2: CONTINUING DISLOSURE OBLIGATIONS

Is it tempting to write pages on the primary disclosure issues that arise during the issuance of the bonds. On the other hand, during the issuance of the bonds

you will have the assistance of bond counsel, the underwriter, and the underwriter's counsel. That assistance will be of much more value than any generic summary I could offer now. So I will say only two things on the primary disclosure issues that arise during the issuance of the bonds.

First, you should read the disclosure. All of it. And you should, to the limits of your ability and influence, make yourself comfortable and confident that it is correct. Second, you should determine for which portions of the disclosure (if any) you will be required to opine. In paragraph (9) of the attached opinion, for example, I opined over certain designated sections of the Official Statement. With respect to those sections, you need to be more than comfortable and confident.

With that, I turn to continuing disclosure. When your municipality issues bonds to the public capital markets, it will enter into a "continuing disclosure agreement" (or some such similar name) that requires the filing of annual reports and material event notices.

Exhibit B is a sample continuing disclosure agreement.

General Filing Notes. In the bad old days you had to file on paper, by mail, in lots of different places. Now you file here: http://emma.msrb.org/. It's pretty simple. Create an account and upload your documents in .pdf form. That's the easy part. Below, we'll talk about the hard parts.

Annual Reports. By a specified date of each year during which the bonds remain outstanding, the municipality will need to file an annual report than contains its audited financial statements and certain additional data. The required additional data will be clearly identified in the agreement and will ordinarily be simple updates of information in the Official Statement. For example, for a utility system revenue bond, the annual report will usually update the rate schedule, largest customers, peak and average flows, etc.

There are a few points to be made about the annual reports. First, make sure that they are filed on time. If they cannot be filed on time (e.g., the audit is not finished), then file what you do have, tell the market what you don't have, and tell them when you expect to file. Then, file what you didn't have as soon as you do have it. Second, make sure that what you file is correct. After all, these are just as much market disclosures as the original Official Statement. In theory, people make secondary trades on the contents of the annual filings. So if you mistakenly say in your annual filing that you have a debt service coverage ratio of 300%, but it is really something like 120%, you might have a problem. Check it, or at least be sure that somebody else is checking it.

Material Event Notices. For the even harder part, the agreement will provide that you must timely notify the market when certain "material events" occur. The current list of required material events are:

- Principal and interest payment delinquencies;
- Non-payment related defaults, if material;
- Unscheduled draws on debt service reserves reflecting financial difficulties;
- Unscheduled draws on credit enhancements reflecting financing difficulties;
- Substitution of credit or liquidity providers, or their failure to perform;

- Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security;
- Modifications to rights of security holders, if material;
- Bond calls, if material, and tender offers;
- Defeasances;
- Release, substitution, or sale of property securing repayment of the securities, if material;
- Rating changes;
- Bankruptcy, insolvency, receivership, or similar event of the obligated person;
- The consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action, or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and
- Appointment of a successor or additional trustee or the change of name of a trustee, if material.

One of your responsibilities, then, is to create (or make sure that someone within your municipality creates) a system that "reminds" the municipality to file if any of these things occurs. It's easy to overlook the need to file unless (a) your bond counsel happens to ask, or (b) you have a reliable system in place to make it happen.

One More Thing: The "Next" Issue. One requirement for a new Official Statement is that it must describe your compliance with your prior continuing disclosure agreements. So, if your municipality was late in filing an annual report, or didn't file a material event notice, or otherwise breached the prior continuing disclosure agreements, you have to say that in the new Official Statement. As a bond lawyer, I used to be pretty casual about continuing disclosure. But the SEC and the MSRB are getting very, very concerned about this matter, and we can't afford to be casual anymore.

General Questions to Ask about Disclosure. I mentioned several times above the importance of accuracy in disclosure. Here are some questions you might ask yourself in thinking about disclosure:

- Have we adopted disclosure processes for preparing Official Statements, and if we have, am I satisfied that such processes have been reasonably designed to produce accurate and reliable information?
- Has responsibility been delegated to appropriate officials?
- Is my Council being asked to approve an Official Statement?
- Do I have a reasonable basis to have confidence in the integrity and competence of the financing team (e.g., financial staff, in-house counsel, outside counsel) that has prepared the Official Statement?
- Do I know anything that would cause me to question the accuracy of the disclosures or that would indicate that they are misleading?
- Have I seen something in the audited financial statements that I know is incorrect?

- Do I know of any potentially material issues that should be brought to the attention of the financing team or for which I would like a further explanation?

IX. CRITICAL ISSUE #3: POST-ISSUANCE TAX COMPLIANCE

Interest payments on most municipal bonds are exempt from federal income tax. Purchasers of municipal bonds will therefore require a lower rate of interest on a tax-exempt bond than they would for a taxable bond (i.e., the net return for a lower-yielding bond with no tax payments required is comparable to a higher-yielding bond that does require tax payments on the interest). As a practical matter, then, tax exemption provides a benefit to the issuer in the form of a lower cost of borrowing. To qualify for and maintain the tax exemption, however, the issuer must comply with elaborate federal rules.

As with disclosure, you'll have help on the tax issues when issuing the bonds. In particular, your bond counsel will bore and/or irritate you at great length on potential tax risks in your deal. In the briefest form possible, the two main issues are:

- Private Use. Putting aside certain "private activity bonds" (which are beyond the scope of this paper), a bond-financed facility that exceeds the safe harbor thresholds for "private use" will not be eligible for tax exemption. Sometimes private use is easy to see. If you issue bonds to build a new car dealership, and then lease it to your good friend the car dealer, that's private use. But sometimes private use is harder to see. What about a bank that sponsors your athletic field and gets its name over the door? What about a private company that caters every event in your auditorium? What about a private vehicle maintenance company that occupies a bond-financed city shop? What about parking spaces in a bond-financed public parking deck that are leased to a private hotel?

- Arbitrage. The issuer cannot earn a materially higher rate of return on the investment of bond proceeds than it is paying on the bonds. In this interest rate market that is a theoretical rather than a real limitation, but you still have to follow the rules.

Again, your bond lawyer will handle these questions when the bonds are issued. After the bonds are issued, however, things might change. That is where local counsel may become the central player. For example, assume your municipality issues general obligation bonds to build a new public services complex. You are planning for future growth, so you build the complex larger than it needs to be. Initially, the only occupant of the complex is your municipality. But a few years down the road, growth is slower than expected, and your City Manager gets a request to lease the unused space in the complex to a local insurance firm. The unused space is 25% of the total square footage of the building. What do you think the IRS would say about this proposal?

The critical point, then, is that you need to create (or make sure that someone within your municipality creates) a system that ensure post-issuance compliance with the tax rules. The IRS recently began asking on Form 8038s whether the issuer had such policies and procedures in place. In theory, and for now, post-issuance compliance procedures are voluntary. But it's certainly wise to have a system that tracks or requires:

- The investment and expenditure of the bond proceeds;
- The nature, location, and use of all facilities or parts of facilities financed by the bonds;
- Periodic review of compliance with the legal requirements necessary to preserve the tax advantages of the bond;.
- Hiring professionals or consultants as necessary to comply with the legal requirements applicable to the bonds, including, without limitation, the requirement to compute and pay rebate;
- Consultation with bond counsel prior to engaging in post-issuance credit enhancement transactions;
- Consultation with bond counsel before modifying the interest rate, maturity date, or other material terms of any outstanding bonds;
- Retention of records relating to the bonds for the period required by law, which is currently the term of the bonds plus 3 years.

Exhibit C is a sample post-issuance tax compliance policy. This policy is far from state of the art, and you should consult with your own bond counsel in designing a policy that suits your municipality and the nature of your bonds. On the other hand, I think this sample frames the relevant issues for you to be thinking about.

IRS Inquiries and Audits. At some point, you will likely get a look from the IRS to make sure you are doing things right. To give you a sense of what that might involve, **Exhibit D is a letter of inquiry from the IRS on my municipality's recent utility bonds**. I'm glad to say that no further action was taken by the IRS after we submitted a response. On the other hand, as you can imagine, if we had not had our post-issuance tax compliance procedures in place, simply responding would have been incredibly burdensome, perhaps impossible.

X. CONCLUSION

Of course, much more could be said. For municipal finances and borrowing, the rules are complex and the stakes are high. For the most part, however, the most useful contribution the municipal lawyer can make is to be aware of the general issues and to design systems that help ensure ongoing compliance.

EXHIBIT A:
SAMPLE LOCAL COUNSEL OPINION

City of Sumter

South Carolina

29151

June 20, 2007

B. ERIC SHYTLE
CHIEF COUNSEL

P.O. BOX 1449
21 N. MAIN ST.
(803) 774-3983
(803) 436-2615 (FAX)

Banc of America Securities LLC
214 North Tryon Street
Charlotte, North Carolina 28255

Re: $31,855,000 City of Sumter, South Carolina Waterworks and Sewer System Improvement Revenue Bonds, Series 2007

Ladies and Gentlemen:

As counsel to City of Sumter, South Carolina (the "City"), a body politic and corporate of the State of South Carolina (the "State"), I have considered the validity of the above-referenced bonds (the "Series 2007 Bonds"), and in this connection I have examined:

(a) Title 6, Chapter 17, Code of Laws of South Carolina 1976, as amended (the "Enabling Act");

(b) the Contract of Purchase dated June 5, 2007 (the "Contract of Purchase"), between the City and you;

(c) the Official Statement dated June 5, 2007 (the "Official Statement"), relating to the Series 2007 Bonds;

(d) the Bond Ordinance enacted by the City Council of the City (the "Council") on June 15, 1999, as amended on October 3, 2000 and June 5, 2007 (the "Bond Ordinance") and the 2007 Series Ordinance enacted by the Council on June 5, 2007 (the "2007 Series Ordinance" and with the Bond Ordinance, the "Ordinance");

(e) the Insurance Agreement dated as of June 1, 2007 (the "Insurance Agreement") between the City and XL Capital Assurance; and

(f) such other documents and instruments and proceedings of the City as I have deemed relevant.

As to questions of fact material to my opinion, I have relied upon representations and other certifications of officials of the City without undertaking to verify the same by independent investigation.

Based on the foregoing, I am of the opinion that as of this date:

(1) The City is a body politic and corporate and a municipality of the State, duly created, validly existing, and in good standing under the Constitution and laws of the State, and has all requisite power and authority (i) to adopt and implement the Ordinance and to issue, sell, and deliver the Series 2007 Bonds, (ii) to conduct its business as currently being conducted and as proposed to be conducted and as described in the Official Statement, and (iii) to carry out the transactions contemplated by the Contract of Purchase and the Official Statement.

(2) Under the Constitution and laws of the State, each of the Contract of Purchase and the Insurance Agreement has been duly authorized by all necessary action on the part of the City, has been duly executed and delivered by the City, and, assuming the due authorization, execution, and delivery of such document by the other party thereto, constitutes a legal, valid, and binding obligation of the City, enforceable in accordance with its terms, except that: (i) the enforceability thereof may be subject to the exercise of judicial discretion in accordance with general principles of equity and to bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting creditors' rights, and (ii) I express no opinion as to the validity or enforceability of Section 11 of the Contract of Purchase.

(3) The City has taken all action legally required of it to enact and to implement the Ordinance and to authorize the issuance, sale, and delivery of the Series 2007 Bonds. The Series 2007 Bonds have been duly authorized and executed by the City and constitute legal, valid, and binding obligations of the City, enforceable in accordance with their terms (except that the rights of the holders of the Series 2007 Bonds and the enforceability thereof may be subject to the exercise of judicial discretion in accordance with general principles of equity and to bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting creditors' rights heretofore or hereafter enacted to the extent constitutionally applicable), and are entitled to the benefits and security of the Ordinance. Each of the Bond Ordinance and the 2007 Series Ordinance is in full force and effect and is valid and enforceable in accordance with its terms, except to the extent that enforceability thereof may be limited by applicable bankruptcy, insolvency, or other rights affecting the enforcement of creditor's rights generally.

(4) The execution and delivery of the Contract of Purchase, the Insurance Agreement, and the Series 2007 Bonds and the compliance by the City with the terms thereof and the adoption and implementation by the City of the Ordinance does not and will not violate, conflict with, or result in any breach of any of the provisions of, or constitute a default under the Enabling Act, or result in creation or imposition of any lien, charge, or other security interest or encumbrance of any nature whatsoever (other than as contemplated by the Contract of Purchase, the Insurance Agreement, or as described in the Official Statement), pursuant to any agreement or other instrument to which the City is a party or by which it may be bound, or any license, judgment, constitutional provision, decree, order, law, statute, ordinance, or governmental rule or regulation applicable to the City.

(5) To the best of my knowledge, the City is not in default in any material respect under any material agreement or other instrument to which it is a party or by which it may be bound.

(6) All consents, approvals, or authorizations, if any, of any governmental authority required on the part of the City in connection with the adoption and implementation of the Ordinance and the execution and delivery of the Contract of Purchase have been obtained, and the City has complied with all applicable provisions of law requiring any designation, declaration, filing, registration, and/or qualification with any governmental authority in connection with the foregoing.

(7) All consents, approvals, or authorizations, if any, of any governmental authority required on the part of the City in connection with the offer, issue, sale, or delivery of the Series 2007 Bonds and the transactions contemplated thereby and the Official Statement have been obtained (except that the City has not received a construction permit from the South Carolina Department of Health and Environmental Control for the Pocotaligo Plant Project, as defined in the Official Statement), and the City has complied with all applicable provisions of law requiring any designation, declaration, filing, registration, and/or qualification with any governmental authority in connection with the foregoing (certain aspects of which are addressed elsewhere in this opinion).

(8) There is no litigation pending or threatened contesting the creation, organization, or existence of the City or the System or that seeks to restrain or enjoin the issuance or delivery of the Series 2007 Bonds or the proceedings or authority under which they are to be issued or delivered, or that in any manner questions the authority of the City to pledge the revenues of the System to the payment of the Series 2007 Bonds and the interest thereon or the use of the proceeds of the Series 2007 Bonds and, except as described in the Official Statement under the heading "LITIGATION," there is no litigation pending or threatened, to my knowledge, that would have a material adverse effect upon the City's or the System's financial condition.

(9) The Official Statement has been duly authorized and delivered by the City. I have considered the information contained in the Official Statement under the headings "THE PROJECT," "FINANCIAL FACTORS," "DESCRIPTION OF THE SYSTEM" and "LITIGATION" and elsewhere in the Official Statement as to the City, and nothing has come to my attention that leads me to believe that such information contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances under which they were made, not misleading.

(10) All actions taken by the City in connection with the Ordinance, the Contract of Purchase, the Insurance Agreement, the Official Statement and the Series 2007 Bonds are legal and valid in all respects and none of the proceedings held or actions taken by the City with respect to any of the foregoing have been repealed, rescinded, or revoked.

Sincerely,

EXHIBIT B:
SAMPLE CONTINUING DISCLOSURE AGREEMENT

CONTINUING DISCLOSURE CERTIFICATE

This Continuing Disclosure Certificate (the "Disclosure Certificate") is executed and delivered this _____ day of _____, 201__, by [ISSUER] (the "Issuer") in connection with the issuance of the Issuer's [$AMOUNT] General Obligation Bonds, Series 201__ (the "Bonds"). The Bonds are being issued pursuant to the Constitution and the laws of the State of South Carolina, including particularly a resolution adopted on the _____ day of _____, 201__, authorizing the issuance of not exceeding [$AMOUNT] general obligation bonds (the "Resolution"). The Issuer covenants and agrees as follows:

SECTION 1. Purpose of the Disclosure Certificate. This Disclosure Certificate is being executed and delivered by the Issuer for the benefit of the Bondholders and in order to assist the Participating Underwriters in complying with Securities Exchange Commission Rule 15c2-12(b)(5).

SECTION 2. Definitions. In addition to the definitions set forth in the Resolution, which apply to any capitalized term used in this Disclosure Certificate unless otherwise defined in this Section, the following capitalized terms shall have the following meanings:

"Annual Report" shall mean any Annual Report provided by the Issuer pursuant to, and as described in, Sections 3 and 4 of this Disclosure Certificate.

"Beneficial Owner" shall mean any person which (a) has the power, directly or indirectly, to vote or consent with respect to, or to dispose of ownership of, any Bonds (including persons holding Bonds through nominees, depositories or other intermediaries), or (b) is treated as the owner of any Bonds for federal income tax purposes.

"Bondholder" or "Holder" shall mean the registered holder of any of the Bonds and any Beneficial Owner of the Bonds.

"Dissemination Agent" shall mean the Issuer or any successor Dissemination Agent designated in writing by the Issuer and which has filed with the Issuer a written acceptance of such designation.

"Listed Events" shall mean any of the events listed in Section 5(a) of this Disclosure Certificate.

"National Repository" shall mean the Electronic Municipal Market Access System maintained by the Municipal Securities Rulemaking Board, or any successor thereto.

"Participating Underwriter" shall mean any of the original underwriters of the Bonds required to comply with the Rule in connection with offering of the Bonds.

"Repository" shall mean the National Repository and each State Depository, if any.

"Rule" shall mean Rule 15c2-12(b)(5) adopted by the Securities and Exchange Commission under the Securities Exchange Act of 1934, as the same may be amended from time to time.

"State Depository" shall mean any public or private depository or entity designated by the State as a state depository for the purpose of the Rule. As of the date of this Certificate, there is no state depository established in South Carolina.

SECTION 3. Provision of Annual Reports.

(a) The Issuer shall, or shall cause the Dissemination Agent to, not later than February 1 of each year, commencing February 1, 201__, provide to each Repository an Annual Report which is consistent with the requirements of Section 4 of this Disclosure Certificate. Not later than fifteen (15) business days prior to said date, the Issuer shall provide the Annual Report to the Dissemination Agent, if other than the Issuer. The Annual Report may be submitted as a single document or as separate documents comprising a package, and may cross-reference other information as provided in Section 4 of this Disclosure Certificate; provided that the audited financial statements of the Issuer may be submitted separately from the balance of the Annual Report.

(b) If the Issuer is unable to provide to the Repositories an Annual Report by the date required in subsection (a), the Issuer shall send a notice to the Municipal Securities Rulemaking Board in substantially the form attached as Appendix I.

(c) The Dissemination Agent shall:

(i) determine each year prior to the date for providing the Annual Report the name and address of the National Repository and each State Depository, if any; and,

(ii) if the Dissemination Agent is other than the Issuer, file a report with the Issuer certifying that the Annual Report has been provided pursuant to this Disclosure Certificate, stating the date it was provided and listing all the Repositories to which it was provided.

SECTION 4. Content of Annual Reports. The Issuer's Annual Report shall contain the Issuer's complete audited financial statements, which shall be prepared in accordance with generally accepted accounting principles and Government Auditing Standards issued by the Comptroller General of the United States. If the Issuer's audited financial statements are not available by the time the Annual Report is required to be filed pursuant to Section 3(a), the Annual Report shall contain unaudited financial statements in a format similar to the financial statements contained in the final Official Statement, and the audited financial statements shall be filed in the same manner as the Annual Report when they become available. In addition thereto, the Annual Report shall contain or incorporate by reference the following:

(a) School District enrollment for current fiscal year;

(b) Total anticipated state appropriations subject to withholding under Article X, Sec. 15, South Carolina Constitution for current fiscal year;

(c) Anticipated funding under Education Finance Act, Education Improvement Act and School Building Aid Program for current fiscal year;

(d) Market Value/Assessment Summary of taxable property in School District;

(e) Tax levy for School District for current fiscal year;

(f) Tax collections for School District for preceding fiscal year;

(g) Ten largest taxpayers for School District for preceding fiscal year;

(h) Anticipated funding under any program successor to the School Building Aid Program, the Education Finance Act or the Education Improvement Act; and

(i) Anticipated funding from Homestead Exemption Fund established pursuant to Section 11-11-155, Code of Laws of South Carolina, 1976.

Any or all of the items listed above may be incorporated by reference from other documents, including official statements of debt issues of the Issuer or related public entities, which have been submitted to each of the Repositories or the Securities and Exchange Commission. If the document incorporated by reference is a final official statement, it must be available from the Municipal Securities Rulemaking Board. The Issuer shall clearly identify each such other document so incorporated by reference.

SECTION 5. Reporting of Certain Events.

(a) Pursuant to the provisions of this Section 5, the Issuer shall give, or cause to be given, notice of the occurrence of any of the following events with respect to the Bonds:

(i) Delinquency in payment when due of any principal of or interest on the Bonds;

(ii) Defeasance of the Bonds or any portion thereof;

(iii) Any change in any rating on the Bonds;

(iv) The issuance by the Internal Revenue Service of proposed or final determinations of taxability or Notices of Proposed Issue (IRS Form 5701 TEB);

(v) Tender offers;

(vi) Any unscheduled draw, reflecting financial difficulties, on any reserve fund established by the Issuer to secure further the timely repayment of the Bonds;

(vii) Any unscheduled draw reflecting financial difficulties on any credit enhancement device obtained by the Issuer to secure further the timely repayment of the Bonds;

(viii) Any change in the provider of any credit enhancement device described in item (vii) above, or any failure by the provider to perform under such a credit enhancement device; or

(ix) Bankruptcy, insolvency, receivership or similar event of the Issuer.

(b) Pursuant to the provisions of this Section 5, the Issuer shall give or cause to be given notice of the occurrence of any of the following events with respect to the Bonds, if material:

(i) Occurrence of any event of default under the Resolution (other than as described in clause (a)(i) above);

(ii) Material notices or determinations with respect to the tax status of the securities, or other material events affecting the tax status of the security;

(iii) Amendment to the Resolution or this Disclosure Undertaking modifying the rights of the Beneficial Owners of the Bonds;

(iv) Giving of a notice of optional or unscheduled redemption of any Bonds;

(v) The release, substitution or sale of any property hereafter leased, mortgaged or pledged by the Issuer securing repayment of the Bonds;

(vi) Consummation of a merger, consolidation or acquisition involving an obligate person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such action, other than pursuant to its terms; or

(vii) Appointment of a successor or additional trustee, or the change of name of a trustee.

(c) Whenever the Issuer obtains knowledge of the occurrence of a Listed Event in subsection (b) above, the Issuer shall as soon as possible determine if such event would be material under applicable federal securities laws.

(d) If the Issuer determines that a Listed Event in subsection (b) above would be material under applicable federal securities law, or upon the occurrence of any Listed Event in subsection (a) above, the Issuer shall file a notice of the Listed Event in a timely manner, not in excess of ten business days of such occurrence, with the National Repository and the Issuer Repository, if any.

SECTION 6. Termination of Reporting Obligation. The Issuer's obligations under this Disclosure Certificate shall terminate upon the defeasance, prior redemption or payment in full of all of the Bonds.

SECTION 7. Dissemination Agent. The Issuer may, from time to time, appoint or engage a Dissemination Agent to assist it in carrying out its obligations under this Disclosure Certificate, and may discharge any such Agent, with or without appointing a successor Dissemination Agent. The initial Dissemination Agent shall be the Issuer.

SECTION 8. Amendment; Waiver. Notwithstanding any other provision of this Disclosure Certificate, the Issuer may amend this Disclosure Certificate, and any provision of this Disclosure Certificate may be waived, if such amendment or waiver is supported by an opinion of counsel expert in federal securities laws, to the effect that such amendment or waiver would not, in and of itself, cause the undertakings herein to violate the Rule if such amendment or waiver had been effective on the date hereof but taking into account any subsequent change in or official interpretation of the Rule. With respect to any amendment to this Disclosure Certificate:

(a) The amendment may only be made in connection with a change in circumstances that arises from a change in legal requirements, change in law, or change in the identity, nature, or status of an obligated person, or type of business conducted;

(b) This Disclosure Certificate, as amended, would have complied with the requirements of the Rule at the time of the issuance of the Bonds, after taking into account any amendments or interpretations of the Rule, as well as any change in circumstances; and

(c) The amendment, in the opinion of said counsel, does not materially impair the interests of Holders of the Bonds.

In the event of an amendment hereto, any Annual Report provided pursuant to Section 4 herein which contains amended operating data or financial information will explain, in narrative form, the

reasons for the amendment and the impact of the change in the type of operating data or financial information being provided.

SECTION 9. Additional Information. Nothing in this Disclosure Certificate shall be deemed to prevent the Issuer from disseminating any other information, using the means of dissemination set forth in this Disclosure Certificate or any other means of communication, or including any other information in any Annual Report or notice of occurrence of a Listed Event, in addition to that which is required by this Disclosure Certificate. If the Issuer chooses to include any information in any Annual Report or notice of occurrence of a Listed Event in addition to that which is specifically required by this Disclosure Certificate, the Issuer shall have no obligation under this Certificate to update such information or include it in any future Annual Report or notice of occurrence of a Listed Event.

SECTION 10. Default. In the event of a failure of the Issuer to comply with any provision of this Disclosure Certificate, any Bondholder may take such actions as may be necessary and appropriate, including seeking mandamus or specific performance by court order, to cause the Issuer to comply with its obligations under this Disclosure Certificate. A default under this Disclosure Certificate shall not be deemed an event of default under the Resolution, and the sole remedy under this Disclosure Certificate in the event of any failure of the Issuer to comply with this Disclosure Certificate shall be an action to compel performance.

SECTION 11. Duties, Immunities and Liabilities of Dissemination Agent. The Dissemination Agent shall have only such duties as are specifically set forth in this Disclosure Certificate, and the Issuer agrees to indemnify and save the Dissemination Agent, its officers, directors, employees and agents, harmless against any loss, expense and liabilities which it may incur arising out of or in the exercise or performance of its powers and duties hereunder, including the costs and expenses of defending against any claim of liability, but excluding liabilities due to the Dissemination Agent's gross negligence or willful misconduct. The obligations of the Issuer under this Section shall survive resignation or removal of the Dissemination Agent and payment of the Bonds.

SECTION 12. Beneficiaries. This Disclosure Certificate shall inure solely to the benefit of the Issuer, the Dissemination Agent, the Participating Underwriters and Holders from time to time of the Bonds, and shall create no rights in any other person or entity.

[ISSUER]

By: _____
[TITLE]

Date: _____, 201__

Appendix I

NOTICE TO REPOSITORIES OF FAILURE TO FILE ANNUAL REPORTS

Name of Issuer: [ISSUER]

Name of Bond Issue: [AMOUNT] General Obligation Bonds, Series 201___

Date of Issuance: [DATE], 201__

CUSIP Prefix: _____

NOTICE IS HEREBY GIVEN that the Issuer has not provided an Annual Report with respect to the above-referenced Bonds as required by Section 3 of the Continuing Disclosure Certificate dated _____, ____. The Issuer anticipates that the Annual Report will be filed by _____, 20__.

[ISSUER]

By: _____

[TITLE]

Dated: _____

EXHIBIT C:
SAMPLE POST-ISSUANCE TAX POLICIES AND PROCEDURES

CITY OF SUMTER, SOUTH CAROLINA
TAX-ADVANTAGED BOND COMPLIANCE POLICIES AND PROCEDURES

Statement of Purpose

The City of Sumter, South Carolina (the "City"), from time to time, issues debt that is eligible for tax benefits under federal and South Carolina law ("Tax-Advantaged Bonds"). The purpose of these policies and procedures is to ensure compliance with the legal requirements applicable to Tax-Advantaged Bonds.

Summary

This document contains two components:

- The "Policies," which are general statements of the goals of the City with respect to compliance with the legal requirements applicable to Tax-Advantaged Bonds; and
- The "Procedures," which are specific operational methods to implement the Policies.

The Policies may be amended by official action of the City Council of the City upon consultation with Haynsworth Sinkler Boyd, P.A., the City's bond counsel ("Bond Counsel").

The City Manager will be responsible for ensuring that Tax-Advantaged Bonds comply with legal requirements applicable to Tax-Advantaged Bonds and will develop and implement the Procedures. The Procedures may be amended by the City Manager of the City in consultation with Bond Counsel.

PART I: TAX-ADVANTAGED BOND COMPLIANCE POLICIES

A. Investment and Expenditure of Bond Proceeds. The City will track the investment and expenditure of proceeds of Tax-Advantaged Bonds.

B. Bond-Financed Facilities. The City will track the use of facilities financed by Tax-Advantaged Bonds by private users.

C. Periodic Review. The City will periodically review compliance with the legal requirements necessary to preserve the tax advantages of such Tax-Advantaged Bonds.

D. Potential Non-Compliance. The City will take appropriate action upon discovery of non-compliance with the legal requirements applicable to Tax-Advantaged Bonds.

E. Retention of Professionals; Rebate Analyst. The City will engage professionals or consultants as necessary to comply with the legal requirements applicable to Tax-Advantaged Bonds, including, without limitation, the requirement to compute and pay rebate.

F. Purchase of Investments. All investments of the proceeds of Tax-Advantaged Bonds will be purchased at Fair Market Value and will comply with other legal requirements as advised by Bond Counsel.

G. Credit Enhancement Transactions. The City will consult with Bond Counsel prior to engaging in post-issuance credit enhancement transactions.

H. Subsidy Payments. The City will ensure that any federal subsidy payment is timely transmitted to the appropriate account of the City.

I. Post-Issuance Modifications. The City will consult with Bond Counsel before modifying the interest rate, maturity date, or other material terms of any outstanding Tax-Advantaged Bonds.

J. Records Retention. The City will retain records relating to the Tax-Advantaged Bonds for the period required by law, which is currently the term of the debt plus 3 years.

TAX-ADVANTAGED BOND PROCEDURES

These Procedures are organized with reference to the lettered paragraphs in the Policies.

Certain procedures assign responsibilities to named officials of the City. The capitalized terms used for such officials are defined as follows:

Chief Executive Officer .....City Manager

Chief Financial Officer .....Finance Director

Facilities Officer.....Assistant City Manager, Public Services

Purchasing Officer .....Purchasing Director

The named officials may delegate certain assigned responsibilities but will remain responsible for compliance with the Procedures. The official with ultimate responsibility for compliance with the Policies and Procedures will be the City Manager.

A summary of the initial responsibility assignments appears as Schedule A to these Procedures.

Policy A: Investment and Expenditure of Bond Proceeds.

Implementing Procedures:

1. The Chief Financial Officer will charge debt-financed capital expenditures to a specific fund. Each debt-financed project shall have a specific fund number used to track that project, and discrete expenditures shall be further categorized by project location (by street address or name of facility) and functional description of financed improvement.

2. The Purchasing Officer will enter purchase orders, and the Chief Financial Officer will pay and capture such purchase orders in the general ledger, by the specific account code.

3. The Purchasing Officer will electronically scan, file, and retain all purchase orders and invoices by vendor, check number, check date, and purchase order number, if applicable.

4. Until final allocation of bond proceeds, the Chief Financial Officer will periodically analyze each project for expenditures and will summarize the expenditures on a spreadsheet or other retainable ledger.

5. The spreadsheet or ledger will identify facilities or equipment financed by Tax-Advantaged Bonds ("Bond Financed Facilities").

6. The Chief Financial Officer will ensure that the investment of all proceeds of Tax-Advantaged Bonds is tracked by fund or account (e.g., debt service fund, debt service reserve fund, project or construction fund, etc.) and investment yield.

Policy B: Bond-Financed Facilities.

Implementing Procedures:

1. The Facilities Officer will meet periodically with the Chief Executive Officer to review and evaluate existing or pending sales, leases, management contracts, research contracts, or other arrangements that relate to the City's real or personal property (collectively, "Use Arrangements").

2. The Facilities Officer will be responsible for determining whether any Use Arrangement relates to Bond Financed Facilities. If so, the Facilities Officer will consult with counsel to the City ("City Counsel") on the Use Arrangement's effect on the Tax-Advantaged Bonds. If the term of the Use Arrangement relating to any Bond Financed Facilities exceeds 200 days, or if the City Counsel so recommends, the Facilities Officer shall also consult Bond Counsel for advice prior to execution of the Use Arrangement.

3. The Purchasing Director shall notify the Chief Executive Officer upon receipt of any Use Arrangements submitted for approval for any Bond Financed Facilities.

Policy C: Periodic Review.

Implementing Procedures:

1. After the adoption of the Policy, the Chief Financial Officer will evaluate tax compliance for all outstanding Tax-Advantaged Bonds (the "Initial Evaluation"). In the Initial Evaluation, the Chief Financial Officer will identify all outstanding Tax-Advantaged Bonds and the Bond Financed Facilities that were financed with those Tax-Advantaged Bonds. Upon the completion of the Initial Evaluation, the Chief Financial Officer will report to the Chief Executive Officer on the results of the Initial Evaluation.

2. Thereafter, the Chief Financial Officer will periodically evaluate tax compliance for all outstanding Tax-Advantaged Bonds (each, a "Periodic Evaluation"), with the same objectives and scope as the Initial Evaluation, and will report to the Chief Executive Officer the results of each Periodic Evaluation.

3. Not later than 18 months after completion of any Bond Financed Facilities, the Chief Financial Officer shall make and retain a final allocation of the expenditure of proceeds of Tax-Advantaged Bonds and other amounts used to finance such Bond Financed Facilities.

Policy D: Potential Noncompliance.

Implementing Procedures:

1. If the Initial Evaluation or any Annual Evaluation discloses potential non-compliance, the Chief Executive Officer will promptly consult with City Counsel and Bond Counsel.

Policy E: Retention of Professionals; Rebate Analyst.

Implementing Procedures:

1. The City has engaged Amtec Corp. as its arbitrage rebate computation agent (the "Rebate Analyst").

2. The Chief Financial Officer will ensure that the Rebate Analyst timely prepares returns relating to payment of arbitrage rebate and that such forms are timely submitted, and any rebatable arbitrage is timely paid, to the United States.

Policy F: Purchase of Investments.

Implementing Procedures:

1. The Chief Financial Officer will ensure that all proceeds of Tax-Advantaged Bonds will be invested at the direction of Chief Financial Officer, who shall ensure that such proceeds are invested in compliance with federal tax requirements and that all such investments are made at Fair Market Value. The Chief Financial Officer shall consult with Bond Counsel prior to investing any proceeds of Tax-Advantaged Bonds in guaranteed investment contracts or certificates of deposit not publicly traded on any investment exchange.

Policy G: Credit Enhancement Transactions.

Implementing Procedures:

1. Prior to bidding for, purchasing, entering into, or otherwise engaging in any post-issuance credit enhancement transactions relating to the proceeds of or debt service on Tax-Advantaged Bonds (including, without limitation, bond insurance policies, letters of credit, guaranteed investment contracts, interest rate swaps, and market hedges), the Chief Financial Officer shall consult with Bond Counsel.

Policies H: Subsidy Payments.

Implementing Procedures:

1. See the implementing procedures of Policy A, above.

Policy I: Post-Issuance Modifications.

Implementing Procedures:

1. Prior to modifying the terms of any outstanding Tax-Advantaged Bonds (including, without limitation, changes in maturity date, interest rate, call provisions, financial or earnings covenants, or use of proceeds), the Chief Financial Officer shall consult with Bond Counsel.

Policy J: Records Retention.

Implementing Procedures:

1. Retention Period: The City shall retain records relating to Tax-Advantaged Bonds for the term of such Tax-Advantaged Bonds, plus 3 years. If Tax-Advantaged Bonds are refunded, the City shall retain records relating to the refunded bonds for the term of the refunding bonds, plus 3 years.

2. Records to be Retained:

   A. The primary records regarding the issuance and sale of the Tax-Advantaged Bonds (i.e., the bond transcript and closing documents); records showing the investment and expenditure of the original proceeds of the Tax-Advantaged Bonds; records showing regarding the bidding and terms of post-issuance credit enhancement; rebate computations; any filings with the IRS; any correspondence with the IRS; architectural or construction drawings and documents of the bond financed or refinanced facilities; and any other records relating to the issuance, sale, and closing, and the investment and expenditure of the proceeds, of Tax-Advantaged Bonds.

   B. Elections regarding accounting methods, rebate matters, or application of regulatory provisions.

   C. Copies of any Use Arrangements including leases, naming rights agreements, title retention agreements, management contracts, sponsored research contracts, capacity reservation agreements, agreements regarding rates or charges for use of Bond Financed Facilities, incentive payment service contracts, requirements contracts, "take" contracts, or "take or pay" contracts.

   D. The Chief Financial Officer shall be custodian of the foregoing records.

The Foregoing Procedures were last revised on June ___, 2012.

Schedule A: Summary of Responsibility Assignments

Chief Executive Officer

1. Ensure overall compliance with Policies and Procedures; monitor responsibility assignments and periodically review Procedures; periodically revise Procedures as necessary.

2. Meet with Facilities Officer to evaluate use of bond financed facilities. (Policy B)

3. Ensure preparation of and review Initial Report and Periodic Reports. (Policy C)

4. Report potential non-compliance to Bond Counsel. (Policy D)

Chief Financial Officer

1. Monitor, record, and allocate expenditure of bond proceeds by project location and functional description. (Policy A)

2. Until final allocation of bond proceeds, prepare a monthly report of project expenditures. (Policy A)

3. Prepare and retain separate records for investment performance of bond proceeds. (Policy A)

4. Prepare Initial Report and Periodic Reports. (Policy C)

5. Make and record final allocations of expenditures of proceeds of Tax-Advantaged Bonds. (Policy A)

6. Retain and manage relationship with Rebate Analyst. (Policy E)

7. Consult with Bond Counsel before (a) purchasing guaranteed investment contracts or non-publicly traded certificates of deposit with proceeds of, (b) entering into credit enhancement transactions with respect to, or (c) modifying the terms of, Tax-Advantaged Bonds. (Policies F and G)

8. Ensure compliance with retention policies and act as custodian of retained records. (Policy J)

Facilities Officer

1. Meet with Chief Executive Officer to evaluate use of bond financed facilities. (Policy B)

2. Monitor Use Arrangements and consult with counsel prior to entering into new Use Arrangements. (Policy B)

Purchasing Officer

1. Coordinate with Chief Financial Officer on purchase orders and expenditures with respect to Bond Financed Facilities. (Policy A)

2. Scan and file all purchase orders and invoices with respect to Bond Financed Facilities. (Policy A)

3. Notify Chief Executive Officer of any Use Arrangements submitted for approval that relate to Bond Financed Facilities. (Policy A).

EXHIBIT D:
IRS INQUIRY LETTER

Robin M. Helton
Internal Revenue Agent, Tax Exempt Bonds
ID No. 0860528
Tax Exempt & Government Entities Division

Group 7221: Box 30
10715 David Taylor Drive
Charlotte, NC 28262
robin.helton@irs.gov
Office: 704-548-4255
Fax: 704-548-4110

Internal Revenue Service
Tax Exempt and Government Entities Division

Department of the Treasury

City of Sumter, South Carolina
Attn: Deron McCormick, City Manager
P. O. Box 1449
Sumter, SC 29150

Date:
August 29, 2013
Contact Person:
Robin M. Helton
Employee ID Number:
1000860528
Contact Telephone Number:
704.548.4255
Contact Address:
Internal Revenue Service
TEB:F: 7221: Box 30: Helton
10715 David Taylor Drive
Charlotte, NC 28262

Re: Examination of $31,855,000 Waterworks and Sewer System Improvement Revenue Bonds, Series 2007, Issue Date: June 20, 2007

Dear Sir or Madam:

We have selected the debt issuance named above for examination. The Internal Revenue Service (IRS) routinely examines municipal debt issuances to determine compliance with Federal tax requirements.

Your debt issuance was selected for examination as part of a project/initiative involving financings of utility facilities. The primary purpose of this examination will be to ascertain the compliance of your debt issuance with the Federal tax requirements applicable to governmental bonds. At this time, we have no reason to believe that your debt issuance fails to comply with any of the applicable tax requirements. As always, we reserve the right to expand this examination to any aspect of your debt issuance.

Please review the enclosed Form 4564, *Information Document Request,* and mail all requested documents to the address noted above by the date indicated on the Form 4564. Other items may be requested as the examination proceeds. If necessary, we will request information by submitting additional information document requests.

If you desire to appoint a representative to act on your behalf, a power of attorney must be filed with the IRS in order for the IRS to discuss or provide your representative with confidential information. A Form 2848, *Power of Attorney and Declaration of Representative,* or any other properly written power of attorney or authorization may be used for this purpose. Copies of Form 2848 may be obtained from any IRS office or downloaded at http://www.irs.gov. Instructions for completing Form 2848 for municipal debt issuances are attached.

During this examination the IRS may need to contact third parties. Third party contacts may include, but are not limited to bond counsel, special tax counsels, employees and trustees, GIC providers and underwriters.

We are providing this notification in accordance with section 7602(c)(1) of the Internal Revenue Code, which became effective for third party contacts made after January 18, 1999.

Thank you for your cooperation in this matter. Please feel free to call or write if you have any questions or concerns about this matter or are unable to promptly respond to the Form 4564.

Sincerely,

Robin M. Helton
Revenue Agent
Tax Exempt Bonds

Enclosures:
Publication 1-TEB
Form 4564
Instructions for completing Form 2848

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01

To: (Name of Taxpayer and Company, Division or Branch) **City of Sumter, SC**	Subject: Examination of the tax-advantaged status of the Bonds described below
	Submitted to: City Manager
	Dates of Previous Requests: N/A

Description of Documents Requested:

Re: $31,855,000 Waterworks and Sewer System Improvement Revenue Bonds, Series 2007 (the "Bonds")

Please provide the following requested information by the date indicated below. If you have questions about the information requested or you will not be able to provide the information by the date specified, please contact the requestor identified below. Providing as many of the documents as possible on a CD, DVD or other electronic media will facilitate the examination process.

General

(1) Please provide a description of the current status of the Bonds (i.e., outstanding, retired, refunded, defeased, etc.).

(2) If any of the Bonds have been partially or totally refunded, please identify the CUSIP numbers for the refunding bonds, and provide copies of the Official Statements if not available on the MSRB-EMMA website and any verification report created if the refunding transaction was an advance refunding. If the refunding bonds did not have CUSIP numbers, provide a copy of the information return for the refunding bonds.

(3) Please provide a schedule of the total interest, including accrued OID, paid on the Bonds from the issue date to the most recent interest payment date.

(4) Please provide a complete copy of the bond transcript.

(5) Please provide copies of any and all amendments to the documents contained in the bond transcript. (i.e., trust indenture, management contracts, etc.)

Information Due By Sept. 30, 2013	At Next Appointment		Mail In	X

FROM	Name and Title of Requestor Robin M. Helton, Internal Revenue Agent Employee Badge Number: 1000860528	Date: August 28, 2013
	Office Location: 10715 David Taylor Drive Charlotte, NC 28262 Phone: 704.548.4255 Email: robin.helton@irs.gov	

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01

To: (Name of Taxpayer and Company, Division or Branch) **City of Sumter, SC**	Subject: Examination of the tax-advantaged status of the Bonds described below
	Submitted to: City Manager
	Dates of Previous Requests: N/A

Description of Documents Requested:

Exam Focus

(6) Please describe the governmental purpose of the Bonds.

(7) Please provide a description of the financed property. Include a listing of the facilities or assets acquired with bond proceeds including the date(s) acquired or placed in service, the total cost of each asset, the capacity of each asset (e.g., generation capacity, water volumes, etc.) and whether when purchased the property was new or used.

(8) Please provide a description of the security for the Bonds, e.g. general obligation, special tax, lease, mortgage, revenues of the project, pledged funds, other (describe). Please provide copies of all leases, mortgages, pledge agreements, etc. that secure the Bonds, if not contained in the bond transcript. Please provide copies of any amendments to the original agreements.

(9) If any person or entity other than the issuer owns the facility financed with bond proceeds, please provide a description of the owner. If no other person or entity owns the facility, state such in the response.

(10) Have any assets acquired with proceeds of the Bonds been sold or otherwise disposed of? If so, please explain. If no financed assets have been sold or disposed of, state such in the response.

(11) If there has there been a change in the principal user or owner of the bond-financed facility since the Bonds were issued, please describe the circumstance of the change and identify the new principal user or owner. If there has been no change in the principal user or owner of the bond-financed facility, state such in the

Information Due By	Sept. 30, 2013	At Next Appointment		Mail In	X

FROM	Name and Title of Requestor Robin M. Helton, Internal Revenue Agent Employee Badge Number: 1000860528	Date: August 28, 2013
	Office Location: 10715 David Taylor Drive Charlotte, NC 28262 Phone: 704.548.4255 Email: robin.helton@irs.gov	Page 2

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01

To: (Name of Taxpayer and Company, Division or Branch) **City of Sumter, SC**	Subject: Examination of the tax-advantaged status of the Bonds described below
	Submitted to: City Manager
	Dates of Previous Requests: N/A

Description of Documents Requested:

response.

(12) If any person or entity other than the issuer or other owner uses or has used the facility financed with bond proceeds in a capacity other than a customer, manager or service provider, please provide copies of leases and contracts with these parties, if not contained in the bond transcript. Please provide copies of any amendments to the original agreements. Employment contracts with government employees do not need to be provided.

(13) Please provide copies of all management or service agreements with respect to the financed property, if not contained in the bond transcript. Please provide copies of any amendments to the original agreements.

(14) If customers purchase output or otherwise use the capacity of the financed facility (e.g., use of sewerage and sewer treatment system) pursuant to generally applicable and uniformly applied rates, please provide the rate schedule currently in effect. Also, please indicate the number of customers subject to each rate on the schedule and the percentage of capacity of the financed facility billed at each rate on the schedule, as of the end of the last fiscal year. If the structure of the rate schedule is such that customers are subject to more than one rate as their utilization increases, please report the numbers of customers and percentage of capacity used based on the applicable marginal rate.

(15) If customers purchase output or otherwise use the capacity of the financed facility (e.g., use of sewerage and sewer treatment system) pursuant to individual contracts, please provide the percentage of the capacity of the facility utilized in each year the Bonds have been outstanding to fulfill the obligations under such contracts. If the financed property consists of gas or electric generation and transmission facilities, or facilities for the collection, storage or distribution of water, also separately provide the percentage of the capacity of the facility utilized in each year the Bonds have been outstanding to fulfill the obligations under contracts

Information Due By	Sept. 30, 2013	At Next Appointment		Mail In	X	

FROM	Name and Title of Requestor Robin M. Helton, Internal Revenue Agent Employee Badge Number: 1000860528	Date: August 28, 2013
	Office Location: 10715 David Taylor Drive Charlotte, NC 28262 Phone: 704.548.4255 Email: robin.helton@irs.gov	

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01
To: (Name of Taxpayer and Company, Division or Branch) **City of Sumter, SC**	Subject: Examination of the tax-advantaged status of the Bonds described below	
	Submitted to: City Manager	
	Dates of Previous Requests: N/A	

Description of Documents Requested:

that constitute "take," "take or pay" and "requirements" contracts (other than such contracts under which the average annual payments do not exceed 1% of the average annual debt service on the Bonds).

(16) If any bond proceeds were loaned to any other person or entity, please describe each such loan, including the amount of the loan, the borrower and the purpose of the loan. If no loans have made, state such in the response.

(17) If any of use of bond proceeds described above may generally constitute private business use, but is specifically permitted under the Regulations or a revenue procedure that exempts certain uses from "private use", please identify the use and the manner in which it is exempted from private use.

(18) If the financed property consists of gas or electric generation and transmission facilities, please provide a description of the "project" of which the financed property is a part (for this purpose, "project" has the meaning set forth in Regulations § 1.141-8(b)). Also, provide a description (issuer, issue date, amount outstanding, CUSIPs) for each other outstanding tax-exempt bond issue outstanding on the issue date of the Bonds if such other outstanding bond issue also financed the project that included the property financed by the Bonds. For this purpose, an outstanding bond issue financed the project if 5% or more of the proceeds of that issue were used to finance the project.

(19) Please provide copies of all material event notices published since the Bonds were issued pursuant to SEC Rule 15c2-12. If no notices have been published, state such in the response.

(20) Please provide copies of all minutes of meetings of the issuer related to the bond issuance.

Information Due By	Sept. 30, 2013	At Next Appointment		Mail In	X	
FROM	Name and Title of Requestor Robin M. Helton, Internal Revenue Agent Employee Badge Number: 1000860528					Date: August 28, 2013
	Office Location: 10715 David Taylor Drive Charlotte, NC 28262		Phone: 704.548.4255 Email: robin.helton@irs.gov			

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01

To: (Name of Taxpayer and Company, Division or Branch) **City of Sumter, SC**	Subject: Examination of the tax-advantaged status of the Bonds described below
	Submitted to: City Manager
	Dates of Previous Requests: N/A

Description of Documents Requested:

(21) If another governmental entity leases, owns or otherwise controls use of the facility, please provide copies of all minutes of meetings of the governmental entity related to the bond issuance. If no other governmental entity leases, owns or otherwise controls use of the facility, state such in the response.

Use of Proceeds

(22) Please identify the proceeds (as defined in 1.141-1(b)) of the Bonds described above, including:

(a) Sale proceeds

(b) Investment proceeds (during the project period)

(c) Disposition proceeds

(d) Replaced amounts

(23) Please identify the amount of proceeds used for a reasonably required reserve and replacement fund.

(24) Were there any changes to the expected use of proceeds since the date of issuance? If so, please describe.

(25) Are there any unspent proceeds? If so, please provide an explanation of the original intended use of such proceeds and the issuer's current plans for using the proceeds.

(26) Please describe the accounting method used to account for gross proceeds, investments and expenditures of the bond issue. Please describe how this accounting method is reflected in the issuer's books and records. (Note: If an issuer fails to maintain books and records sufficient to establish the accounting method

used for an issue and the allocation of the proceeds of that issue, the specific tracing method is to be used.)

(27) Have there been any deviations from the accounting method used? If so, please describe.

(28) Were proceeds allocated to expenditures made before the issue date of the Bonds? If so, please provide a copy of the notice of official intent adopted by the issuer.

Arbitrage and Yield Restriction

(29) Please provide a copy of the latest rebate report prepared for the Bonds.

(30) Please provide a copy of any spending exception report prepared (if not a part of the rebate report).

(31) If any bond proceeds were used to advance refund the debt service of another issue, please provide a copy of the verification report for any escrow fund established.

(32) Please describe any funds, other than those identified in the tax certificate, that have been pledged as security or otherwise made available to pay debt service on the Bonds (or to secure or reimburse a credit enhancer). Such funds might include amounts received from grants, dedicated tax revenues (such as ad valorem taxes), endowment funds, deposits, or other funds required to be maintained at a certain level.

(33) If a rebate report has not been prepared, please provide the following:

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01

To: (Name of Taxpayer and Company, Division or Branch) **City of Sumter, SC**	Subject: Examination of the tax-advantaged status of the Bonds described below
	Submitted to: City Manager
	Dates of Previous Requests: N/A

Description of Documents Requested:

(a) a description of how the issuer ensures compliance with yield restrictions and the arbitrage rebate requirements;

(b) a copy of trust or bank statements received for each fund established for bond proceeds;

(c) a computation of the bond yield of the issue;

(d) a description of any financial derivative products, such as swaps, options, floats, caps, collars, etc., that were integrated in the computation of the bond yield (provide copies of the agreements, if not included in bond transcript);

(e) a description of any financial derivative products related to the Bonds which were not integrated;

(f) a description of any qualified guarantee whose costs are treated as additional interest costs in determining the bond yield of the issue (provide copies of the guarantee(s) and related agreements, if not included in bond transcript);

(g) a description of any investments of bond proceeds whose yield exceeded the yield on the Bonds, whether during any temporary period or not; and

(h) a description of any exception from rebate that applied to the Bonds.

(34) Please provide a copy of the latest Form 8038-T, if filed.

Record Retention / Post Issuance

(35) Internal Revenue Code section 6001 requires that every person liable for any tax imposed by title 26 of the U.S. Code shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Have adequate records necessary to substantiate compliance and support the continued exclusion from gross income of

Information Due By	Sept. 30, 2013	At Next Appointment		Mail In	X

	Name and Title of Requestor Robin M. Helton, Internal Revenue Agent Employee Badge Number: 1000860528	Date: August 28, 2013
FROM	Office Location: 10715 David Taylor Drive Charlotte, NC 28262	Phone: 704.548.4255 Email: robin.helton@irs.gov

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01

To: (Name of Taxpayer and Company, Division or Branch) City of Sumter, SC	Subject: Examination of the tax-advantaged status of the Bonds described below
	Submitted to: City Manager
	Dates of Previous Requests: N/A

Description of Documents Requested:

the interest paid on the Bonds been retained? If "No", please describe any deficiencies in the records retained.

(36) Has the issuer adopted written procedures which contain the following key characteristics to ensure that violations are timely identified and corrected so that the Bonds remain in compliance with federal tax requirements from the time they are issued until they are no longer outstanding?

(a) Due diligence review at specified regular intervals?

(b) Identification and training of the officer(s) or employee(s) responsible for review?

(c) Retention of adequate records to substantiate compliance (e.g., records relating to the allocation of proceeds, etc.)

(d) Procedures reasonably expected to identify noncompliance in a timely manner?

(e) Procedures to ensure that steps will be taken to correct noncompliance in a timely manner?

Power of Attorney

(37) Please complete and email or fax Form 2848 if you intend to have a representative handle this examination. (See enclosure on proper completion of Form 2848 for tax-exempt bond examinations.) If your representative acted as bond counsel for the issue under exam, a conflict of interest waiver as described in section 10.29(b)(3) of Circular 230 must accompany the Form 2848.

The information requested above is to assist us in determining compliance of your bond issue with the relevant tax exempt bond provisions of IRC sections 103, and 141 through 150 of the Internal Revenue Code.

Additional information may be requested at a later date if needed.

Information Due By Sept. 30, 2013	At Next Appointment		Mail In	X

	Name and Title of Requestor Robin M. Helton, Internal Revenue Agent Employee Badge Number: 1000860528	Date: August 28, 2013
FROM	Office Location: 10715 David Taylor Drive Charlotte, NC 28262	Phone: 704.548.4255 Email: robin.helton@irs.gov

Parliamentary Procedure

The Fine Art of Herding Cats

Norma Houston
IMLA Institute for Local Government Lawyers
October 3, 2015

UNC SCHOOL OF GOVERNMENT

Is This Your Board?

UNC SCHOOL OF GOVERNMENT

Is This You?

UNC SCHOOL OF GOVERNMENT

Parliamentary Basics

UNC SCHOOL OF GOVERNMENT

Rules of Procedure

With Rules

Without Rules

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7 Basic Principles

1. The board must act as a body
2. The board should conduct its business orderly and efficiently
3. The board must act by at least a majority
4. Every member should have an equal opportunity to participate
5. Rules of procedure should be followed consistently and uniformly
6. Decisions should be based on the merits, not on manipulation of the rules
7. Rules should help, not hinder

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Sources of Rules

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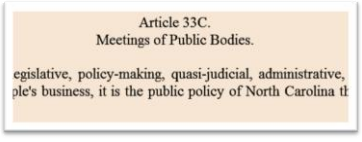
Statutes

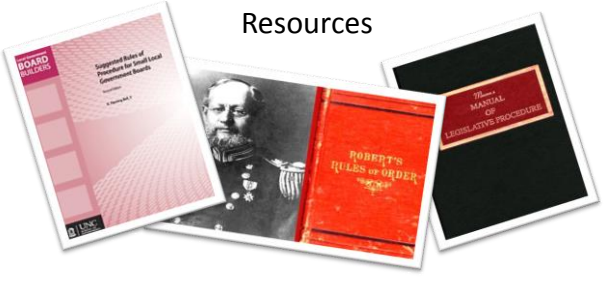


Article 33C.
Meetings of Public Bodies.

egislative, policy-making, quasi-judicial, administrative,
ple's business, it is the public policy of North Carolina th

Local Rules

"Fall-back" Resources



Charter

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7 Common Problem Areas

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7 Common Problem Areas

1. Agenda
2. Quorum
3. Motions
4. Debate
5. Voting
6. Postponing / Reviving Matters
7. Managing Public Input

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1. Agenda

- The board is ultimately responsible for its own meeting agendas
- Preparing a preliminary agenda may be delegated
- A majority of the board can always amend the agenda
- Is there a legal restriction on the subject-matter of the meeting (regular, special, etc.)?

2. Quorum

- Number of members who must be present to conduct business
- Defined as "majority of membership" – means more than ½ of total seats
- What if a member steps out?
- What about vacancies?

3. Motions

- Only one substantive (main) motion may be pending
- Multiple procedural motions may be pending
- Motion before discussion, or vice versa?
- Are seconds to motions always required?
- Are all motions debatable?
- When is a motion out of order?

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Order of Consideration of Motions

Motion to approve ordinance

1st motion: Substantive (main) motion

Motion to amend ordinance

2nd motion: Procedural to substantive motion

Motion to postpone

3rd motion: Procedural to 2nd motion

Motion to call the question

4th motion: Procedural to 3rd motion

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Precedence of Procedural Motions

Alter board proceedings	• Adjourn • Recess • Follow Agenda • Suspend Rules • Divide Question
Stop debate	• Defer Consideration (Table) • Call the Previous Question • Postpone • Refer to Committee
Modify a matter	• Amend
Revisit a decision	• Revive Consideration (Remove from Table) • Reconsider • Rescind or Repeal • Prevent Reconsideration (Clincher)

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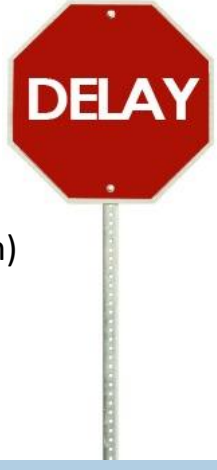
4. Postponing / Reviving Matters

Procedural Options:

- Table
- Remove from the Table
- Prevent Reintroduction ('Clincher')
- Postpone (indefinitely or to a date certain)
- Reconsider
- Rescind (or repeal)



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5. Debate

- All members should have a similar opportunity to speak
- The presiding officer may wish to step aside if actively involved
- Extend courtesy to each other and the public in the debate
- "Calling the previous question" cuts off debate; *requires a vote of the board*

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6. Voting

- Only a simple majority is usually required
  - Check legal requirements for the type of majority vote required
- Does the Presiding Officer vote?
- Record votes in the minutes to memorialize board action

- Determine when a member may be excused from voting – *conflicts of interest*
  - How to "count" an unexcused non-vote *(ex: NC cities have "default yes" rule set by statute)*

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7. Managing Public Input

- Establish rules for speakers to ensure fairness and maintain order
- Announce rules before comment period/hearing
- Provide rules in writing
- Apply rules consistently to all speakers
- Determine subject matter limitations – if any – in advance (be careful not to trample 1st Amendment)

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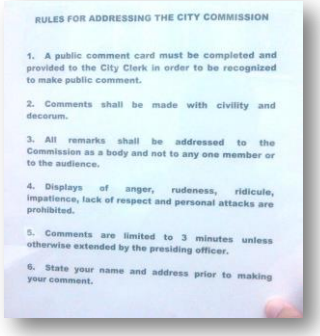
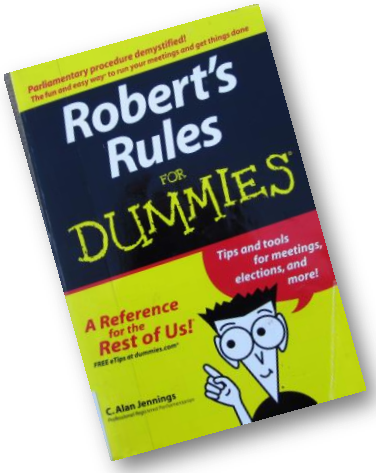
Public Input Rules: Tips & Suggestions



- Time limit for speakers *(timekeeper?)*
- Representative to speak for large group
- Remove disruptive individuals
- Limit signs and displays
- Sign-up sheet
- No personal attacks, profanity, etc.
- Receiving written comments, handouts, etc.

Bottom Line: KEEP IT SIMPLE!



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Resources

SOG Publications: www.sog.unc.edu

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Good Luck!

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INSTITUTE FOR LOCAL GOVERNMENT LAWYERS

PARLIAMENTARY PROCEDURE FOR LOCAL GOVERNMENTS

THE FINE ART OF HERDING CATS

IMLA Institute for Local Government Lawyers
October 3, 2015

Norma Houston
Albert and Gladys Coates Term Distinguished Lecturer for Teaching Excellence
UNC School of Government
Chapel Hill, North Carolina

TABLE OF CONTENTS

ACKNOWLEDGEMENT

The information in this manuscript relies in part upon previous manuscripts and publications authored by former UNC School of Government faculty member Professor A. Fleming Bell, II. The author wishes to express her appreciation for Professor Bell's work and expertise in this field.

Norma Houston joined the School of Government in 2006, during which time she spent 4 years on staff to UNC President Erskine Bowles. Prior to joining the SOG, Houston served as chief of staff and general counsel to State Senate President Pro Tempore Marc Basnight, as Dare County attorney, assistant attorney general in the NC Department of Justice, and staff attorney for NC Prisoners Legal Services. Houston earned a BS in criminal justice and psychology and a JD from the University of North Carolina at Chapel Hill. She is a member of the North Carolina State Bar and has previously served as an adjunct faculty member at the UNC-Chapel Hill School of Law and teaches state government in the School's graduate program in public administration. Her favorite motion is the clincher.

PARLIAMENTARY PROCEDURE FOR LOCAL GOVERNMENTS
THE ART OF HERDING CATS

"Without rules, there would be injustice and confusion."

Demeter's Manual of Parliamentary Law and Procedure (1969)

I. INTRODUCTION

Municipal and county governing boards are often populated with well-intended public servants who have little or no understanding of parliamentary procedure. The meetings of many local boards are often conducted informally, even casually. Rules of procedure might be applied loosely, even inconsistently, and oftentimes consist merely of making a motion and taking a vote. This "down-home" approach may appear to work well when the matters before the local board are noncontroversial, but when controversy arises – and it always does – multiple motions might be made in rapid succession, members become confused about what they are voting on, and at that point, the chairman/mayor invariably turns to the board's attorney for advice. Where does the local attorney turn for guidance?

II. BASIC PRINCIPLES OF PARLIAMENTARY PROCEDURE

While some might find parliamentary procedure dull, even frustrating, these rules serve a valid purpose. At their heart is the rule of the majority with respect for the minority. The object is to allow deliberation upon questions of interest to the board and to arrive at the sense or the will of the members on these questions.[1] Parliamentary procedure is based on the principles of allowing the majority to make decisions effectively and efficiently (majority rule), while ensuring fairness towards the minority and giving each member the right to voice an opinion.[2] Fundamentally, parliamentary procedure defines how groups of people, no matter how formal or informal, can most effectively meet and make decisions in a fair, consistent, and efficient manner.[3] Because most local boards are legally established with a continuous existence,[4] rules of procedure can provide continuity and stability in board proceedings in the midst of post-election changes in membership. Of course, the local board can at any time change its own local rules, but there is, at least, an ongoing procedural framework from which to work.

---

[1] Robert, Henry M., Parliamentary Law, 1923, p. 3.

[2] Robert, Henry M. (2000). Robert's Rules of Order Newly Revised, 10th ed., p. XLVII.

[3] National Association of Parliamentarians, http://parliamentarians.org/procedure.php.

[4] Compare local governing boards to legislative bodies, which adjourn one legislative session sine die and are constitutionally reconstituted as a new body upon convening of a new session.

The basic principles of parliamentary procedure can be distilled to seven discrete points, some of which are particularly relevant to local government boards:

First, the board must act as a body. The powers of a public body do not reside in the members themselves, but in the board as a whole. Governmental governing boards must act as a group in order to transact public business; virtually no individual authority is vested in individual members unless specifically designated by law.

Second, the board should conduct its business – really, the people's business – orderly and efficiently. Rules of procedure are designed to keep group discussions orderly, maintain focus on the business of the body, and help ensure transparency by enabling the public to follow the board's deliberations and understand the actions taken. Orderly and efficient meetings also show consideration for the time not only of the board members themselves, but also staff and public observers.

Third, the board must act by at least a majority. "Majority rule" is one of the basic tenants of parliamentary procedure. It is grounded in the first principle articulate above, that the board acts as a body, and thus majority action represents the "will" of the body.

Fourth, every member should have an equal opportunity to participate. Counterbalancing the rule of the majority is protecting the right of the minority to be heard and meaningfully participate in the board's business. For governmental bodies, the principles and law of representative democracy require each member's vote to count equally because the votes of the citizens they represent count equally. As such, the views of each constituency are entitled to be heard.

Fifth, rules of procedure should be followed consistently. The fairness, transparency, and orderly flow of business that result from proper utilization of rules of procedure can be undercut if those rules are not followed consistently. When rules are applied inconsistently or "changed in the middle of the game," the public may perceive the board (or at least its majority) to be biased and unfair, and the impacted board member – and his or her constituencies – may feel disenfranchised.

Sixth, decisions should be based on the merits of the matter, not on manipulation of the rules. Rules of procedure are intended to facilitate the orderly, efficient, and transparent conduct of the board's business. The public, not to mention board members, do not like the perception or worse, the reality, that "trickery" was used in conducting the public's business. On the positive side, knowing the rules can be helpful in ensuring orderly debate and action, and individual

members can make use of the rules to enhance their own effectiveness and prevent against being shut out of deliberations.

Seventh, rules should help, not hinder. Boards should avoid getting tied up in knots with complicated rules. Rules of procedure are a tool to help, not hinder, board proceedings. For most local government boards, complicated rules can be confusing and counter-productive to the principals of the rules themselves. In short, keep it simple.

III. Sources of Rules

As governmental entities, municipal and county boards derive their rules of procedure from multiple sources. Where do these rules come from?

- *State statutes and common law:* Important elements of board procedures may be governed by state statutes and common law. Public notice requirements, quorums, vote majorities, public hearing and comment periods, definitions of conflicts of interest, and even some of the responsibilities of the presiding officer most likely will be mandated by statute or common law.[5]

- *Local charter or similar legal authority:* Sometimes, matters such as whether the presiding officer can vote other than in the case of a tie and special vote majority requirements will be addressed by local charter or similar legal authority.

- *Local rules of procedure:* Local governing bodies generally have the legal authority to adopt their own local rules of procedure. It is helpful to check local rules to determine whether they adequately address the procedural needs of the board in a manner that is not unduly complex or convoluted, and is not inconsistent with other legal requirements. Local rules should always be (1) written, and (2) adopted by the governing body. Suggested local rules that align with the topics in this manuscript are excerpted from UNC School of Government Professor Fleming Bell's *Suggested Rules of Procedure for Small Local Government Boards.*[6] See Appendix A.

- *"Fall-back" rules:* Some boards will identify in their local rules a parliamentary authority to be used in the event that state law, local charter, and local rules do not address a

[5] For example, in North Carolina, requirements for open meetings, meeting location, disruptions, the role of the chairman, quorums, voting, adopting ordinances, keeping minutes, public hearings, and public comment periods are all governed by state statute.

[6] A. Fleming Bell, II, *Suggested Rules of Procedure for Small Local Government Boards, 2d ed.* Chapel Hill, N.C.: School of Government (1998).

particular procedural matter. Many local boards will defer to *Robert's Rules of Order, Newly Revised (RONR)*. Another resource, which unlike Robert's is specifically designed for legislative bodies, is *Mason's Manual of Legislative Procedure*. Whether *RONR, Mason's*, or another parliamentary authority is most appropriate is within the discretion of the local board. Ideally, rules for all but the most obscure or unusual situations will be addressed in the board's own local rules.

IV. Seven Common Problem Areas

While local government boards experience a myriad of procedural conundrums, there are several issues experienced commonly enough that they are worth addressing.

1. Setting the Agenda

Because of the volume and complexity of the matters they must consider, most boards use agendas for their meetings. Some small government boards use agendas only to organize the materials they must consider and to give themselves an opportunity to study the issues before they meet. These boards generally allow last-minute additions to the agendas of regular meetings by general consent.

Other boards use their agendas to control the length of their meetings and direct the order of business at the meeting. In this case, the board will often hold an agenda meeting or a work session before the regular meeting to ask questions and thoroughly explore the proposals that must be voted on at the regular meeting.[7] Generally, these boards take a stricter approach toward agenda modifications and do not allow late additions to regular meeting agendas unless an emergency exists.

Regardless of what process is used, the board ultimately controls its own agenda. The board chair or manager may set the agenda, but a majority of the members can always change or modify it. Having clear guidelines for setting and modifying the agenda included in the board's local rules can help avoid potential disputes during a board meeting about additions to the agenda.

An important factor in setting the agenda is the laws governing meetings of public bodies applicable to the local government board. The subject matter – and thus, what may be placed

[7] Under North Carolina's open meetings laws, if a majority of the board members are present at an agenda-setting work session, the session would be considered a meeting of the public body subject to public notice requirements.

on the agenda – may be restricted under a state's open meetings laws if the meeting is called for a special or emergency purpose.

From a practical standpoint, the following questions commonly arise when setting the meeting agenda:

- What should is included?
- What should not be included?
- What restrictions, if any, are imposed on the subject matter of the meeting under state law?
- If matter on the agenda warrants closed (executive) session, how should that matter be identified on the agenda?
- What is the order of business?
- How and at what point during the meeting will citizen comments and public hearings be handled?

2. Considering Motions

Considering and handling motions can be one of the most problematic areas of parliamentary procedure, especially for small boards. A motion is basically a question put before the board, which the board members answer by voting "aye" (yes) or "nay" (no). A complex series of motions is actually nothing more than a series of questions to be answered. Nonetheless, determining which question (motion) is to be answered (voted on) in which order, and whether the question (motion) is appropriate at all (in order) can be challenging for boards whose members are not well-versed in the intricacies of parliamentary procedure.

All motions can be divided into two categories:

1. Substantive motions, and
2. Procedural motions.

A ***substantive motion*** is the substantive question put before the board; it is the matter of public business that the board has been asked to consider. A substantive motion may deal with any subject within the board's legal powers, duties, and responsibilities. Substantive motions are also referred to as *main* or *principal* motions.[8] Examples of substantive motions include approval of a zoning ordinance or adoption of the budget.

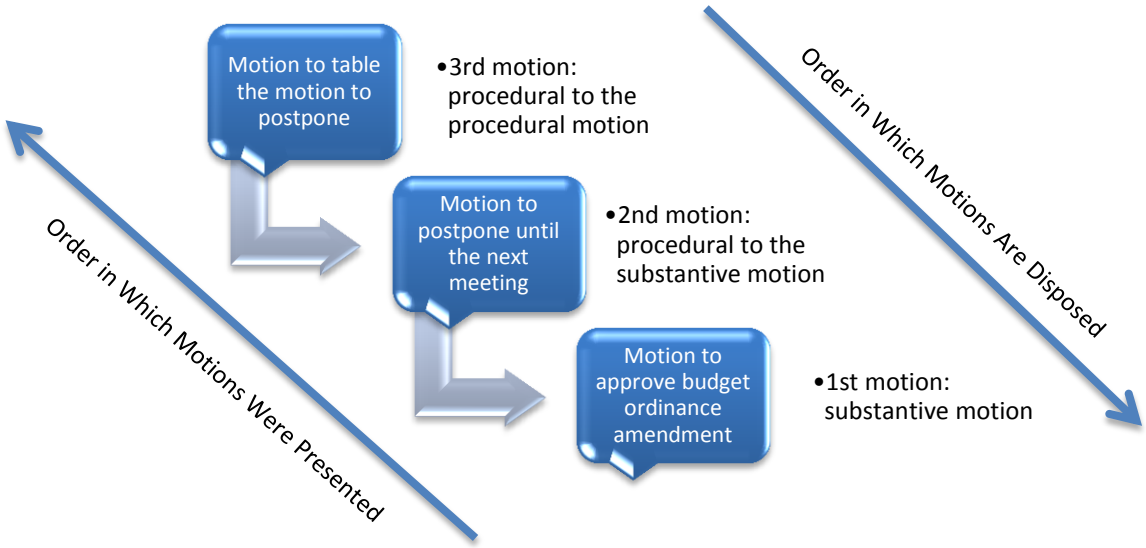
[8] *RONR* does not refer to substantive motions as such; instead it refers to main or principal motions.

A *procedural motion* is a proposed action on a main motion; it is a proposed procedural disposition of the main motion used to "act upon" a substantive motion. Examples of procedural motions include motions to amend, postpone, and lay on the table. Procedural motions can also be made on other procedural motions.

Only one main motion may be under consideration at any given time. This rule reflects the basic principle of parliamentary procedure that distinct issues will be considered and dealt with one at a time, and a new proposal may not be put forth for consideration until action on the preceding one has been concluded. Proceeding in this fashion enables a board to conduct its business in an orderly fashion.

This rule does not apply to procedural motions. Procedural motions may be offered and entertained in succession without necessarily disposing of the previous procedural question, resulting in multiple procedural motions pending at the same time. This is where confusion often arises. To provide a framework for handing such situations, rules of procedure establish a hierarchy or priority of motions, with lesser procedural motions yielding to higher ones. It is helpful to have this hierarchy identified in the board's local rules. By way of example, precedence of motions charts from *RONR* and from the North Carolina Senate are attached as Appendix B.

In handling successive procedural motions, the appropriate practice is to consider them in the reverse order in which they were made. For example, consider the following scenario:



The vote on the motion to table will be taken first since it was offered last, and if approved, disposes of the motion to postpone since a motion to table is superior to a motion to postpone.

If the motion to table fails, then the motion to postpone is considered. If that motion passes, the substantive motion (approval of budget ordinance amendment) is postponed. If the motion to postpone fails, then the substantive motion may finally be considered.

Under standard parliamentary practice, a motion must be on the floor before a board may proceed with discussion or action. For small boards, this formality is not necessary. In fact, it is not only acceptable but in fact is quite common for the board to discuss an agenda item first without a motion on the floor, and only after the discussion has concluded will a motion on that item be offered. If a local board prefers to follow more standard parliamentary practice by requiring a motion to be offered before discussion on that item is allowed, the board may encounter hesitation from some members who fear a "motion for discussion purposes" signals their position on the matter. One solution suggested by Professor Bell is to note "Discussion and Possible Action" on the agenda for a particular item or even all agenda item to signify that discussion will occur prior to consideration of any motions or action, and thus alleviating the need to follow standard parliamentary practice. However the board chooses to handle this issue, its practice should be memorialized in its local rules.

Another source of confusion is the requirement that motions be seconded in order to be considered. The principal underlying a required second is that a proposal should have at least some minimal level of support in order to be considered. The effect is that at no business can be presented except by two people – one to make the motion and the other to second it. If a second is required and not offered, the motion will "die for lack of a second." While this may be an appropriate practice for a large body, it is less appropriate for small local boards. Indeed, *Mason's* does not require a motion be seconded under the theory that elected officials represent a public constituency who are entitled to have a matter presented to the body for consideration without having the support of a second. [9] Even *RONR* recognizes that motions need not be seconded in smaller groups (RONR § 48, p. 477). Professor Bell recommends against requiring motions to be seconded, and this author concurs.

3. Handling Debate

All members should have opportunity to speak during the discussion and debate on a matter or any motion. The purpose of rules of procedure is to provide an orderly process for this debate. The board chair is responsible for controlling the flow of debate and ensuring that all members who wish to are afforded an opportunity to participate. Chairs may find it helpful to develop a

[9] http://www.ncsl.org/legislatures-elections/legislatures/masons-manual-for-legislative-bodies.aspx.

method by which to keep track of those who wish to speak and recognize them in the order they have requested recognition, or perhaps recognize in alternate succession proponents and opponents of the issue. It is equally important for the chair to prevent other members of the board from interrupting or otherwise creating distractions when one of their colleagues "has the floor" (is speaking). Maintaining courtesy and decorum during debate is the obligation of all members, but should be enforced by the chair. Local boards should even consider including in their local rules a provision that requires decorum and courtesy among members, and admonishes them to refrain from personal attacks.

What about the chair's right to participate in the debate? The chair is a member of the local board and represents a constituency just as any other member. As such, the chair normally is entitled to offer motions, debate, and vote on matters unless state law applicable to the local jurisdiction or local charter provide otherwise. Although not strictly required under most parliamentary rules, it sometimes is appropriate for the chair to relinquish the gavel if the chair is heavily involved in the debate to avoid perceptions of undue influence. Good leadership depends, to a certain extent, on not taking sides during a debate. On a small board this may not always be feasible or desirable; yet an unfair advantage accrues to the side whose advocate controls access to the floor, especially if the debate is heated. Ordinarily the chair should consider asking the vice-chair, if there is one, to preside in such a situation, but if the vice-chair is also engaged in the debate, the chair should feel free to call on some other board member to perform this function.

If a debate has run its useful course, how can it be ended? Under rules of parliamentary procedure, this is done by the procedural motion "to call (or move) the previous question." If this motion passes, it forces an immediate vote on the underlying question, whether that question is another procedural motion or a substantive motion, thus having the effect of cutting off further debate. Because of the draconian effect of a motion to call the previous question, standard parliamentary practice requires this motion to be seconded. This practice is recommended even for small boards to ensure that a single member cannot unilaterally end debate. Because the call of the previous question is made in the form of a motion, it must be voted on by the entire board just as any other motion. This rule avoids the practice followed by some boards of allowing any member to end debate by simply saying "I call the question," without the board actually taking a vote. Such a practice is contrary to standard parliamentary rules and practice. In addition, such a practice allows individual members to impose their will unilaterally on the group, in defiance of the principle of majority rule on which rules of procedure are based. Since every member should have an opportunity to speak, debate should be ended only by a majority vote.

A call of the previous question may not be appropriate to consider if there has been no or very limited discussion.[10] The purpose of this motion is to bring to close a debate that has outlived its productive contribution to the board's consideration of a matter. It should not be used to deny members the opportunity to meaningfully participate in and contribute to the debate. If the call of the previous question is offered subsequent to other procedural motions, it is important to clarify which "question" is being called so that board members clearly understand which matter on which they are voting to end debate. For example, if a motion to amend a proposed budget ordinance is pending, the question may be called on both the motion to amend and the substantive matter (approval of the budget ordinance). On the other hand, the question also may be called only on the motion to amend. If the motion to call the previous question is not clearly put, the chair should ask the member who offered the motion to clarify his intentions.

4. Voting

Standard parliamentary practice requires only a simple majority for the passage of most motions (both procedural and substantive). Local boards should check state law and their local charters to determine if passage of a particular matter requires a majority other than simple, such as two-thirds or three-fifths. To the extent not inconsistent with state law, local boards may determine that a majority more stringent than a simple majority is required for certain motions, especially those which have the effect of ending debate or defeating the underlying substantive matter.

The rule on voting by the chair varies from jurisdiction to jurisdiction. Generally, boards may choose whether the chair always votes or votes only to break a tie (see previous discussion about the chair's right to participate in deliberations and actions by the board). Sometimes this matter will be addressed either in the local government's charter or by state law. Boards should check these legal authorities to determine if the matter has been addressed already before attempting to address it in their local rules.[11]

Votes should always be recorded in the board's minutes to memorialize the official action taken. Whether individual names must be listed (a record of the "ayes" and "noes") or generic vote totals are sufficient may vary from jurisdiction to jurisdiction, and may be governed by

[10] Professor Bell recommends that local rules prescribe a certain period of time before a motion to call the previous question is in order.

[11] A member who is temporarily presiding in the chair's place is still a full member of the board and thus is entitled to make motions and to vote.

state law or local charter. Voting by secret ballot is almost universally prohibited for public bodies.

Because voting is the legal mechanism by which the body transacts the public's businesses, voting is essential to performing the members' duties of office. State law or local charter may address voting requirements, and if so, either will supersede local policy. Given the fundamental importance of voting to a board's transaction of public business, boards should give careful consideration to the circumstances under which a member may recuse himself or be excused from voting. Generally, these circumstances involve a conflict of interest. What constitutes a conflict of interest for purposes of voting may be defined by state law or local charter. To the extent that the board makes a provision in its local rules for excuse/recusal from voting, it may be necessary to define terms like "conflict of interest" to provide clear guidance to members and avoid unfair accusations of a "conflict" where none legally exists.

The board must have a quorum present to begin the meeting. In theory, the quorum must be maintained throughout the meeting in order for the business transacted by the board to be legally valid. Standard parliamentary practice considers a quorum, once established, to remain established even if members leave during the meeting, unless a point of order is raised. If a member is validly excused from voting, this usually does not impact the legal validity of the quorum. However, if a member does not vote and is not validly excused from voting, this may impact the quorum. Again, boards should review state law and their local charters to determine what quorum requirements may be established and the impact an absent member, non-voting member, or a vacancy on the board may have on the quorum.

5. Postponing and Revising Matters

Discussed below are several procedural motions by which consideration of a matter may be postponed or revised (i.e., putting it off or bringing it back up).

Deferring Consideration – "to table," "to lie upon the table," "tabling motion"

The purpose of a tabling motion is to lay aside the pending question, potentially indefinitely. Unless the pending question is "removed from the table" (see below), the effect of a tabling motion is to defeat (or kill) the pending question that was tabled. Under standard parliamentary practice, a tabling motion requires a simple majority to pass, is not debatable, requires a second, and takes precedence over other procedural motions. Under standard parliamentary practice, if the matter laid on the table is not taken from the table by the next regular meeting, the matter dies. There is temptation to use a tabling motion to instantly suppress a matter's consideration without having to take a vote on the matter itself instead of using a call of the previous question motion, which brings the underlying matter to a vote. While both motions

have the effect of cutting off debate, a tabling motion also has the effect of denying a vote on the underlying matter, while a call of the previous question has the effect of forcing an immediate vote. A tabling motion should not be used to *de facto* defeat a matter or improperly delay its consideration.

Revive Consideration – "remove from the table"

A motion to remove a question from the table reverses a tabling motion, thus reviving the underlying question for consideration. Under formal parliamentary rules, a motion to remove from the table requires a two-thirds vote for passage. In addition, some rules prescribe a time limit on when a motion to remove from the table may be in order, usually restricting its eligibility to the same meeting at which the question was tabled or the next meeting. The combination of these restrictions makes it difficult to revive consideration of a matter that has been tabled, thus enhancing the deadly effect of the tabling motion itself.

Prevent Reintroduction – "The clincher"

The "clincher" motion is actually a combination of two motions: a motion to reconsider the previous vote on the question, and a motion to lay the motion to reconsider on the table. The effect is to prevent same motion or matter from being reconsidered endlessly. Because the clincher motion is inherently a tabling motion, it is either for an indefinite period of time or specified period of time depending on what is provided for in the board's rules. The clincher motion may be "undone" using the motion to remove from the table described above.

Postpone – (indefinitely or to a date certain)

A motion to postpone defers consideration of a question to a future time. The postponement may be to a time-certain, such as a specified date, or indefinitely. A motion to postpone indefinitely, unlike a motion to table, does not require the more rigid procedure for removing a question from the table; a simple majority vote can bring the question back before the board for consideration at any time.

Reconsider

A motion to reconsider allows the board to revisit a previous action (vote). Under standard parliamentary practice, a motion to reconsider is only in order if offered by a member who voted with the prevailing side on the previous action. The opportunity to offer a motion to reconsider is usually restricted to the same meeting at which the question was voted on or at the next "legal day" (normally the next meeting of the board). If a motion to reconsider passes, the underlying question is back before the body for reconsideration, having the effect of

nullifying the board's previous action and leaving the board free to take the same or a different action, depending on the will of the majority.

Rescind – "repeal"

Unlike a motion to reconsider, a motion to rescind may be made any time. This motion does not bring a question back before the board for renewed consideration (as with a motion to reconsider), but in fact acts to reverse the board's previous action without affording the board the opportunity to reconsider the matter on which the previous action was taken. A motion to rescind cannot apply to a matter that legally cannot be repealed or rescinded (such as entering into a binding contract).

6. Adjusting for the Type of Meeting

The procedural rules under which a board must operate may vary depending on the type of meeting, legally speaking, the board is conducting. For example, notice requirements for meetings under a state's sunshine laws will vary depending on whether the meeting is a regular, special, or emergency meeting. Similarly, the eligibility of matters which the board may consider will also vary depending on the type of meeting as dictated by state law, local charter, or local rules. For example, the subject matter of an emergency meeting will be limited to the purpose for which the emergency meeting was called, and other unrelated matters cannot be considered.

7. Managing Public Input

Opportunities for public input are generally provided at local board meetings in two ways: public comment periods and public hearings. Public comment periods are times reserved on the board agenda for general input from the public on virtually any topic. Public hearings are legally required as part of the board's consideration of a legislative and quasi-judicial matter, such as adopting zoning ordinances or considering a request for a conditional use permit, and are limited to the subject matter of the hearing. Local boards should consult their state's laws and local charters to determine what matters require a public hearing prior to board action.

The board may decide as a matter of general policy to set aside part of each meeting for public comments, and may even be required to do so by state law. If the board chooses, or is required, to open a period of the meeting for public comments, it has created a limited public forum and

must be careful not to censor individuals or groups based on their point of view on a particular issue to avoid violating the speakers' constitutional right to freedom of speech.[12]

Whether the opportunity for public input is provided in the form of a public comment period or a public hearing, the board should adopt simple rules for public input to ensure fairness and maintain order. These rules should be made available to the public in advance of the meeting and also provided during the meeting, ideally both in written form and announced at the beginning of the comment period or hearing. Of paramount importance is applying the rules consistently to all speakers, and ensuring that the board members themselves refrain from interjecting comments, challenging speakers, and other behavior that may be deemed disrespectful to the public.

Examples of rules and best practices for ensuring fair and orderly public comment periods and public hearings include:

- Time limits per speaker (if time limits are imposed, the board should designate a board member or staff person to be the time-keeper and apply time limits to all speakers consistently)
- Identifying a spokesperson for large groups (this rule can be helpful for time management with large groups).
- Maintaining decorum and courtesy by speakers such as prohibiting personal attacks or using profanity.
- Utilizing a sign-in sheet and recognizing speakers in the order in which they signed.
- Reasonable restrictions on signs, displays, and other such items to ensure safety within the meeting room (this rule must be balanced against protected First Amendment rights).
- Receiving written comments (the board should determine if it wishes to allow comments to be submitted in writing and, if so, whether there will be any limitations on the submission such as page length or format).
- Allowing handouts, flyers, and other similar materials (if the board chooses to limit such materials, the limitations must be balanced against protected First Amendment rights).

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[12] For further information on public comment during board meetings, see A. Fleming Bell, II, John Stephens, and Christopher M. Bass, "Public Comment at Meetings of Local Government Boards," Parts One and Two, *Popular Government* 62 (Summer 1997): 3–14 and (Fall 1997): 27–37, respectively. Both parts of this article are available in free PDF downloads at the following link: http://shopping.netsuite.com/s.nl/c.433425/it.I/id.11/.f.

- Have the chair announce the beginning and end of the comment period or hearing.
- If there is both a formal public hearing and a general public comment period on the same agenda, clearly distinguish between the two to avoid confusion among the public and accurately document a legally required public hearing in the board's minutes.

V. Conclusion

When used properly, rules of parliamentary procedure can greatly enhance a board's ability to conduct its business efficiently, effectively, transparently, and fairly. For public bodies, some of the rules applicable to the board will be established by statute, common law, and local charter. For those rules left to the discretion of the board to adopt, local government boards, especially those in small jurisdictions, should strive to craft rules of procedure that are not unduly complex and facilitate, not hinder, the board's transaction of public business. Relying on more complex parliamentary authorities, such as *RONR* or *Mason's Manual,* should occur only if all other sources of the boards rules – statute, common law, local charter, and local rules – do not address a particular situation.

Bottom line – keep it simple!

VI. Additional Resources

Henry M. Robert and others, *Robert's Rules of Order Newly Revised*. 10th ed. Da Capo Press (2011).[13]

National Conference of State Legislatures, *Mason's Manual of Legislative Procedure* (2010).[14]

American Institute of Parliamentarians, *New Standard Code of Parliamentary Procedure.* Fifth ed. New York: McGraw-Hill (2012).

George Demeter, *Demeter's Manual of Parliamentary Law and Procedure,* Blue Book ed. Little, Brown and Company (1969).

UNC-Chapel Hill School of Government publications:

- Fleming Bell, II. *Suggested Rules of Procedure for a City Council*, 3d ed. Chapel Hill, N.C.: School of Government, 2000.
- Fleming Bell, II. *Suggested Rules of Procedure for Small Local Government Boards*, 2d. ed. Chapel Hill, N.C.: School of Government, 1998.
- Joseph S. Ferrell. *Rules of Procedure for the Board of County Commissioners*, 3d ed. Chapel Hill, N.C.: School of Government, 2002.

To purchase School of Government publications, please visit our online bookstore at http://shopping.netsuite.com/s.nl/c.433425/sc.7/category.-107/.f.

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[13] Henry Martyn Robert (1837-1923), was an engineering officer in the regular Army during the Civil War era. He wrote his now-famous manual on parliamentary procedure (first published in 1876) in response to his poor performance in leading a church meeting. Resolving to never repeat the experience, he researched parliamentary law and procedure, ultimately developing the set of parliamentary rules that bear his name. The rules were loosely based on procedures used in the United States House of Representatives, but Robert's Rules were not intended for use in national and state legislatures. The majority of state legislative chambers rely on *Mason's Manual of Legislative Procedure (see ftn. 14).*

[14] Paul Mason (1898-1985), was an American author, parliamentarian, historian, and scholar. He served as Chief Assistant Secretary of the California State Senate in the first half of the 20th Century. His first manual of legislative procedure was published in 1935. Before his death in 1985, Mason assigned the copyright of his manual to the National Conference of State Legislatures. The book is edited by an NCSL commission every few years to keep it up-to-date with the latest legal precedents. According to NCSL, 70 of the 99 state legislative bodies in the United States use *Mason's Manual* as their parliamentary procedure authority. http://www.ncsl.org/legislatures-elections/legislatures/masons-manual-for-legislative-bodies.aspx

APPENDIX A

SELECTED SUGGESTED RULES OF PROCEDURE FOR SMALL LOCAL GOVERNMENT BOARDS[15]

Rule 4. Agenda

(a) Proposed Agenda. The board's [clerk] [secretary] [chief administrative officer] shall prepare a proposed agenda for each meeting. A request to have an item of business placed on the agenda must be received at least [two] working days before the meeting. Any board member may, by a timely request, have an item placed on the proposed agenda. A copy of all proposed [orders] [policies] [regulations] [resolutions] shall be attached to the proposed agenda. [An agenda package shall be prepared that includes, for each item of business placed on the proposed agenda, as much background information on the subject as is available and feasible to reproduce.] Each board member shall receive a copy of the proposed agenda [and **the** agenda package] and [it] [they] shall be available for public inspection and/or distribution when [it is] [they are] distributed to the board members.

(b) Adoption of the Agenda. As its first order of business at each meeting, the board shall, as specified in Rule 6, discuss and revise the proposed agenda and adopt an agenda for the meeting. The board may by majority vote add items to or subtract items from the proposed agenda, except that the board may not add items to the agenda of a special meeting unless (a) all members are present and (b) the board determines in good faith at the meeting that it is essential to discuss or act on the item immediately. If items are proposed to be added to the agenda, the board may, by majority vote, require that written copies of particular documents connected with the items be made available at the meeting to all board members.

The board may designate certain agenda items "for discussion and possible action." Such designation means that the board intends to discuss the general subject area of that agenda item before making any motion concerning that item.

* * *

Rule 5. Public Address to the Board

Any individual or group who wishes to address the board shall make a request to be on the agenda to the board's [clerk] [secretary] [chief administrative officer]. However, the board shall determine at the meeting whether it will hear the individual or group.

* * *

Rule 6. Order of Business

Items shall be placed on the agenda according to the order of business. The order of business for each regular meeting shall be as follows:

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[15] Rule excerpts in this appendix are taken from A. Fleming Bell, II, *Suggested Rules of Procedure for Small Local Government Boards*, 2d ed. Chapel Hill, N.C.: School of Government (1998).

- Discussion and revision of the proposed agenda; adoption of an agenda
- Approval of the minutes
- Public hearings
- Administrative reports
- Committee reports
- Unfinished business
- New business
- Informal discussion and public comment

By general consent of the board, items may be considered out of order.

* * *

Rule 7. Presiding Officer

The presiding officer shall have the following powers:

To rule motions in or out of order, including any motion patently offered for obstructive or dilatory purposes;

To determine whether a speaker has gone beyond reasonable standards of courtesy in his remarks and to entertain and rule on objections from other members on this ground;

To entertain and answer questions of parliamentary law or procedure;

To call a brief recess at any time;

To adjourn in an emergency.

A decision by the presiding officer under any of the first three powers listed may be appealed to the board upon motion of any member, pursuant to Rule 16, Motion 1. Such a motion is in order immediately after a decision under those powers is announced and at no other time. The member making the motion need not be recognized by the presiding officer, and the motion, if timely made, may not be ruled out of order.

The chair of the board shall preside at board meetings if he or she is present, unless he or she becomes actively engaged in debate on a particular matter. The chair [shall have the right to vote only when there is a tie] [may vote in all cases]. In order to address the board, a member must be recognized by the chair.

If the chair is absent, the [vice-chair] [another member designated by vote of the board] shall preside. [If both the chair and vice-chair are absent, another member designated by vote of the board shall preside.] The vice-chair or another member who is temporarily presiding retains all of his or her rights as a member, including the right to make motions and the right to vote.

If the chair becomes actively involved in debate on a particular matter, he or she [may] [shall] designate another board member to preside over the debate. The chair shall resume presiding as soon as action on the matter is concluded.

* * *

Rule 8. Action by the Board

The board shall proceed by motion, except as otherwise provided for in Rules 3, 4, and 25. Any member, including the chair, may make a motion.

* * *

Rule 9. Second Not Required

A motion does not require a second.

* * *

Rule 11. Substantive Motions

A substantive motion is out of order while another substantive motion is pending.

* * *

Motion 15. To Reconsider.

The board may vote to reconsider its action on a matter. The motion to do so must be made by a member who voted with the prevailing side (the majority, except in the case of a tie; in that case the "nos" prevail) and only at the meeting during which the original vote was taken, including any continuation of that meeting through [recess] [adjournment] to a time and place certain. The motion cannot interrupt deliberation on a pending matter but is in order at any time before final adjournment of the meeting.

* * *

Rule 16. Procedural Motions

(a) Certain Motions Allowed. In addition to substantive proposals, only the following procedural motions, and no others, are in order. Unless otherwise noted, each motion is debatable, may be amended, and requires a majority of the votes cast, a quorum being present, for adoption. Procedural motions are in order while a substantive motion is pending and at other times, except as otherwise noted.

* * *

Motion 17. To Prevent Reintroduction for [Six] Months.

The motion shall be in order immediately following the defeat of a substantive motion and at no other time. The motion requires for adoption a vote equal to [a majority] [two-thirds] of the entire membership of the board. If adopted, the restriction imposed by the motion remains in effect for [six] months or until the next organizational meeting of the board, whichever occurs first.

APPENDIX B
PRECEDENCE OF MOTIONS CHARTS

RONR ORDER OF PRECEDENCE OF MOTIONS[16]

The ordinary motions rank as follows, the lowest in rank being at the bottom and the highest at the top of the list. When any one of them is immediately pending the motions above it in the list are in order, and those below are out of order.

DEBATABLE	USUALLY PRIVILEGED	NOT ALWAYS PRIVILEGED*	CAN BE AMENDED	REQUIRES 2/3 VOTE FOR ADOPTION	MOTION
-	X	A	X	-	FIX THE TIME TO WHICH TO ADJOURN.
-	X	B	-	-	ADJOURN.
-	X	C	X	-	TAKE A RECESS.
-	X	-	-	-	RAISE A QUESTION OF PRIVILEGE.
-	X	-	-	-	CALL FOR THE ORDERS OF THE DAY.
-	-	-	-	-	LAY ON THE TABLE.
-	-	-	-	X	PREVIOUS QUESTION.
-	-	-	-	X	LIMIT OR EXTEND LIMITS OF DEBATE.
X	-	-	X	-	POSTPONE TO A CERTAIN TIME.
X	-	-	X	-	COMMIT OR REFER.
X	-	-	X	-	AMEND.
X	-	-	-	-	POSTPONE INDEFINITELY.
X	-	-	X	-	A MAIN MOTION.

*Not Always Privileged:

a - Privileged only when made while another question is pending, and in an assembly that has made no provision for another meeting on the same or the next day.

b - Loses its privileged character and is a main motion if in any way qualified, or if its effect, if adopted, is to dissolve the assembly without any provision for its meeting again.

c - Privileged only when made while other business is pending.

[16] *Robert's Rules of Order online (http://www.rulesonline.com/rror--01.htm)*

PRECEDENCE OF MOTIONS ON QUESTIONS

(North Carolina Senate Rules 18-24)[17]

MOTION	REQUIRES A SECOND	DEBATABLE	SUBSTITUTE MOTION ALLOWED
TO ADJOURN	YES	NO	NO
TO LAY ON THE TABLE	YES	NO	NO
TOR THE PREVIOUS QUESTION ("CALLING THE QUESTION")	YES	NO	NO
TO POSTPONE INDEFINITELY	NO	YES	YES
TO POSTPONE TO A CERTAIN DAY	NO	YES	YES
TO COMMIT TO A STANDING COMMITTEE	NO	YES	YES
TO COMMIT TO A SELECT COMMITTEE	NO	YES	YES
TO AMEND	NO	YES	YES

Other Procedural Motions:

- Motion to Substitute (Rule 22)
- Motion to Divide the Question (Rule 28)
- Motion to Reconsider (Rule 24)
- "Clincher" (Motion to Reconsider + Motion to Lay on the Table)

[17] Senate Resolution 1, adopted 1/9/13, as amended by Senate Resolution 110, adopted 2/20/13.

SUGGESTED RULES OF PROCEDURE FOR A CITY COUNCIL[18]

MOTION	REQUIRES A SECOND?	DEBATABLE?	NOTES
TO APPEAL A PROCEDURAL RULING OF THE PRESIDING OFFICER	NO	YES	IF TIMELY MADE, PRESIDING OFFICER CANNOT RULE THE MOTION OUT OF ORDER
TO ADJOURN	NO	YES	CANNOT INTERRUPT DELIBERATION ON PENDING MATTER
TO TAKE A RECESS	NO	YES	CHAIR CAN ALSO CALL RECESS
TO CALL TO FOLLOW THE AGENDA	NO	YES	WAIVED IF NOT MADE AT FIRST OPPORTUNITY
TO SUSPEND THE RULES	NO	YES	REQUIRES VOTE EQUAL TO QUORUM (NOT 2/3 OR SIMPLE MAJORITY)
TO GO INTO CLOSED SESSION	NO	YES	MOTION MUST STATE THE REASON FOR THE CLOSED SESSION CONSISTENT WITH THE OPEN MEETINGS ACT (G.S. 143-318.11)
TO LEAVE CLOSED SESSION	NO	YES	MOTION MADE DURING CLOSED SESSION
TO DIVIDE A COMPLEX MOTION AND CONSIDER IT BY PARAGRAPH	NO	YES	ALLOWS CONSIDERATION OF INDIVIDUAL PARTS OF A COMPLEX MATTER
TO DEFER CONSIDERATION	NO	YES	REPLACES TRADITIONAL MOTION TO LAY ON THE TABLE; MOTION THAT IS DEFERRED DIES IF NOT TAKEN UP WITHIN 100 DAYS OF DEFERRAL
TO CALL THE PREVIOUS QUESTION ("CALL THE QUESTION")	NO	YES	NOT IN ORDER UNTIL EVERY MEMBER HAS HAD ONE OPPORTUNITY TO SPEAK
TO POSTPONE TO A CERTAIN TIME OR DAY	NO	YES	MOTION MUST INCLUDE THE TIME OR DAY CERTAIN

[18] Bell, Fleming A, II, *Suggested Rules of Procedure for A City Council, 3rd. ed.,* Institute of Government, UNC Chapel Hill (2000).

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Public Records and Open Meetings

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Public Records Overview

Public access to state and local government records is mostly governed by state law, usually as a matter of state legislation rather than common law, but in some cases, a mixture of the two.

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

A minority of states have adopted public records statutes modeled after the federal Freedom of Information Act (FOIA). These statutes attempt to be comprehensive treatments of access to records held by state and local governments, putting all the law in a single statute. The federal model leaves a good bit of discretion to courts in determining whether particular records are open or closed, and in these states, the courts rely very much on federal decisions interpreting the federal FOIA. Some of these states have created state-level Freedom of Information Commissions, which have power to review agency actions regarding record requests. The federal "Freedom of Information Act" (FOIA – 5 U.S.C. § 552) itself does not apply to state or local government. *Rimmer v. Holder*, 700 F.3d 246 (6th Cir. 2012); *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369 (9th Cir. 1981).

Elements of Public Records Laws

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

Examples of common exceptions include:

- Personnel records. (Some personnel records, such as salaries, are usually open to public access.)
- Law enforcement records. (Some police records, such as incident reports and arrest records, are usually open to public access; in some states, police investigation records become open once a trial is held or an investigation is closed. Juvenile records normally receive greater protection.)
- Medical records associated with specific patients. Hospital credentialing and peer review information is also often closed to access. Furthermore, with increased competition among hospitals, more and more states exempt information that might be important to a hospital's competitive position. Some states also explicitly exempt emergency medical system records. Federal law (HIPAA) affects access to certain types of protected individual health information.
- Student records. Federal law (FERPA) requires that these records be confidential as a condition of federal education aid.
- Trade secrets submitted to governments by private companies.
- Income and sales information found in tax records. (Property tax records are usually open.)
- Matters within the attorney-client privilege. (This is not universal, and in some states attorney work product is also open to the public.)
- Minutes of closed sessions of public bodies, at least for a time.
- Records of economic development agencies regarding client contacts.
- Records about social services clients, because of federal requirements.
- Records involving public security, including drawings and plans for public buildings and for infrastructure.
- Individual financial or other identifying information, such as bank or credit card account numbers. Federal law limits the use of Social Security numbers (see 5 U.S.C. 552a(note); *Ingerman v. Delaware River Port Authority*, 630 F. Supp. 2d 426 (D.N.J. 2009)).

Consideration of privacy interests in releasing records

Public records laws significantly abrogate common law rights of privacy, but some statutes (including federal FOIA) include provisions exempting or allowing redaction of records in order to prevent unwarranted invasion of privacy. Courts balance privacy interests against the strong policy of public access and also consider federal and state constitutional privacy protection. *See Oklahoma Pub. Employees Ass'n v. State ex rel. Oklahoma Office of Pers. Mgmt.*, 267 P.3d 838 (Okla. 2011) (state employees' privacy

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

Other Statutory Provisions Governing Access

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

Statutory provisions typically include:

- *Custody/retention requirements:* Defining who has custody and to whom requests must be made. Delineating requirements for retention and preservation of records, and authorizing their destruction.
- *Allowable costs:* Charges imposed on requesters of public records are usually nominal, covering only the marginal cost of making the copy. Sometimes statutes permit higher charges for specific types of records or for extensive requests.
- *Required format of copies:* If a record is maintained in electronic form, in most states the requester is entitled to a copy in that form.
- *Time for production*: Records usually must be produced within a reasonable time, and what is reasonable depends on many variables: size of request, number of requests, location of record, etc. A custodian may not, however, automatically put the records request at the bottom of the list of things to do. In some states the statute sets a specific number of days within which a records request must be responded to.
- *Identity of requester/intended use:* The purpose for which someone seeks a record is irrelevant to that person's right of access. Some statutes have incorporated restrictions on commercial use of individual information and lists.
- *Records, not information:* Access extends to specific records, not information, so that an agency is generally not required to compile information from records or create new records upon request. But note: courts may require production of information contained in electronic databases.

Personal/Private/Constituent Records

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

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

Access to Email and Other Electronic Records.

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

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

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

- Questions arise as to whether metadata associated with an electronic record is sufficiently part of the record to be available as a public record. *See O'Neill v. City of Shoreline*, 240 P.3d 1149 (Wash. 2010) (city must search council member's personal hard drive to provide access to specific requested email containing addressee "metadata" information); *Fagel v. Dep't of Transp.*, 991 N.E.2d 365 (Ill. App. Ct. 2013) (provision of "locked" version of excel spread sheet requested in electronic form was not acceptable as response to FOIA request), *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 905 F. Supp. 2d 161 (D.D.C. 2012) (petitioner's argument that it was entitled to metadata failed as a matter of law where providing metadata would require creation of new records rather than production of those which already existed). For an explanation of metadata and current cases, *see*, Kara Millonzi, School of Government, UNC Chapel Hill, North Carolina Local Government Law Blog: *Coates' Canons: Is Metadata a Public Record*? *http://sogweb.sog.unc.edu/blogs/localgovt/?p=3417*

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

Relationship to Discovery/Attorney-Client Privilege

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

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

Open Meetings Overview

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

The new attorney should seek answers to the following questions:

What bodies are covered?

- Elected governing boards are universally subject to open meetings laws.
- Sometimes boards with advisory powers only are not covered.
- Sometimes committees of larger boards are not covered.
- Sometimes boards of private organizations are covered, if these organizations are subject to effective government control, carry out governmental functions, or are acting as agents for government. This kind of coverage is usually the result of case law rather than explicit statutory provision.

What meetings are covered?

- In some states only meetings at which action is taken are subject to the law.
- In some states only formal meetings are subject to the law. Informal gatherings of a board's members are not covered.
- In many states, any gathering at which board members deliberate about board business is subject to the law.

Email and Other Electronic Communications: Courts are grappling with the question of whether email and other electronic communications among board members constitute meetings under open-meetings legislation. *See Citizens Alliance for Prop. Rights Legal Fund v. San Juan Cnty.*, 326 P.3d 730, 734 (Wash. Ct. App. 2014) (noting that "[a]n exchange of emails can constitute a 'meeting' for [state open meeting law] purposes"), *review granted*, 337 P.3d 326 (2014); *Allen v. Lakeside Neighborhood Planning Comm.*, 308 P.3d 956, 963 (Mont. 2013) (affirming lower court's ruling that an electronic meeting did not occur in this case, but declining to adopt the position that a meeting "could never by convened by way of a Yahoo email group"); *Johnston v. Metro. Gov't of Nashville & Davidson Cnty.*, 320 S.W.3d 299, 312 (Tenn. Ct. App. 2009) (certain email exchanges involving "reciprocal attempts at persuasion" among members of local legislative body fell within scope of state open meeting law); *District Attorney for Northern District v. School Comm. of Wayland*, 918 N.E.2d 796 (Mass. 2009*). But see Lambert v. McPherson*, 98 So. 3d 30, 35 (Ala. Civ. App. 2012) (school board member's email to other board members was not a meeting under state law because it "was a unilateral expression of [the sending member's] ideas or opinions" rather than an "exchange of information or ideas among a quorum of board members") (internal quotation marks omitted); *Hill v. Fairfax Cnty. Sch. Bd.*, 727 S.E.2d 75, 79 (Va. 2012) (a series of emails

among council members was not a meeting); *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010) (one-on-one briefings and email exchanges may be violation, but cured by genuine deliberation in open session).

What notice is required of meetings?

- In a few states the statute contains no requirement of notice.
- In some states the statute requires "reasonable" notice, or a comparable formulation, and the courts will second-guess a board as to whether the notice given was in fact reasonable.
- In some states the statute sets out very specific requirements for notice.

What can be discussed (or acted upon) in closed or executive session?
Common topics include:

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

What remedies are available when the statute has been violated?

- Most commonly, litigants can seek declaratory or injunctive relief.
- In many states, litigants can seek to invalidate actions taken after statutory violations.
- In a few states, violations expose board members to civil penalties or criminal prosecution or to personal liability for plaintiffs' attorney fees.

Application of Public Records and Open Meetings Laws to Private Entities

A private entity does not become subject to sunshine laws simply by contracting with or receiving funds from a public entity. On the other hand, government cannot avoid sunshine laws by delegating its responsibility to a private entity. Courts have analyzed this issue by applying different tests and sets of factors including: whether the private agency is performing governmental functions or serves as the "functional equivalent" of a government body; the extent of oversight and control the public agency has over the private agency, with respect to specific records; whether the public agency owns or has a right of access to the record. *See SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1043 (Pa. 2012) (private entity was subject to state public records law where stadium contract for operation of a minor league ball park was found to be a "delegation of some non-ancillary undertaking of government"); *Evertson v. City of Kimball*, 767 N.W.2d 751 (Neb. 2009) (private investigator report prepared under contract is public); *State ex rel.*

Oriana House, Inc. v. Montgomery, 854 N.E.2d 193 (Ohio 2006) (functional equivalent test for determining whether nonprofit organization is subject to law); *News and Observer Publishing Co. v. Wake County Hospital System, Inc.*, 284 S.E.2d 542 (N.C. Ct. App. 1981) (multiple factors evaluating extent of control).

Resources

Public Records

For those states that operate under statutes modeled after the federal Freedom of Information Act, the U.S. Department of Justice maintains a website containing information about FOIA and related open government resources:
http://www.justice.gov/oip/foiapost/mainpage.htm

David M. Lawrence
Public Records Law for North Carolina Local Governments
(School of Government, 2d ed., 2009)
Although this book focuses on North Carolina, it draws on cases from around the country and therefore might be a useful starting point for investigating the law and finding cases.

Open Meetings

In most states there will be some state-level source on that state's open meetings law. The most likely publishers are state leagues or associations of cities or counties, the state attorney general's office, or a university-based public service organization.

There is one comprehensive national source on open meetings laws and cases:
Ann Taylor Schwing.
Open Meetings Laws,
(Fathom Pub. Co., Anchorage, 3d ed. 2011)

Public Records and Open Meetings
Questions for Discussion

Answer each question based on your knowledge of the law of your state. The purpose of these questions is to illustrate current issues under public records and open meetings laws and the range of responses.

1. Your board has recently approved a controversial economic development project. The local newspaper has submitted two public records requests: 1) electronic copies of all correspondence, including email, sent or received by any of the board members, the manager, and the attorney relating to the project and its approval; and 2) a detailed list of all expenditures of public funds that have been spent on the project to date.

    a. Must the unit provide these records? Are there any records that might be withheld or redacted? If so, on what grounds?

    b. Must the unit compile information about expenditures in response to this request?

    c. Some emails are from private individuals, and if the emails are provided electronically (which has been requested), the private email addresses will be exposed. May the city provide the emails in hard copy or redact the headers to avoid disclosing this information?

    d. Some of the council members have emails that are within the scope of the request but they were made and are stored on the members' personally-owned computers and mobile devices. Must these emails be provided?

    e. Some emails that fit the request were made on members' private email accounts. Must these emails be provided?

    f. What costs, if any, may the unit charge the newspaper for providing the requested records?

2. The front page story in the local paper this morning was all about the *alleged* open meetings law violations at the city council meeting last night. The highlights are listed below. Which of these actions actually do violate the open meetings law?

    a. Board members were seen texting during the meeting. A public records request for the text messages revealed that
        - Two of the five members were texting each other about a matter that was on the agenda;
        - One member was receiving text messages from a person in the audience, who was feeding the member talking points for the discussion that was taking place;
        - Three of the five board members were discussing whether their favorite pub was going be closed by the time this "endless meeting" was over.

    b. One member, who could not be present, participated in the meeting by telephone, and was allowed to vote by phone. Her vote was the deciding vote on one matter, and without her, there would not have been a quorum.

    c. The board went into executive session to discuss a personnel matter, and after the meeting was over, one member told a reporter that he thought the employee that they discussed should be fired, but that he couldn't get a majority of the board to agree with him.

International Municipal Lawyers Association
2015 Institute for Local Government Lawyers – October 3, 2015

Personnel & Employment Law

Presentation & Materials by
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What to expect from this session:

Icebergs,

Shipwrecks, &

Guidance

Personnel & Employment Law is a journey

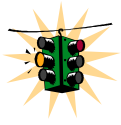
- This session is designed to provide some road maps & guideposts to help navigate through the maze
- 3 Key Thoughts:
  - Proceed with caution!
  - Be Prepared!
  - Seek Guidance!

Overview – Some Essentials

- The Framework
  - Employee – or NOT
  - Employment-at-Will – or NOT
- Protective Labor Legislation
  - Just a Sampling
- Constitutional Considerations
  - Employee Communications
- The Life Cycle of Public Employment
- The Municipal Attorney's Role

Part I. The Framework

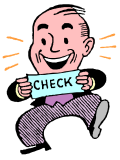
The Nature of Local Government Employment



First Cautions: Employment Status Employment-at-Will – or Not

First things first

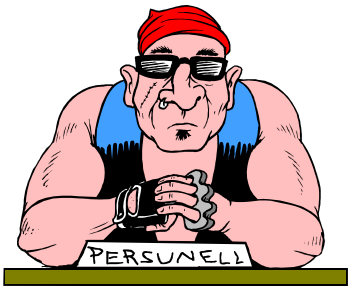
- Employee
- Volunteer
- Or
- Independent Contractor



Sample(!!!) I.C. Tests

- 1. Who controls means & methods of performing work?
- 2. Does worker hold his services out to general public?
- 3. Does worker perform task without supervision?
- 4. Does worker possess required permits, licenses and certificates?
- 5. Is worker doing business as a corporation or under a business name?
- 6. Does work require extensive skill, education or experience?
- 7. Who establishes routine or schedule?
- 8. What is duration of relationship?
- 9. What is method of payment, whether by time or by job?
- 10. Are taxes deducted or withheld from worker's check?
- 11. Who determines hours of work?
- 12. Does worker receive fringe benefits or bonuses?
- 13. Who provides equipment necessary for completion of work task?

A Public Employee's View of At-Will Employment:



At-will v. Not-at-will

- To say, as some do, that the difference is based on "contract" is incorrect.
- An at-will employee is employed under a contract (not necessarily written), but the contract is terminable at the "will" of either party.
- This means that contract law basics, such as good faith obligations, apply as a limitation on at-will employment.
- Nonetheless, the distinction using "contract" employment continues to be used.

One Version of the "Basic At-Will Rule"

In the absence of contract, policy, statute, or other applicable legal restriction, "just cause" is not required to justify discharge of an employee, including local government employees.

However, the discretion retained by at-will employers may not be used arbitrarily or capriciously, or exercised with malice or in bad faith, in violation of public policy.

At-Will Status: General Summary

At-will public employee is subject to discipline & termination at the discretion of the employer, but:

1. Arbitrary or capricious/malice/bad faith/public policy limitations exist.
2. Employer may not exercise discretion so as to violate applicable anti-discrimination or other laws.

Additional exceptions or qualifications may apply as follows:

Other Exceptions to & Limitations on Employer "At-Will" Discretion

1. Just Cause Requirements
2. Statutes, Ordinances, and Charters
3. Handbooks and Personnel Policies
4. Contracts (Individual and Collective)
5. Past or Contemporaneous Practices
6. Employee Expectations
7. Property and Liberty Interests

If employment is not at-will, then what? Just Cause – Sample Standards

1. Notice that Improper Conduct May Create a Problem
2. Rule/Order Is Reasonable
3. Fair Effort Made to Determine Basis for Action
4. Fair Investigation
5. Proof Exists
6. Equal Treatment for Similarly-Situated
7. Penalty = Reasonable Under Facts

If employment is not at-will, then what? Due Process or Process that is Due

- Employment due process can be said to include:
  - The right to be notified of causes for the action and
  - To be provided the opportunity to defend.
- Other elements of due process may include:
  - The right to be represented,
  - The right to confront accusers, and
  - The right to an impartial tribunal (or review).

Framework: Employment Policies
Hurdles or Helps?

- Personnel Policies
  - Do They Alter Employment Status?
  - Do They Bind Management?
  - Do They Bind Employees?
  - What Good Are They?
  - What about "disclaimers"?
  - What Is the Role of the Municipal Lawyer in regard to Policies?

Part II. Laws that Govern Employment: A Highly Selective Sampling

Local Government Employment is Highly Regulated by Protective Labor Legislation – and Other Laws – Enacted on both Federal & State Levels

Second Caution:
Tread Lightly – and
Carry a Statute Book

Knowing and Abiding by the Law

- State-Federalism Issues – Ongoing!
- Protective Legislation
  - EEO – Don't Say Discrimination!
    - Title VII, Title IX, ADA, ADEA, FLSA,
    - FMLA, FCRA, USERRA
    - Fed laws provide minimum protection
- And some not mentioned in handout:
  - SSI, ERISA

Protective Labor Legislation
A Selected Sampling

- Non-Discrimination Laws (paper p. 8 & Table 1)
  - Interplay of Congress, Courts, Administrative Agencies, State & Local Governments.
  - Protected classes (criteria may vary by jurisdiction).
  - Same-sex marriage "conundrum" – is this now "resolved" by recent decision?
  - EEO v. Affirmative Action & Equal Protection (e.g., *Ricci* & *Schuette* cases).
  - Some Criteria that Are or May Be Protected:
    - Civil Rights
    - Age
    - Gender
    - Disability
    - Military Service
    - Genetic Information

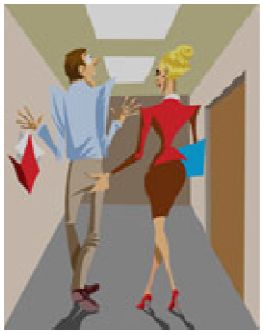
More Examples of Laws

- Some other laws – just the highlights:
  - FLSA – again but this time minimum wage & OT, not discrimination
  - HIPAA & Privacy & "Obamacare"
- And for good measure:
  - FOIA & RTK
  - UC & WC
  - OSHA (maybe)
  - & More

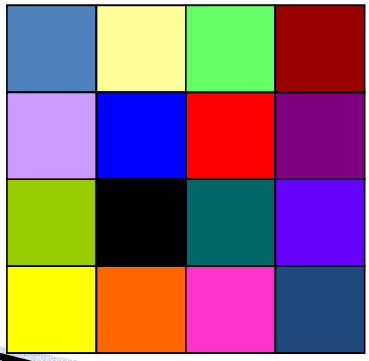
Some Recent Developments

- FLSA – hours worked
  - Donning & Doffing; Security Requirements
- FLSA – overtime
  - New Regulations are coming – when and what they will require are the big questions
- Privacy and Communications
  - Changes will be coming (sometime) in laws regulating employee use of email, internet, social media – most current law is out-of-date
- Immigration
  - Who knows what's coming?
- Health Care
  - IBID!

An aside on sexual harassment & retaliation . . .



How many squares?



Retaliation, Whistleblowing & More

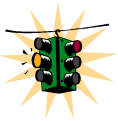
- Retaliation:
  - Alleged in more than half of EEOC complaints.
  - May be an element of prohibited discrimination or may be a separate offense.
  - Even if not enumerated, may constitute violation of state whistleblower protection laws.
- An example of a whistleblower complaint and an accidental (but fortuitous) defense.
  - "My employer operated an illegal stump dump."
  - "I reported it & got fired."
  - "We were gonna fire the jerk anyway."

OK, now what?

- Just give up?
- Yell "Help!"?
- Don't do employment law?
- Hopefully, none of the above.
  - Learn
  - Ask
  - Keep at it.

Part III. Government Employers are Arms of the State – So . . .

Local Government Employees Have Constitutional Protections Not Applicable in the Private Sector – Their Employer is an Instrumentality of Government which Must Not Improperly Interfere with Protected Constitutional Rights



Third Caution:
Constitutional Law is Not Limited to Law Enforcement & Land Use

But at-will status & statutes don't end the fun and games . . .

- *Governmental employers are bound by state and federal constitutions, too*
- For Example:
  - Equal Protection
  - Employment Interests & Due Process
    - Property Interest
    - Liberty Interest
  - Privacy Interests
  - Speech, Religion, and Assembly

For discussion of Equal Protection, Property Interest, and Liberty Interest

- Please see paper
- For now, let's talk a little bit about employee speech and expression . . .

A little speaking about speech

Public Employee Speech

- From No Right:

- To:
- *Pickering, Connick , Ceballos, & Lane*

Employees & Communications

- Electronic communications (e.g., email and cell phones) are in common use in public sector, too.
- Can (and should) an employer control their use?
- What about personal use? Permitted or otherwise?

- Don't forget that practice may trump policy!
  - *City of Ontario v. Quon* & employee texting

Part V. Life-Cycle of Public Employment

- Pre-Hiring
- Recruitment, Selection, & Hiring
- Administration
- Discipline & Termination
- Post-Termination

Part VI. Municipal Attorneys & H.R.

- Preventive Advice and Guidance
- Develop and Implement Training
- Compliance Practices
- Records Management
- Reputation is a Non-Renewable Resource
- Keeping Current
- Documentation
- ETHICS:
  - Know whom you represent!!

Questions or Comments?

Thank you.

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IMLA 2015 Annual Conference
Las Vegas, NV
October 3 – 7, 2015
Institute for Local Government Lawyers

Employment Law Session
Overview of Employment Law for Local Government Lawyers
Materials to Accompany Presentation by
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INSTITUTE FOR LOCAL GOVERNMENT LAWYERS

2015 IMLA Annual Conference

Las Vegas, NV

October 3, 2015

Overview of Personnel Law for Local Government Lawyers[1]

By

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Crean Law Office, Pembroke, New Hampshire

Executive Director/General Counsel

New Hampshire Municipal Lawyers Association

Table of Contents

Overview and Introduction. A single hour or less devoted to employment law in the public sector cannot hope even to scratch the surface of this complex arena in which common law, constitutional principles, and federal and state legislation combine to create

[1] Portions of these materials are derived, with appreciation, from materials prepared for previous employment law sessions of the Institute for Local Government Lawyers by Attorney Eunice Gibson. Any changes or adaptations are the responsibility of this author, not Attorney Gibson.

pitfalls for public employers. Some local governments have legal resources, both in-house and on retainer, that specialize in human resources law. Not every local government entity can have such resources readily on tap. Even for municipal attorneys who seldom are called upon to address personnel matters, a basic knowledge of the employment relationship and statutory and constitutional protections for public employees is essential to the position of local government advisor and advocate.

This portion of the IMLA Local Government Institute seeks to provide a framework to obtain an understanding of selected employment law issues. Not all topics included in these materials will be addressed in the accompanying presentation, so the materials may be seen as references on the topics selected. Naturally, not all topics in personnel law can be addressed here. Further, in our federal scheme, interplay and interaction of federal and state laws may lead to contradiction or confusion, and some aspects of personnel law will differ from jurisdiction to jurisdiction. Local government actions and variations such as those involving a charter, ordinance, policy, handbook, or practice, make the array of complicating factors even more complex.

The watchwords, therefore, here, as in many other areas of municipal practice, are:

- Proceed with caution!
- Be Prepared!
- Seek Guidance!
- Keep up to date!

In addition to the references and sources included in the materials, readers may seek additional guidance in IMLA's Municipal Lawyer magazine, which is a rich resource. IMLA's Personnel Section (of which the author is chair) can provide a vehicle for discussion. IMLA's monthly employment law webinars also provide timely guidance and updates. Finally, each year's IMLA Mid-Year Seminar and Annual Conference traditionally include work sessions on employment law.

As a final preliminary comment, a key aspect of municipal employment law (particularly in contrast to private sector law) lies in the concept that the municipal employer is an arm of the government. Thus, some of the freedom or flexibility that may exist for employers in the private sector is constrained by requirements that the government, even in its role as an employer, must comply with constitutional mandates such as those in the Bill of Rights and with statutes not usually applicable to the private sector (such as Freedom-of-Information Acts or Right-to-Know Laws).

I. The Framework

(A) Contractor v. Employee Status. Local government attorneys must understand the differences between independent contractor, volunteer, and employee status. This key element can affect liability for employment taxes, as well as status under most, if not all, laws affecting municipal employment. Certain federal laws, e.g., FLSA,[2] apply their own tests for determining this status. Some state laws may contain their own tests, while common law principles will govern situations in which statutes do not expressly apply.

[2] The *Fair Labor Standards Act*, *infra*, Table 1. See also July 2015, US DOL Wage & Hour Division Administrator's Interpretation, available at http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

Some states, recognizing the difficulties inherent in applying different tests under different statutes, have sought to create a single definition of employment. It does not appear that any attempt at creating uniformity has been made under federal laws. In fact, any effort to create uniformity may not be appropriate in all circumstances given the wide array of purposes associated with labor laws and the variety of circumstances under which individuals are engaged to provide their personal services for another entity. Several sources commonly suggest at least seven factors to consider in making the distinction. With regard to workers compensation, the State of Vermont Department of Labor (http://labor.vermont.gov/workers-compensation/misclassification/), (last visited 7/8/15) identified two basic tests for this purpose (Right-to-Control and Nature-of-the Business) and lists thirteen factors that may be used with regard to the right-to-control test:

1. Who controls the means and methods of the work performance?
2. Does the worker hold his services out to the general public?
3. Does the worker perform the task without supervision?
4. Does the worker possess the required permits, licenses and certificates?
5. Is the worker doing business as a corporation or under a business name?
6. Does the work require extensive skill, education or experience?
7. Who establishes the routine or schedule?
8. What is the duration of the relationship?
9. What is the method of payment, whether by time or by job?
10. Are taxes deducted or withheld from the worker's check?
11. Who determines the hours of work?
12. Does the worker receive fringe benefits or bonuses?
13. Who provides the equipment necessary for completion of the work task?

No single answer or accumulation of answers determines the issue. Instead, the test looks at the totality of responses to see if the employer "controls" the worker.

For the "nature of the business" test, the Vermont labor department suggests two questions:

1. Is the work being performed of the type that normally could be carried out by an employee in the course of business?
2. Are the activities being performed by the workers an integral part of the employer's regular business?

A related matter involves the question of whether an individual may be considered a volunteer instead of an employee. Some protective legislation still may apply to these positions while others do not. Liability to and for the conduct of such a person largely will be governed by state law. For more information, see "Volunteer, Employee or Independent Contractor" in the appendices. To avoid uncertainty, a local government might consider using appointment forms for volunteers, much as it would use a document to establish an employment or independent contractor relationship.

(B) Nature of the Employment Relationship.

(1) At-Will v. "Just Cause." Once an individual's status as an employee has been clarified, a second step determines if the employment relationship is "at-will." Currently, this fundamental issue in local government employment law remains a product

primarily of state law (both common law and statute).[3] The principal difference between at-will status and any other status[4] lies in how the employment relationship may be terminated, though employment status also may affect discipline and other factors. In its most basic form, the distinction lies in the requirement in non-at-will employment for some type of "cause" to justify termination or significant discipline or change in employment status.

Each state, by statute or common law, or by local government action such as an ordinance or charter, determines whether employment (public sector, private sector, or both, or selected aspects of each) is at-will, and also establishes the rules that govern at-will employment.[5] In a gross over-generalization, employment-at-will means that the employment relationship may be severed at any time for any reason by either the employee or the employer. Yet, even where employment-at-will is the rule, state and federal laws (and common law) may limit discretionary alteration in employment status by, for example, barring action that is based on prohibited criteria (e.g., gender, race, religion) or by enactment of other protective labor legislation as discussed in Section II, *infra*.

In general, in addition to statutory exceptions, three exceptions exist even where employment status primarily is at-will: public policy exceptions, implied contract exceptions, and covenant of good-faith and fair dealing exceptions. Each of these doctrines may operate to alter the commonly stated notion that "an at-will employee may be terminated at any time for any reason."

One principal effect of employment status lies in the grounds and procedures required to support employer action (particularly discipline or termination). When employment is not at-will employment, the standard to sustain discipline or discharge is elevated, perhaps to the level (again depending on state law) of requiring "cause" or "just cause" for the action. The meaning of "cause" varies by jurisdiction, but in determining if cause exists, factors often include:

1. **Notice of consequences of conduct.**
2. **Reasonableness of employer's rule or requirement.**
3. **Fairness and reasonableness of investigation.**
4. **Even-handed treatment in the workplace.**
5. **Equitable penalty.**

Some of these components of "cause" do relate to procedure and are discussed in greater detail in part III; but another key distinction arising from employment status determines the process that is required (i.e., "due") to discipline or terminate properly. Though

[3] Congress has proposed but, as yet, not enacted legislation to alter or eliminate at-will status in the public sector, for selected portions of the public sector (e.g., first responders), or for both the public and private sectors.

[4] "Contract employment" often is used to describe non-at-will employment. That is not a completely accurate term for non-at-will status. As will be discussed, at-will employment may be viewed as a contractual relationship, but it can be terminated "at-will."

[5] In New Hampshire, for example, full-time police officers may be terminated only after a hearing and for cause, NHRSA 41:48, removing them from the normal "at-will" status for public employees in New Hampshire.

requirements are jurisdiction-specific, in general terms, elements of formal due process[6] are required only where an employee has a "property interest" or "liberty interest" in employment. A property interest in employment exists when the employee has a legitimate expectation of continued employment absent cause for termination or discipline. A liberty interest arises where discipline or discharge can adversely affect an employee's reputation and ability to obtain employment. Liberty interests do not necessarily invoke full due process protections, but generally guarantee at least a post-termination name-clearing hearing.

When due process does not apply, procedures do not arise to that required by formal due process, though states may require employers to follow a "procedure that is due." One example is that used in New Hampshire:

> Absent a governing statute, policy, contract, or other legal requirement, any reasonable procedure should suffice to protect due process rights of public employees who are being discharged. In such instances, an employee has no right to a pre- or post-termination hearing, and there is only the obligation to treat the employee reasonably, arising from the requirement of good faith dealing in contractual relations.
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> It is only when (an) employee has a legitimate property or liberty interest in continued employment that procedural due process protections will apply. Such rights do not arise where an employee does not have contractual, statutory, or other rights of, or some other reasonable expectation of, continued employment. *Short v. SAU No. 16*, 136 N.H. 76 (1992)

(2) Exceptions to At-Will Employment. Even where at-will is the rule, the common notion of a completely free hand for employers may be overstated. Most states recognize that any employment relationship is a contractual one, albeit one that may not be in writing and one that can be severed for reasons other than "cause." Contract law requires that parties act in good faith, with an implied requirement to act in good faith in employment matters. Thus, arbitrary and capricious or bad faith conduct may not serve as a basis for employer action, particularly where such conduct can be seen as violating public policy.[7] This is the first of several exceptions to at-will status.

Other factors that can affect employer "freedom" to control the relationship include:

1. Protected status of the employee created by state or federal law;
2. "Just Cause" requirements imposed externally or internally;
3. Statutes, ordinances, and charters;
4. Handbooks and personnel policies;
5. Contracts (individual and collective);
6. Past or contemporaneous practices;
7. Employee expectations.

(C) Handbooks, Policies and Practices. Though not generally required by law, employers in both the private and public sectors often adopt policies that seek to regulate

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[6] Meaning, for example, the right to be advised of charges, confront accusers, be represented, and be entitled to a hearing and an impartial judge.

[7] Though these good faith limitations on at-will status are not uniform nationally, some type of course-of-conduct requirement likely can be found to exist. For more in-depth discussion, please see Crean, *At-Will Status: Definitions, Exceptions, and Practical Concerns* in the appendices.

the workplace. Some employers choose to compile all or selected policies into an Employee Handbook (sometimes called a Personnel Manual). Such policies primarily seek to set standards for employee conduct (thereby setting a framework for meeting key element #1 of the "cause" components set forth in subsection (B) (1) - notice of expected conduct of employees). These types of policies intend to set standards for conduct such as: promptness, tardiness, performance, and workplace conduct (e.g., sexual harassment).

Another set of policies may set forth employee compensation and benefits such as holidays, vacation, sick leave, or insurance. A third set of policies outlines procedures by which employers administer the workplace and includes such items as statements of grounds and procedures for discipline and discharge.

Policies and handbooks often contain disclaimers, reservations, and other statements whereby management attempts (according to some) to tie the hands of employees while leaving management free to follow or not follow the policies. Thus, handbooks may include statements to the effect that:

- They do not create contracts (or do not alter at-will status);
- They may be amended or rescinded with or without notice;
- Discipline will be imposed commensurate with the nature of the offense and any steps (such as progressive discipline) need not be followed precisely.

Courts may look unfavorably on overly-broad handbook or policy language stating, in effect, that employees are bound to comply, but management need not comply with procedures and standards. This perceived inequity has led some courts to construe policies narrowly against employers. Though effective use of policy language may maximize retained flexibility and discretion, overly-broad language and lax practices may create a prism through which employment practices can be seen as skewed and unfair.

Policies also may be "trumped" if employer actions in other contexts conflict with the policies. Policies may not be enforced, for example, when contrary provisions of employment letters (agreements) and employer (e.g., supervisor) practices do not conform to policy.[8] Ensuring that those responsible for personnel administration follow policy (or failure to do so) can be decisive in defending employment practices litigation.

(D) An Aside on Collective Bargaining. As of the date that these materials are being prepared for this Institute (July 2015), collective bargaining in the public sector remains a matter primarily regulated by state law. In the private sector, labor relations and collective bargaining that involve interstate commerce are subject to federal law and the jurisdiction of the National Labor Relations Board. Though Congress has considered legislation to address collective bargaining rights in the public sector, primarily for law enforcement and public safety employees, it largely has steered clear of this area, which is traditionally controlled by state legislatures. Whether that remains the case is yet to be determined. In addition, in the eyes of some observers, the NLRB has sought to expand its jurisdiction to include some public sector matters, under the rubric of protecting employee collective action or expression.

[8] See, e.g., *Dillman v. N.H. College*, 150 N.H. 431 (2003); *City of Ontario v. Quon*, *560* U.S. 746, 130 S.Ct. 1011 (2010).

States vary as to whether they permit or prohibit collective bargaining in the public sector. Those that do permit it generally regulate the manner in which employee bargaining organizations are chosen and establish an agency to oversee public collective bargaining. The establishment of an oversight agency may be the most common element of the laws in states that do allow public sector bargaining. From there, statutes vary widely, ranging from those that bar strikes by public employees to those that provide for compulsory arbitration to resolve stalemates in negotiations (termed "interest arbitration" to be distinguished from "compulsory" or "binding" arbitration, often used to describe resolution of employee or union grievances).

Local government lawyers who represent employers in collective bargaining negotiations, contract administration, and dispute resolution (including grievance handling) may find that they lack resources and guidance, particularly in contrast to resources available to unions. That imbalance may be shifting a bit, as state municipal leagues and municipal attorneys' associations seek to fill a void by collecting data on wages and benefits, and by providing other tools to assist in negotiations.

II. Selected Protective Labor Legislation For Local Government Employees. As noted, the vast universe of laws that regulate the work force cannot be summarized effectively here. What follows is a selective snapshot of some of the more important (or at least well-known) federal laws that govern the municipal workplace. State laws may duplicate or even conflict with federal laws, and federalism principles dictate that federal laws generally create the "floor" of protections. Thus, state and local laws and practices may provide greater protections for employees, but may not undercut federal requirements.

No one may claim that advising local governments on labor law issues is easy. Municipal lawyers have no recourse but to become familiar with laws and to understand that any advice in general or in specific matters must be premised upon close and timely review of laws, agency rules, and court decisions interpreting them. As in so many areas of law, employment law is dynamic.

In addition to the protections under these laws, many of them have mandatory posting requirements[9] and record-keeping and reporting requirements. Helpful practices for any local government would include a chart depicting applicable laws, posting requirements, and identification of individual(s) responsible for compliance (including record keeping and report submission). State labor departments or other agencies also have mandatory posting requirements and those requirements also may be available at state agency websites.

The array and complexity of federal and state labor laws cannot be understated. Acquiring resources to assist in this task can be daunting and expensive. Fortunately, the Internet is a valuable, if not indispensable, resource in assisting municipal lawyers, particularly in employment law. As with any use of the Internet, however, it is essential to consider the source and recognize that not all information is official, up-to-date, or reliable. Government agency websites may provide access to laws and regulations,

[9] Though many commercial vendors offer posters claiming to satisfy posting requirements, federal and state agencies often have their own posters available for downloading – free of charge – from their websites. See, e.g., http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm, the U.S. Department of Labor website page on federally required posters.

posting requirements and posters, training programs, compliance handbooks, records of decisions, and administrative guidance. Many also permit filing of requests for administrative clarification and guidance in advance of making decisions. As with any research conducted over the Internet, users should verify accuracy and timeliness of materials prior to relying on them.

The remainder of this section briefly reviews selected statutes that relate to local government employment. This review is selective and should not be deemed comprehensive or exhaustive. Because these laws often have lengthy titles, they are often known by acronyms using initials from their titles. Accordingly, they are sometimes described as "alphabet soup" protections for employees and job applicants.

(A) Protected Classifications under Federal & State Law

(*1) Equal Employment Opportunity.*

(a) Overview. Both federal and state laws prohibit "discrimination" in employment.[10] The notion of prohibiting "discrimination" is somewhat of a misnomer without adding the qualifier that these laws prohibit discrimination on the basis of some enumerated criteria. Discrimination, after all, denotes only a choice, and not so long ago, a person who was described as being discriminating was being complimented. Today, discrimination has acquired a different connotation in that it describes negative behavior that is unacceptable and often illegal. Federal and state laws seeking to bar negative discrimination create "protected classes" of individuals who are protected from discriminatory action in a number of ways, notably including housing, public accommodation, and employment. Examples of regulated criteria related to equal employment opportunity include: gender, race, religion, disability, and more. As mentioned above, in our federal system, federal laws set a minimum level of protection for employees which states cannot lessen. States though, for example, may provide additional protections such as encompassing employers with fewer employees than set by federal law or by adding categories of protected employees (e.g., gender preference, not currently covered by express federal law).

The stated goal of these laws with respect to employment is not to ensure equal treatment for everyone regardless of ability or other factors. Instead, the laws seek to provide equal opportunity in employment by barring employment actions (such as decisions or practices relating to hiring, promotion, benefits, discipline, and termination) that are based on or utilize a prohibited criterion.

Several of these laws arose in the 1960s, an era that saw a reawakening of concern with civil rights and discrimination based on race. Since then, prohibited criteria have expanded based on legislative notions of the types of discrimination practices evident. They now include disabilities, gender, and an array of classifications described in this section (with the latest federal expansion being genetic information discrimination).

In addition to variations in how state and federal laws define prohibited criteria and how laws apply to different employers, another complicating factor arises in the administration and interpretation of the various laws. Some are written or interpreted to

[10] Anti-discrimination laws generally apply to both public and private sector employment. However, some laws apply only to one sector and not the other, may apply differently, or have different "carve-outs" or exceptions that result in the law applying differently. The Family and Medical Leave Act, discussed *infra*, is one example.

bar discriminatory treatment (generally requiring that there be evidence of intent to discriminate), while others also are found also to bar disparate impact (generally conduct – even unintended conduct – which may result in discriminatory effect).

At least a portion of this dichotomy has arisen due to the selection of language used in different laws enact at different times as well as by some fifty-plus years of court interpretation. A reasonable, though now somewhat dated-summary and review is contained in an on-line 2009 Louisiana State University Law Center Digital Commons article, Corbett, "Fixing Employment Discrimination Law."[11]

To both further protect employees and assist in enforcement, numerous state and federal laws also prohibit retaliation against employees who seek to avail themselves of their protections by reporting discriminatory treatment or by participating in an investigation of charges. The EEOC reports that approximately half of the claims filed in cases they enforce involve retaliation. Courts at all levels (including the U.S. Supreme Court) now pay increasing attention to retaliation claims. Yet, in this arena, too, variation seems to be the rule, as the laws are written with differing emphasis and terminology. In addition to laws that expressly bar retaliation, all states have some form of statutory protection for "whistleblowers" in addition to express anti-retaliation provisions.[12]

Employees, employers, legislatures and the courts have raised questions as to whether these legislative protections, or the manner in which they are administered, might run afoul of the equal protection clause of the Fourteenth Amendment.[13] One example in which a constitutional issue arose involved firefighters in New Haven, Connecticut, challenging the City's decision to ignore promotional test results. The City decided not to use the test results, fearing that the poor test results of "protected" classes might result in a disparate impact challenge to those tests. The U.S. Supreme Court decided the case on statutory grounds and, therefore, deferred to another day the inevitable task of reconciling EEO laws (including affirmative action requirements) with the equal protection clause.[14]

However, in 2014, the Supreme Court decided *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigration Rights.*[15] As with so many recent decisions, the majority and dissenting sides heatedly disagreed. The opinion, though, upheld a state constitutional amendment prohibiting the state from granting certain preferences, including race-based preferences, in a wide range of actions and decisions. Justice Kennedy stated that the case was NOT about the constitutionality or merits of race-conscious admissions policies in higher education. Instead, he characterizes the issue as whether, and in what manner, voters in states may choose to prohibit the

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[11] available at: http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1002&context=faculty_scholarship.

[12] For more information, see Crean *Whistleblowing in the Public Sector Workplace: From Snitch to Saint?* IMLA's Municipal Lawyer, Vol. 47, No. 3, May/June 2006. For a discussion of sexual harassment and retaliation, see *Recent Developments in Sexual Harassment: Prevention of, and Defense Against, Claims for Retaliation*, included in the appendices.

[13] In addition, some laws are challenged as infringing on other Constitutional rights. One example is the claim that sexual harassment policies and practices may improperly infringe on a public employee's right of free speech or religion as protected by the First Amendment. Other challenges may assert that federal law improperly infringes on state sovereignty.

[14] *Ricci v. DeStefano*, 557 U.S. 557 (2009).

[15] 572 U.S. __, 134 S.Ct. 1623 (April 22, 2014).

consideration of racial preferences in government decisions. Though the case dealt specifically with admission to institutions of higher education, it may well have implications for states that may wish to address employment practices. The various concurring and dissenting opinions show there is little unanimity on the court on the underlying issue of preferences, so further developments will be needed to draw solid guidance from the decision. [For further discussion, see Part III (A).]

(b) Selected EEO Statutes. Table 1 depicts several selected examples of laws that regulate employment premised upon the general notion of equal employment opportunity. These laws may be amended on occasion, and their true effect is shaped by state and federal court decisions and agency regulations and enforcement.

TABLE 1. SELECTED EQUAL EMPLOYMENT OPPORTUNITY ("ANTI-DISCRIMINATION") STATUTES

Title/Popular Name	**Citation**	**Description** [Note: A parenthetical letter at the end of a description refers to comments after the Table.]
Title VII, Civil Rights Act of 1964	42 U.S.C. § 2000, et seq.	Civil rights legislation that bars "discrimination" on enumerated grounds. Administered by Equal Employment Opportunity Commission, whose rules contain the "real meat" of the law. As an outgrowth of gender discrimination, sexual harassment, including retaliation, is a major element of employment law. States have enacted their own EEO laws and grounds for protection may be broader than those under federal law (e.g., marital status, gender preference). (a)
Title IX, Civil Rights Act of 1964	42 U.S.C. § 2000, et seq.	Prohibits discrimination on the basis of race, color, and national origin in programs/activities receiving federal financial assistance, notably in educational contexts, including public elementary and secondary schools, and colleges and universities.
ADA- Americans With Disabilities Act	42 U.S.C. § 1201, et seq.	Protects applicants and employees from discrimination based on physical or mental disability so long as individual can perform essential functions of the job with or without reasonable accommodation. Hiring practices must avoid discriminatory actions, and employees may have right of reinstatement following a period of disability. States have enacted their own versions of protection for disabled workers. Also regulates workplace conditions that impact the disabled. (b)
FLSA or Fair Labor Standards Act & Equal Pay Act	29 U.S.C. § 201, et seq. 29 U.S.C. § 206, et seq.	FLSA establishes minimum hourly wage, prohibits gender discrimination in pay practices, and requires payment of overtime for work in excess of a regular workweek for "non-exempt" employees. Equal Pay Act is another federal law governing gender pay issues. (c)
FMLA or Family and Medical Leave Act	29 U.S.C. § 2601, et seq.	For covered eligible employees, requires employer to provide unpaid leave to address employee's medical needs or those of employee's family. Interplay with ADA and workers compensation laws is complex. Employers often fail to take action that may prevent exposure to continuing, unfunded obligations under FMLA and local paid leave policies. (d)

ADEA or Age Discrimination in Employment Act	29 U.S.C. § 621, et seq.	Prohibits discrimination in employment practices seeking to protect individuals over the age of 40. State laws may apply more broadly and inclusively. (e)
FCRA or Fair Credit Reporting Act	15 U.S.C. § 1681, et seq.	Restricts employer use of credit information, requiring, e.g., notice of any employment use of adverse credit information and opportunity for employee/applicant to correct. See also state laws on discrimination because of arrest or conviction record and emphasis on possible bars to using arrest records under EEO statutes.
USERRA or Uniform Services Employment and Reemployment Rights Act	38 U.S.C.A. § 3411	Protects eligible service personnel from adverse employment actions while on active duty and provides for qualified reinstatement rights to former position upon return.
GINA or Genetic Information Nondiscrimination Act	29 U.S.C. § 216, et seq. 42 U.S.C. § 300gg-1, et seq.	Prohibits use of genetic information in making employment decisions, restricts employer and other entities from requiring or requesting genetic information and restricts its disclosure.

Additional Comments on Selected Table 1 Statutes.

(a) In *Ledbetter v. Goodyear Tire & Rubber Co., Inc*., 550 U.S. 618 (2007), the U.S. Supreme Court held that a wage discrimination charge must be filed within 300 days of the last intentionally discriminatory act by the defendant employer. In 2009, the *Lily Ledbetter Equal Pay Act* sought to undo this decision and expand the time limit for filing disparate pay claims. 2013 U.S. Supreme Court decisions limited both federal and state legislative powers to use single-sex marital status in employment. [See *Hollingsworth v. Perry*, __ US __ (June 26, 2013) and *United States v. Windsor*, __ U.S. __, (June 26, 2013). In 2015, the Court held that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.[16] How this decision might impact employment issues remains to be seen.

Other 2013 SCOTUS decisions defined who qualifies as a "supervisor" whose workplace harassment will be automatically attributed to his or her employer for purposes of Title VII liability [*Vance v. Ball State University, __ U.S.* ___ (June 24, 2013)] and the level of proof required to show retaliation in certain Title VII cases [*University of Texas Southwestern Medical Center v. Nassar, __ U.S.* __ (June 24, 2013)].

(b) In 2009, Congress, reacting to court decisions applying ADA narrowly, amended aspects of the ADA to broaden the scope of conditions coming within its scope.

(c) FLSA overtime requirements apply only to workweek hours and do not mandate overtime for work over a set number of work hours in a day or on weekends or holidays. Municipal lawyers need to understand FLSA requirements such as:

- Employees who are not covered under FLSA;
- Exemptions from overtime pay requirements (primarily white collar exemptions for professional, administrative, and executive employees);

[16] *Obergefell v. Hodges*, __ U.S. ___ (June 26, 2015).

- Special provisions for computing overtime for first responders, including firefighters and law enforcement.

FLSA overtime issues also may include matters such as:

- Computation of hours worked;
- Applicable rates of pay;
- Compensatory time off;
- Call time;
- Compensability of time spent donning and doffing uniforms and protective gear.

FLSA, like other federal laws, sets a floor, and state and local government entities (by law, regulation, charter, ordinance, or personnel policy or practice) may provide more generous treatment for employees.

(d) Congress recently changed FMLA primarily to address issues arising with increased deployment of armed forces personnel. (See also USERRA description in Table 1.) U.S. Department of Labor and Justice websites provide guidance on FMLA, including recommended forms to facilitate compliance and the unending requirement for record-keeping inherent in federal labor laws.

(e) In addition to being aware of possible state law differences, a key aspect of age discrimination is compliance in offering early retirement "buy outs" with particular reference to the Older Workers Benefit Protection Act, added as a collection of discrete amendments to ADEA in 1990, and codified at 29 U.S.C. §§621, 623, 626, and 630.

(B) Miscellaneous Other Employment Laws.

(1) *Fair Labor Standards Act*, *FLSA*, *supra* Table 1. As mentioned above, in addition to its anti-discrimination and child labor protections, FLSA sets overtime pay requirements for covered, non-exempt employees based on the workweek (not on the basis of hours worked per day or for holiday or weekend work). A common misconception under FLSA is that salaried employees automatically are exempt from overtime pay requirements. Instead, exempt employees must be salaried, AND be paid a minimum amount, and meet the tests for exemption under the FLSA as executive, administrative, or professional employees. The U.S. Department of Labor announced in the summer of 2015 that it was considering a rule to expand overtime eligibility, and anticipated announcing a proposed rule and rule-making proceeding that is expected to commence in the fall or winter of 2015. An important protection against inadvertent mistakes in overtime payment issues can be the adoption of a salary basis policy, also known as a "safe harbor policy," See http://www.dol.gov/whd/regs/compliance/fairpay/modelPolicy_PF.htm.

(2) *Hatch Act*, 5 U.S.C. § 1501, et seq. The Hatch Act applies to executive branch state and local employees who are principally employed in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency. Covered state and local employees may not:

- Be candidates for public office in a partisan election;
- Use official authority or influence to interfere with or affect the results of an election or nomination; or
- Directly or indirectly coerce contributions from subordinates in support of a political party or candidate.

States laws also may govern employee political action. Free speech rights of public employees may trump applicability of some of these laws. [See Part IV (D), *infra.*]

(3) *Employee Polygraph Protection Act,* 29 U.S.C. § 2001 and *Electronic Communications Protection Act* 18 U.S.C. §§ 2510-2522. Though the EPPA regulates and limits use of polygraphs and employee monitoring in private sector employment, it does not generally apply to limit practices in the public sector. The ECPA contains exceptions for employer monitoring, but these do not provide *carte blanche* license for employers to intercept email or monitor cell phone calls. An amendment to the ECPA, called the Stored Communications Act (SCA), may limit employer access (specifically including public employers) to copies and records of employee communications such as those made using email and cell phones. Also, employers must be aware of state laws, including those that may not expressly address workplace practices but, instead, control practices, such as wiretapping, in a broader sense. Employers are well-advised to consider adopting policies that limit and define employee expectations of privacy in the workplace. [See also Part IV (C) and (D).]

(4) *Privacy Act,* 5 U.S.C. § 552a, et seq. This law protects privacy of social security numbers. See 42 U.S.C. § 405(c)(2)(C)(viii)(I) regarding use of social security numbers. States may have privacy laws or have created a common law right of privacy in the workplace. [See comments in subpart (3) immediately above and in Part IV (C), *infra*.] Several states have enacted laws barring employers from requiring employees to disclose their social media user names and passwords. At this time, Congress is considering similar legislation but has not yet passed it.

(5) *Federal Health Insurance Portability and Accountability Act.* HIPAA, as this law is known, was enacted, in part, to assist in continuing health insurance coverage when an individual changes jobs or otherwise changes coverage. It includes provisions for securing data associated with medical treatment and health insurance but, perhaps, its most well-known aspect was the direction to the Department of Health and Human Services to create what is known as the HIPAA Privacy Rule. Though widely misunderstood to create a cloak over all medical information, it primarily relates to disclosure and use of protected personal health information (PHI) by health care providers, insurers, and to some extent employers who provide coverage for employees. A key term in the rule is "covered entity" and not all persons who have access to medical information are deemed to be encompassed within its reach. In some cases, though, emergency medical personnel employed by a local government may be deemed providers. Covered entities should create the position of privacy officer for the purposes of reviewing compliance and receiving complaints about improper use or disclosure. From a municipal perspective, HIPAA issues sometimes are overdrawn but, at the risk of oversimplification, problems can exist if PHI is improperly obtained and used in employment decisions or improperly disclosed. A good starting point to better understand HIPAA and the privacy rule (and to obtain links to the law and the rule) is the HHS Office for Civil Rights website: http://www.hhs.gov/ocr/privacy/index.html.

Though HIPAA may have a more limited reach than is commonly believed, other laws (particularly on the state level) may protect health information. A recommended practice is to adopt HIPAA-like rules to provide privacy protections to ensure proper handling of confidential information about an employee's medical background and health.

(6) *Patient Protection and Affordable Care Act,* P.L. 111-148. Even a summary discussion of the potential impact on local government of the so-called "Obama Care" act is well beyond the scope of this paper and the Institute. It is sufficient to state at the present that much of the impact is unknown as of now, though it certainly will impact human resources functions now and in the future.

(7) *Federal Restrictions on Garnishment.* Technically part of the Consumer Credit Protection Act (CCPA), U.S.C. § 1671 et seq., this law protects employees from discharge by their employers because their wages have been garnished for any one debt, and it limits the amount of an employee's earnings that may be garnished in any one week. State laws on garnishment also may apply.

(8) *Citizenship and Eligibility for Employment.* Given recent developments in U.S. history, significant changes in immigration and eligibility for employment have occurred and further change may be expected. A combination of statutes now creates requirements and procedures for verifying eligibility for employment. Rather than attempting to list that array, the website created by the U.S. Citizenship and Immigration Services may be a worthy starting point: http://www.uscis.gov/portal/site/uscis.

Employers walk a thin line between the prohibitions against discrimination based on national origin and the requirements to ensure that employees validly may work in the United States. Most human resources departments, at least in larger municipalities, are aware of the standard forms and actions that are required by federal law, but municipal attorneys may wish to attain working knowledge of these requirements and the various forms and documents required of employers.[17]

One possible source of assistance is the federal "E-Verify" program.[18] Though criticized for inaccuracy at its inception, the federal government claims to have improved the system of late. Several states have mandated use of e-verify, and challenges to such laws are making their way through the judicial system.

(9) *False Claims Act,* 31 U.S.C. §3729. The False Claims Act protects "whistleblowers" in connection with federal funding or purchasing. Other federal funding statutes contain whistleblower protections, and virtually all states have enacted some form of whistleblower protection. See also the IMLA Municipal Lawyer article on whistleblowing cited at note 11, *supra*.

(C) Other Statutes to Consider.

(1) *Open Records Laws*. Public right-to-know or freedom-of-information acts often dictate how employee personnel documents are handled. These laws also may control some of the procedures that govern personnel proceedings, at least with respect to

[17] See Young, *Immigration 101 for Municipal Employers*, IMLA's Municipal Lawyer, March/April 2004, for overview, though the article, by now, may be a bit dated.

[18] According to a description at the Department of Homeland Security, "E-Verify is an Internet-based system that allows an employer, using information reported on an employee's Form I-9, Employment Eligibility Verification, to determine the eligibility of that employee to work in the United States. For most employers, the use of E-Verify is voluntary and limited to determining the employment eligibility of new hires only. There is no charge to employers to use E-Verify. The E-Verify system is operated by the Department of Homeland Security in partnership with the Social Security Administration." See, e.g., http://www.dhs.gov/files/programs/gc_1185221678150.shtm.

whether a proceeding may be conducted privately or in public. Records retention laws also may affect storage and destruction of personnel records.[19]

(2) *Workers Compensation.* Workers compensation, in general, substitutes for common law tort liability a regulated manner of compensating employees who are injured or killed on the job. Statutory schedules for lost wages and permanent or temporary injury accompany requirements for employers to be responsible for medical costs. Many laws impose temporary alternate duty requirements and create conditional reinstatement rights for injured workers. Workers compensation laws interact with the ADA and FMLA, and this interplay poses continuing challenges for local governments.

(3) *Unemployment Compensation*. Though local governments originally were not covered under federal unemployment compensation law, they now are required to participate. State laws, operated under the general "FUTA" umbrella of federal law, control the system, eligibility for benefits, and determination of costs to employers as either contributing or reimbursing employers.

(4) *Occupational Safety and Health.* OSHA, as it is known, applies to private sector employers in the main. It does not apply to employees of state and local governments, unless they are in one of the states operating an OSHA-approved state plan. Public sector lawyers need to be aware that use of contractors and other private sector employers on public projects may require consideration of OSHA factors.

(5) *Civil Service Laws.* As mentioned previously, labor law is an ever-changing landscape. At the present, federal civil service laws primarily relate to federal employment, while local government civil service standards, if they exist, are creatures of state laws. Where they exist, civil service laws generally supplant all or a portion of a state's body of at-will employment law. Congress has considered, but not yet enacted, legislation to create a "for-cause" standard to replace at-will employment in the public sector which could extend civil-service-like standards throughout the country.

(6) *Protective Occupations*. Police, fire, EMT, and other first responders often are singled out for treatment under law. An example noted previously is FLSA rules on overtime for these occupations. States also create special protections or provisions under their labor laws to recognize the special nature of these positions. As noted in part I (D), Congress has considered legislation to mandate recognition of collective bargaining rights for certain public sector protective occupations, though as of the writing of this paper, the bills have not been enacted into law.

(7) *Ethics and Conflicts of Interest.* To date, most laws setting standards for ethical conduct and regulating conflicts of interest involving local officials and employees are set by state law and/or local codes or policies. Some federal laws may set standards applicable to local governments, particularly when those governments apply for and use federal funds.

(8) *Liability and Indemnification of Public Officials and Employees.* The extent to which public officials and employees may be held liable for their actions and the

[19]Lawyers who primarily advise employers in the private sector often recommend retaining personnel records for three, or preferably, four years. Public records retention requirements may vary from these periods.

actions of their governments, and to which governments will be held accountable for actions by their officials and employees, (e.g., tort liability) generally is addressed by state statutory or common law. However, liability under federal principles (e.g., violation of civil rights) will be subject to federal principles. State immunity laws do not negate liability thereunder, e.g., 42 U.S.C. § 1983.

(9) *Marital Status, Domestic Partners and More.* EEOC statutes have barred discrimination on marital status and gender for years. Newer laws, at least in some states, now may bar discrimination based on factors such as gender or sexual preference or gender identity. State laws on "same-sex" marriage or other committed relationships may create additional concerns for employers, who must avoid improper discrimination (see discussion at page 12).

III. Constitutional Protections for Local Government Employees. A fundamental difference between private and public sector employment lies in the nature of a public employer as an arm of the state. Early in our country's history, constitutional protections from governmental action were less prevalent than now.[20] Constitutional protections now clearly can apply to public employment and this section looks at those in the realms of equal protection; due process; employee privacy, including search and seizure; and First Amendment protection, primarily free speech.

(**A) Equal Protection.** Employment discrimination is contrary to law when the criteria upon which discrimination is based are defined as prohibited criteria. Employment discrimination also may be held to be a denial of equal protection of the law. Though most discrimination complaints will be filed under applicable statutes, a plaintiff may seek to file a constitutional claim to seek enhanced damages, when a statute of limitation has expired,[21] or to assert a claim for a class not protected by statute.

Employees also may use equal protection to challenge affirmative action or employment practices that they deem favor a protected class over a non-protected class. Though decided on statutory grounds, an equal protection claim was raised in the U.S. Supreme Court decision in which firefighters challenged a city's decision not to use promotion test results, fearing claims of disparate impact.[22] Several justices seemed receptive to resolving the constitutional issue in this case, but even those who wished not to do so recognized the inevitably of the Court having to face the issue.

A U.S. Supreme Court opinion[23] that ruled on the constitutionality of considering race in college and law school admissions is being cited occasionally in employment cases. However, as the *Ricci* case declined to address the matter, the conflicts in the circuits on equal protection's role in the workplace will continue pending further decisions. However, in the 2014 *Schuette* case (at n. 15), several justices felt the time was ripe to look at constitutional issues in this area. Yet, the majority decided to not take up the issue "head-on."

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[20] Justice Holmes remarked while on the bench in Massachusetts that "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of City of New Bedford,* 29 N.E. 517, 517-518 (1892).

[21] Time frames for filing EEO claims are set in the laws, may vary between state and federal laws, and usually are much shorter than customary statutes of limitations for tort or contract cases.

[22] *Ricci, et al. v. Destafano, et al*., *supra,* n. 14.

[23] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Equal protection also may be invoked in the context of workplace practices. A ninth circuit decision[24] cited language in *Grutter* (n. 23) as follows: ". . . skills needed in the global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints . . .". A private sector employer's discharge of an employee who objected to its "diversity" posters was upheld against a charge of religious discrimination. How such claims may fare against a public employer remains to be determined. [Also see comments under part (D).] The recent decision on the birth control coverage mandate[25] also suggests religious-based issues may continue to be addressed in future decisions.

(**B) Employment Interests & Due Process**. The discussion of at-will employment in part I noted that at-will exceptions may exist when an employee has a property interest in employment or a liberty interest in regard to reputation and ability to obtain employment. In such a case, because the employer is a state actor, due process considerations may affect the employer's "free hand" by elevating standards for discipline or discharge or imposing procedural protections to safeguard employee rights.

(1) Property Interest. A local government employee who has a property interest in the position may not be deprived of it without due process of law. State and local law determine whether or not there is a property interest, and employees with a property interest also are entitled to due process in connection with imposition of substantial discipline.[26]

Two primary issues arise in this context: (a) When does an employee obtain a property interest in employment? and (b) What elements of due process are due when a property interest exists? As to the former inquiry, there is no single, standard formulation that will apply in all cases. The cases cited at note 26 do hold that an employee who may be discharged or disciplined only for "cause" will have a protected property interest. Another key can be found when an employee has a legitimate expectation of continued employment absent cause to terminate or discipline. This expectation may be created in any number of ways, including for example:

- State law governing the employment relationship;
- Use of prohibited discriminatory criteria by the employer;
- Personnel policies and practices that provide an employee with such protections;
- Collective bargaining agreements imposing "for cause" requirements;
- Individual employment agreements having that effect.[27]

What then is the requirement that an employer have due cause for action? At its core, just cause requires that discipline be fair and appropriate under all of the circumstances.

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[24] *Peterson v. Hewlett-Packard*, 358 F.3d 599 (9th Cir. 2004).
[25] *Burwell v. Hobby Lobby,* ___ U.S. ___ (June 30, 2014).
[26] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Gilbert, et al. v. Homar*, 520 U.S. 924 (1997).
[27] Employers may inadvertently create property interests by casual use of language that may establish an expectation of continued employment even in the absence of express language or handbook language seemingly retaining at-will employment.

Among factors to be considered to determine if cause exists are the following (also described in Part I on at-will employment).[28]

> 1. **Notice:** Did the employer give the employee warning or foreknowledge of possible or probable consequences of the employee's conduct?
>
> 2. **Reasonable Rule/Order:** Was the employer's rule/order reasonably related to the orderly, efficient and safe operation of employer's business and performance that the employer might properly expect of the employee?
>
> 3. **Investigation:** Did the employer, before administering discipline, make an effort to discover whether the employee in fact did violate or disobey a rule or order of management?
>
> 4. **Fair Investigation:** Was the employer's investigation conducted fairly and objectively?
>
> 5. **Proof:** Did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
>
> 6. **Equal Treatment:** Has the employer applied its rules, orders and penalties even-handedly and without improper discrimination to all employees?
>
> 7**. Penalty:** Was the degree of discipline administered reasonably related to the seriousness of the proven offense and the employee's record?

If a property interest exists, due process considerations apply, as the Fourteenth Amendment bars deprivation of property without due process of law. Due process in this context does not invoke the full panoply of rights that apply, for example, to criminal proceedings. In employment, due process does not invoke a rigid framework. Instead,

> "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands. . . . To determine what process is constitutionally due, we have generally balanced three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest."[29]

Thus, the essential components of employment due process can be said to include the right to be notified of the basis for action and to be provided the opportunity to defend. Other elements of due process may include the right to be represented and the right to confront accusers. The right to an impartial tribunal occasionally is asserted in an attempt to remove allegedly biased decision-makers from participating in a discipline/discharge proceeding. Again, many of these concepts may be addressed under state law (common or statutory). Prudent municipal legal counsel will examine relevant precedent, and a good practice would be the creation of a template that outlines the steps that are required or may be appropriate to deflect charges of denial of due process.

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[28] The listing included here does not purport to state a single, accepted formulation for cause but instead seeks to identify the components of cause that are often addressed in litigation.
[29] *Gilbert, supra* note 26, internal citations omitted.

(2) Liberty Interest. An employee whose rights do not arise to the level of a property interest in employment, nonetheless may have constitutional protection in the form of a liberty interest. That interest arises when the discipline or discharge reasonably might be expected to adversely affect the employee's opportunity to find other employment or to sully the employee's reputation in a manner that might affect such a job search. In this case, full or even partial "due process" rights do not arise.[30]

To establish a claim for deprivation of a liberty interest, a plaintiff must demonstrate:

- that the plaintiff was discharged;
- stigmatizing or defamatory charges were made against the plaintiff in connection with the discharge;
- that the charges were false;
- that no meaningful pre-discharge hearing was conducted;
- that the charges were made public;
- that plaintiff requested a hearing in which to clear his name; and
- plaintiff's request was denied.[31]

One remedy to infringement on a liberty interest may be to provide a post-termination "name-clearing" hearing and to take appropriate action on that basis.

(C) Privacy Interests, Including Search & Seizure. Public employees have a constitutional right under the Fourth Amendment to be free from unreasonable searches of their persons, private personal property, and "private" areas of their workspaces. Most states also have concluded that employees generally have some privacy rights. In addition, generally applicable state laws in areas such as wiretapping and surveillance may create protections for employees when they have reasonable expectations of privacy.

In the past, privacy interests arose most frequently in areas such as drug testing[32] and employees suspected of theft or other wrong-doing. Today, use of electronic communications (e.g., cell phones, email and the Internet) are areas where employers may wish to monitor employees. To avoid issues under the Stored Communications Act and state laws, to limit employee privacy claims, and to minimize dissatisfaction among employees, employers are well-advised to adopt policies that limit expectations of privacy, define and limit or prohibit personal use of cell phones,[33] computers, and the Internet. Though the U.S. Supreme Court sidestepped numerous issues (including the effect of the Stored Communications Act), it has held that an employee's use of cell phones was not beyond employer scrutiny if the employer properly limited expectations

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[30] Some sources may characterize liberty interests more broadly to include deprivations of other rights, such as those pertaining to speech and assembly as discussed in Part (D). However, in the employment context, liberty interest generally refers to the interests discussed in this Part. See *Board of Regents v. Roth*, *supra*, note 26.

[31] *Rosenstein v. City of Dallas*, 876 F.2d 392 (5th Cir. 1990).

[32] Drug testing is most susceptible to challenge when it is random and unannounced. Postings and warnings to applicants are one manner in which employers seek to avert privacy challenges. Random testing is more likely to be upheld (and may be mandatory under state or federal laws) for some safety sensitive occupations, such as transit operators and commercial drivers.

[33] Cell phone personal use may raise additional concerns. The Internal Revenue Service, for example, has looked at personal use of employer-provided cell phones as a taxable fringe benefit of employment.

of privacy and made sure that employees knew of the policy.[34] Here, as in other areas of employment law, practice that conflicts with policy may "trump" those policies. Computers provide employees with what some may believe is "anonymous" communication that can lead to harassment and other illegal, or at least non-productive, conduct.[35] Regular employee and supervisor training may provide protection for employers.

In addition to exposure to claims of interference with employee privacy or improper searches, failure to set policies regulating use of electronic communications and creating record-keeping procedures may lead to sanctions for spoliation of records in violation of federal rules of civil procedure (and an increasing number of state court rules). Further, by both statute and case law, right-to-know laws and freedom-of-information acts may apply to email communications by officials and employees (and even unknowing citizens who electronically communicate with government).

(**D) Employee Speech, Religion, and Assembly.** Justice Holmes' famous statement about police and free speech, quoted at note 20, is no longer the law, as public employees now possess limited free speech rights under the so-called *Pickering-Connick* rule which seeks to balance the interests of employees as citizens in speaking out on matters of public concern and the interest of the government as an employer in promoting the efficiency of the public services it seeks to provide through its employees.[36] The test under this rule asks first if the employee is speaking as a citizen about matters of public concern. Mere griping about a supervisor, for example, likely would not rise to the level of a public concern, but complaints about that supervisor violating a law likely would. Next, the test determines if the employer may control that speech through discipline or termination because that speech would adversely affect the effective and efficient operation of the workplace. Subsequent cases [see n. 38] refined the doctrine and set up the general contours of speech and the ability of employers to react to employee speech. Speech here also may include expressive conduct such as posters and computer use.

In 2006, the U.S. Supreme Court issued a decision initially viewed with alarm by supporters of employee speech who asserted its ruling could wipe out those rights. The case[37] ruled that public employee protected speech rights are circumscribed when the employee is not speaking as a citizen but, instead, is speaking as part of the demands and requirements of employment as a public employee. Subsequent court rulings appear to support the notion that *Garcetti* does deviate substantially from prior law but, instead, refines the scope of speech which is deemed to address matters of public concern.

Yet, courts still are seeking to define when an employee speaks as a citizen. A recent U.S. Supreme Court decision[38] unanimously held, in an opinion by Justice Sotomayor, that a public employee who testifies truthfully at trial, pursuant to a subpoena, is protected by the First Amendment from employer discipline, at least where the testimony is not pursuant to duties as an employee.

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[34] *City of Ontario, California, et al. v. Quon et al., 560* U.S. 746, 130 S.Ct. 1011 (2009).

[35] See also Crean *Privacy and Governmental Workplace Monitoring – Caution! Emerging and Evolving Doctrine Ahead*, IMLA's Municipal Lawyer, Vol. 45, No. 2, March/April 2004.

[36] *Pickering v. Board of Education of Tp. High School Dist. 205*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

[37] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

[38] *Lane v. Franks*, ___ U.S. ___ (June 19, 2014).

A growing concern related to employee speech is that which involves blogging and social media and networking by public employees. It should come as no surprise that employers can be concerned about appearances created by the very public nature of blogs and Internet sites such as Facebook. Aside from recognizing rights of employees to speak on public issues – and criticize government – any attempts to control employee speech and impose discipline for that speech should be undertaken only after a full review of employee speech rights. Among those rights may be ones created by statutes, including whistleblower laws or those[39] protecting public employee rights to criticize government. Here, as in areas such as employee privacy, employers are well-advised to follow carefully crafted policies that help to navigate these tricky waters.

Employers also must be aware of the role that supervisors play in enforcing (or not enforcing) personnel rules and policies. An important element in *Quon*[40] (in addition to issues regarding privacy of cell phone records) was a supervisor's decision to allow some personal cell phone texting. Though the employer did prevail, the case likely was made more complex due to that supervisor's deviation from adopted employer policies.

The First Amendment protects rights to exercise religion and be free from practices that interfere with the exercise of religious freedom. Those protections can intersect with an employer's need to control the workplace.[41] The *Smith* decision has been characterized as saying "if prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Yet, examples of conflicts are plentiful, such as the need to accommodate religious needs in work schedules. State and federal laws against religious discrimination in the workplace also apply here, and may provide broader protection. Similar concerns arise with respect to protected rights of assembly, particularly when the public workplace can be viewed as a private forum. Employee rights to associate to discuss forming a union, for example, have been the subject of NLRB decisions.

One topic where litigation may be expected to increase and ultimately reach the high court is the interplay between protected First Amendment rights and the goal of prevention of discrimination and harassment in the workplace. Employees have raised free speech objections to sexual harassment policies asserting, for example, that policies adopted in the name of "politically correct" goals interfere with rights to read or view "adult" materials in the workplace. Also, employees with stringent religious beliefs have raised concerns with practices that they view as forcing them to accept lifestyles to which they object.[42] All that can be definitively stated at this time is "stay tuned."

IV. The Life Cycle of Public Employment. As a summary of the foregoing concepts and principles, this part provides, in outline form, what could be described as the life-cycle of public employment. Its purpose is to set forth a framework for analyzing legal

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[39] E.g., NHRSA chapter 98-E, entitled Public Employee Freedom of Expression.
[40] *City of Ontario, California, et al. v. Quon et al.*, *supra*, n. 34.
[41] Decisions here include *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), holding that a state could deny unemployment benefits to a person fired for violating a law prohibiting peyote use, even though its use was part of a religious ritual.
[42] The decision in *Burwell v. Hobby Lobby*, n. 25, may signal increased concern for employee religious rights as well as the impact with respect to employer religious views.

issues and concerns and to suggest areas where local government lawyers facing personnel issues may wish to develop resources and expertise.

(A) Creating an Employment Relationship

(1) Job Descriptions & Organization Charts
(2) Recruiting, Interviewing, Background Checks
(3) Conditional Offers of Employment
(4) Sealing the Hiring Deal
(5) Orientation & Training

(B) Administration of Employment & Attorney-Client Communication

(1) Management by Walking Around (Awareness of What Occurs in the Workplace)
(2) Avoiding the "I didn't know" Syndrome
(3) Avoiding the "I should have called you earlier" Syndrome

(C) Discipline and Discharge

(1) Documentation
(2) Progressive Discipline
(3) Cause, Just Cause or No Cause
(4) Due Process or Process That's Due
(5) The Termination Dance

(D) Post-Parting Blues

(1) Employment Practices Liability
(2) Wrongful Waivers (e.g., Unemployment Compensation, ADEA & OWBPA)

V. A Municipal Attorney's Role in Public Employment Relations. Today, municipal attorneys whose practice includes employment law are likely to view their roles as being more pro-active and preventive than was the case in the not-too-distant past. Employees and employee advocacy groups (not to mention plaintiffs' lawyers) use the Internet and other media to demonstrate forcefully the many "evils" visited on employees by employers. As is the case in society generally, individuals now seem more prone to challenge decision-makers. Employment lawyers in the public sector also must clearly understand the identity of their clients and the risks that are created by providing "informal" guidance to employees. The following comments present some personal views on the role of the municipal attorney in employment matters.

(A) Preventive Advice and Guidance. One role actively advises policymakers to demonstrate leadership on compliance issues. Leadership by example creates an understanding of the legal complexities of the current workplace and fosters the goal of complying with legal requirements.

(B) Develop and Implement Training. Attorneys' knowledge of the law means that they possess keys to implementing preventive practices. Another positive role is to assist in training and retraining for officials, supervisors, and employees.

(C) Compliance Practices. The experience and knowledge of officials and human resources personnel varies markedly from community to community. Even in those municipalities with personnel specialists, a little preventive medicine may be a

prescription to lessening the symptoms leading to employment practices liability. Local government attorneys may assist in training as noted above and also may seek to develop, review, or just be aware of client policies, procedures, and practices in areas such as: handbook creation and review; job applications and interviews; personnel administration such as discipline, discharge and grievance handling; internal investigations; sexual and other harassment; and reasonable accommodation for employees with disabilities and other protected rights.

All attorneys may not possess training skills but, even if they do not participate in training directly, they periodically should review training presentations and materials to ensure they are current and effective.

(D) Records Management. Record-keeping is a fact of life that is particularly true in personnel administration. Responsibility must be delineated for compiling, managing, submitting, and destroying the array of data and information that exist in personnel offices. Protected health information is one source of potential problems. Inaccurate or outdated records of hours of work and wage payments can result in significant exposure for both damages and fines. Access to personnel records constitutes another serious risk area.

(E) Reputation is a Non-Renewable Resource. Another risk-management focus for a municipal attorney arises when employment disputes create stains on the community, regardless of actual losses or wins. Reaction to such an atmosphere does not suggest ignoring personnel administration or accepting improper employee conduct. Instead, legal counsel should understand and seek to further the use of good policies and practices. Sound advice counsels discretion and an understanding that there is no such thing as a secret e-mail. What is said in city hall seldom, if ever, stays there.

(F) Keeping Current. Even those relatively new to municipal practice understand that the only constant is change. The speed with which Congress has acted in recent years has been perhaps less than what some expected due to a preoccupation with the economy, national debt, health care, politics, and international events. In coming years, the pace of legislation may accelerate and significant changes, even in the very nature of the employment relationship, may occur. State legislatures, too, can be expected to respond to economic conditions and calls for changes in protective labor legislation. Courts, as exemplified by some of the U.S. Supreme Court's recent decisions, echoed in state courts and federal circuit courts, have left their mark and will continue to be an active force in developing the rules governing employment, both private and, particularly, public.

VII. Selected Local Government Employment Law & Information Resources

(A) State & Federal Government & Other On-line Resources

(1) U.S. Department of Labor: www.dol.gov, including ***U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation Under FLSA, available at:***

http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

(2) EEOC: www.eeoc.gov

(3) U.S. Department of Justice: www.doj.gov

(4) www.findlaw.com Access is free and includes access to numerous legal resources including cases and codes. Findlaw also provides emails listing decisions for the Supreme Court, circuit courts, and subject areas including constitutional law and labor and employment law.

(5) Google Scholar: http://scholar.google.com/. A free but limited search machine for legal decisions and article.

(6) Another source providing information on recent court decisions according to subject matter is Justia US Law, see: http://law.justia.com/subscriptions?utm_source=Justia+Law&utm_campaign=677a169a65-summary_newsletters_practice&utm_medium=email&utm_term=0_92aabbfa32-677a169a65-406031273.

(B) IMLA Periodicals & Other Resources

(1) Municipal Lawyer. Published by IMLA.
(2) IMLA Personnel Section Meetings
(3) IMLA monthly personnel webinars

Appendices

These materials provide additional detail on some of the issues mentioned in this paper:

Public Employment Relationships in New Hampshire and Their Effect on Discipline and Termination – At-Will Status

Recent Developments in Sexual Harassment: Retaliation

Public Employees and Constitutional Free Speech: 2014 ILGL Update

Recent Developments in Sexual Harassment: Prevention of, and Defense Against, Claims for Retaliation

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Editor's Note: Awareness in Action *Issue #5 contained an article* Harassment and Retaliation: The U.S. Supreme Court Strikes Back. *The article reviewed the 2006 Supreme Court decision that declared retaliation to be a separate and distinct offense under discrimination in employment laws under Title VII of the federal Civil Rights Act. This article takes a fresh look at this continuing problem in the workplace, including an examination of recent cases, and concludes with suggestions to assist public employers in preventing and remedying sexual harassment and discrimination.*

I. Introduction and Background.

Sexual harassment law, in both the public and private sectors, continues to be a developing and active body of law. While statutory changes appear to have been limited, at least on the federal level[1], courts have continued to define and refine concepts inherent in the prevention and remedy of discrimination based on sex or gender. From decisions outlining the basic parameters of employer liability to the 2006 decision establishing retaliation as a separate violation of Title VII[2], the United States Supreme Court has played an active and, some

would say, primary role in developing the contours of employer responsibility and accountability for sexual harassment that occurs in or is related to the workplace.[3]

II. The Basic Framework for Employer Liability for Sexual Harassment.

A. Responsibility and Liability in General; Supervisor Harassment.

Employers are liable for sexual harassment if they knew or should have known it was occurring and failed to take reasonable actions to prevent or remedy its occurrence.

Employers are liable for sexual harassment if they knew or should have known it was occurring and failed to take reasonable actions to prevent or remedy its occurrence.[4] The doctrine was refined with particular regard for supervisor harassment in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998) resulting in the now well-known *Ellerth-Faragher* doctrine described as follows:

> Employers may be "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with... authority over the employee... Although there is no affirmative defense if the hostile environment 'culminates in a tangible employment action' against the employee... the employer does have a defense 'when no tangible employment action is taken' if it 'exercised reasonable care to prevent and correct promptly any' discriminatory conduct and 'the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[5]

During 2008, the U.S. Supreme Court continued its development of the law. These most recent rulings have reinforced and strengthened

employee protections against employer retaliation. Thus, the Court ruled that implied causes of action with regard to retaliation exist

1. under section 1981 of the Civil Rights Act[6] and

2. under the Age Discrimination in Employment Act.[7]

Coupled with pro-employee legislation enacted this January in the current session of Congress[8] and those which are proposed and may be enacted during this session of Congress, employee avenues for redress of perceived employer wrongdoing are expanding on multiple fronts. Statutory changes may occur on the state level, as well. For example, in the 2009 legislation session proposals were introduced[9] to:

- Add gender identity to criteria protected under RSA 354-A (HB 415)
- Require employers to provide paid sick leave (HB 662).

These developments also should be viewed in light of the 2009 *Crawford* decision[10] expanding protection for employees in sexual harassment cases to include those who participate in investigations about allegations of sexual harassment. After examining aspects of these developments, this article will seek to provide guidance for New Hampshire local governments as to preventive and remedial steps that may (or must) be taken to address this expanding exposure to employment practices claims.

The basic formulation arising from these cases interpreting Title VII can be summarized (at some risk of oversimplification) as follows.

In general, employers are held accountable for sexual harassment occurring in or related to the workplace only when the employer

(a) knew or should have known that sexual harassment was occurring and

(b) failed to act reasonably to prevent harassment from occurring or remedying it when it occurred.[11]

Employers, however, may face a burden higher than this traditional negligence standard when harassment is committed by a supervisor.

Employers, however, may face a burden higher than this traditional negligence standard when harassment is committed by a supervisor. When that situation arises, an employer's liability is generally consistent with that in the "normal" context so long as the harassment is not accompanied by economic consequences. An employer also may be able to assert protection resulting from an employee's failure to complain or seeking to utilize an effective remedial system put into place by the employer. In an instance when discrimination by a supervisor is accompanied by economic consequences, exemplified by decisions involving factors such as hiring, firing, promotion, wages or other benefits, an employer faces strict liability.[12]

That general framework remained pretty much intact for ten years after the court clarified the old distinction between "hostile workplace" and "*quid pro quo*" harassment and seemingly replaced them with the descriptive terms of "environmental harassment" and "economic harassment." The present day distinctions may be more semantic than legal, as many commentators, practitioners, human resources personnel, and even judges, continue to employ the older descriptive terms.

B. Expanded Scope of Retaliation Claims. That said, the more recent cases, exemplified by the *Burlington Northern* retaliation case, have been concerned with the prong of the discrimination/harassment violation that addresses employer and workplace response to retaliation claims. In elevating retaliation to a new and distinct status,[13] the Supreme Court fired what might be called a warning shot, advising

employers to take seriously obligations to prevent workplace retaliation as well as the perhaps more readily obvious requirement for employers themselves to avoid retaliation.

III. Harassment Update 2009: Warning Shots Now Hit Home.

Two new decisions, announced shortly after the beginning of 2009, now serve to reinforce the expanding views of the Supreme Court on liability for harassment and retaliation.

The first of these[14] dealt with harassment outside of the workplace – in the form of sexual harassment of students and a school organization's responsibility associated therewith. Though it is not a direct application of workforce harassment and the case arose under Title IX, not Title VII, its importance for municipal public employers should not be underestimated.[15]

The second case (*Crawford*, see note 5) directly involves a form of reputed retaliation by a municipal government that should sound warnings to ensure that government supervisors, managers, and officials understand the manner in which retaliatory actions will be viewed.

In 2002, the Metropolitan Government of Nashville and Davidson County (Metro) began an internal investigation regarding sexual harassment rumors involving its employment relations director. A Metro human resources officer asked Vickie Crawford (a 30-year employee) if she had observed any inappropriate behavior on the part of the director. Crawford responded with allegations of several instances during which the Director was described as acting inappropriately toward her. Two other employees reported similar conduct towards them. Metro took no action against the Director, but instead fired Crawford and her co-accusers shortly after the investigation was completed. Crawford was charged with embezzlement. In turn, Crawford filed a charge of Title VII violation with EEOC, followed by litigation in U.S. District Court.

These provisions protect an employee by barring retaliation against someone who (I) opposes any practice made unlawful by law and (II) has made a charge, testified, assisted or participated in any manner in an investigation, hearing or proceeding under the law.

Justice Souter, writing for the majority of the justices, first notes that Title VII's language barring retaliation against an employee has two prongs. These provisions protect an employee by barring retaliation against someone who

(I) opposes any practice made unlawful by law and

(II) has made a charge, testified, assisted or participated in any manner in an investigation, hearing or proceeding under the law.

The first prong is referred to as the "opposition clause," while the latter is called the "participation clause." Crawford accused Metro of violating both clauses.

The trial court (the U.S. District Court) granted the defendant a summary judgment.[16] It held that she could not use the opposition clause because she "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else," not Crawford. The Court also ruled she could not use the participation clause because Sixth Circuit precedent[17] confined the use of that clause to internal investigations by employers where formal EEOC proceedings were pending.

Crawford appealed the decision to the Circuit Court, which agreed with the lower court on both issues, adding that Crawford did not claim to have "instigated or initiated any complaint prior to her participation in

the investigation, nor did she take any further action following the investigation and prior to her firing."

Because this ruling by the Sixth Circuit conflicted with rulings from other Circuits, the Supreme Court agreed to accept Crawford's appeal and resolve how these matters should be addressed.[18]

Justice Souter first examined the opposition clause in detail, including a review of dictionary definitions of the word "oppose," and concluded that it did not require the employee to act in such a formal manner as the lower courts seem to have required. It would be sufficient, he states, for an employee to indicate "opposition" by communicating a belief to her employer that there has been discrimination. Such a communication, according to EEOC guidelines, "virtually always constitutes the employee's opposition to the activity." He notes that exceptions to this rule might exist (as where the employee describes a supervisor's racist joke as hilarious), but this was not the case here. The Circuit Court would have required something beyond answering questions, demanding some form of action. Souter agrees that such action would solidify an employee's opposition, but he says that is not required by the law, which should be interpreted in such a way as to prevent the "freakish" rule that protects an employee who reports discrimination on her own initiative but "not one

Souter agrees that such action would solidify an employee's opposition, but he says that is not required by the law, which should be interpreted in such a way as to prevent the "freakish" rule that protects an employee who reports discrimination on her own initiative but "not one who reports the same discrimination in the same words when her boss asks a question."

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The Court said the bar for employers was raised substantially under the *Ellerth-Faragher* standard when supervisor harassment is involved so that employers have a strong inducement to ferret out and put a stop to discriminatory activity. Thus, he concludes that the Sixth circuit rule would undermine that standard and void the statute's primary objective to avoid harm to employees. That rule would encourage employees to keep quiet about Title VII offenses for fear of being penalized without any remedy. The opinion cites a law review study which points out that fear of "retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."

As is often the case, the Supreme Court, having found a basis to overturn the Circuit Court, does not explore legal issues beyond that point. That was the case here as the Court chose not to address the "participation" argument. Instead, it sent the case back for further action, including the opportunity to address Metro's defenses aside from the scope of the retaliation clauses.

Justice Alito, joined by Justice Thomas, concurred in the decision and reasoning of Justice Souter. His concurring opinion, however, says that the scope of this decision should have been limited, expressly, to situations in which the employee testifies in an internal investigation or in similar conduct. Alito expresses reservation about the scope of the word opposition unless it is limited to some form of active and purposive conduct. For example, he says, the majority's view might be construed as extending to "silent opposition." A more expansive view of opposition would have important practical implications, such as opening the door for a retaliation claim by someone who never said a word of opposition to the employer or a supervisor. He gives, as an example, an employee "informally chatting with a co-worker at the proverbial water cooler or in a workplace telephone conversation that is overheard by a co-worker."

Of course, to prevail on such a retaliation claim, the employee must prove some connection between the opposition and the alleged adverse consequences. Alito notes, though, that the connection required in some courts can be as simple as demonstrating that the action occurred shortly after the employee's protected activity. In concluding, Alito cited the number of EEOC cases which have "proliferated" in recent years and the likelihood that an expansive view of the majority opinion would accelerate that trend. He concludes by asserting that the potentially expansive view was not inherent in the majority opinion, and he cautions that the opinion is limited to this type of situation in which the employee did actually participate in an internal investigation.

IV. Conclusion and Guidance.

Primex³ has long cautioned employers that there should be no such thing as an "informal" complaint. In other words, employers should treat seriously any allegation of sexual harassment or prohibited discriminatory treatment. This prudent course of action applies even if the employee were to say something like "I really don't want to cause a problem and I don't want to institute a formal complaint, but I think you should just know about... " A logical reading of *Crawford* would deem such a statement as being made to oppose the alleged harassment. Thus, any disciplinary action or even something that the employee perceives as being adverse might be construed as being retaliatory. Though an employer might eventually prevail in situations in which the employee's discipline is justified by the employee's work record, failure to respond in these situations will, at a minimum, create the risk of a claim being filed which will require, at a minimum, time, expense and effort to mount a defense. Life being the uncertainty that it is, there is also no guaranty that a work-related justification for action would overcome a retaliation charge.

...that there should be no such thing as an "informal" complaint.

...employers should review employment policies and handbooks to ensure that sexual harassment and equal employment opportunity statements include statements reflecting the employer's commitment to preventing and remedying problems and to ensure that the reporting, investigation, and remedial procedures are meaningful, effective and designed to lead to timely and responsive action.

In summary, employers should review employment policies and handbooks to ensure that sexual harassment and equal employment opportunity statements include statements reflecting the employer's commitment to preventing and remedying problems and to ensure that the reporting, investigation, and remedial procedures are meaningful, effective and designed to lead to timely and responsive action. Of course, all such policies and practices now routinely should include affirmative statements that protect employees from retaliation for both opposing sexual harassment and for participating in investigative proceedings.

Taking cues from these recent developments, local government employers must take affirmative stances to protect against workplace liability exposures. Here are some lessons learned that can constitute guideposts along the way to improving employment relations while guarding against liability.

Lesson #1: Retaliation Claims Are Here to Stay!

- Retaliation is involved in more than half the cases recently filed with EEOC.

- Retaliation is the new "cottage industry" for employment plaintiff lawyers.

Lesson #2: Revise Employer Policies to Specifically Address Retaliation!

- But, remember that Burlington Northern had an exemplary policy in place.
- Therefore, accompany policy revision/adoption with training and education for current and new employees, particularly supervisors, and don't forget officials.
- But (see *Burlington Northern/White* case again); training is not enough.

Lesson #3: "Engage Mind Before Acting!"

- Use a discipline/discharge checklist.
- Be aware of protected classes and employees with records of complaints or participation in investigations.
- Understand why employer needs to act.
- Do not create false reasons for acting.

Lesson #4: Documentation!

- Failure to document is not limited to harassment and retaliation.
- Consequences of lack of documentation are magnified in the harassment/retaliation arena.
- Understand that documentation includes what employees, supervisors, witnesses, say and don't say.
- Understand that words used to document have meaning and connotation, too.

Lesson #5: Be Aware of Employee's Record Before Acting!

- Again, understand the reason for action.
- Is the record pretense or reality?
- Why act now, and not previously?

Lesson #6: Timeliness

- Deliberate action is important, but so is timeliness.
- Retaliation can be about perception, and delay in acting can be (will be) perceived as failure to act.
- Timeliness is a 2-way street, so provide guidance on reporting requirements, and enforce them (or use waivers/exceptions) with some justifiable degree of consistency.

Endnotes

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. See legislative history of Title VII as set forth on EEOC website at *www.eeoc.gov/policy/vii.html*. The most recent statutory change to Title VII was enacted as part of the *Lily Ledbetter Fair Pay Act of 2009* (Pub.L. 111-2), intended to extend the time frames during which charges of gender discrimination based on wages may be filed.

[2] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). As indicated in the prefatory note to this article, the case was reviewed in *Harassment and Discrimination Retaliation: The U.S. Supreme Court Hits Back*, *Awareness in Action*, *Issue #5*.

[3] Title VII applies to certain local governments, and similar prohibitions on discrimination and sexual harassment apply under the New Hampshire Law Against Discrimination, RSA 354-A.

[4] *E.G., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) upholding liability under EEOC guidelines for both "quid pro quo" and hostile environment harassment resulting in discriminatory treatment under Title VII.

[5] Cited and quoted in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, __ U.S. __ (January 26, 2009), hereafter *Crawford.*

[6] *CBOCS West v. Humphries*, __ U.S. __ (2008).

[7] *Gomez-Perez v. Potter*, __ U.S. __ (2008).

[8] *Lily Leadbetter Fair Pay Act of 2009* (supra at note 2) which amends wage disparity law to expand the window during which wage discrimination claims under the federal Equal Pay Act may be filed.

[9] At the time of the writing of this article, the 2009 legislative session was still in progress.

[10] Supra, note 5.

[11] *Meritor Bank v. Vinson*, supra note 3.

[12] The so-called *Ellerth-Faragher* rule as mentioned on page 32. Strict liability means that the employer may not be able to use defenses such as taking reasonable steps in response to a claim of harassment or the claimant's failure to timely utilize remedial procedures.

[13] No change occurred in applicable statutes or administrative regulations. The Court "simply" took a deeper look at the existing wording of Title VII, finding that the statutory wording on discrimination and harassment differed in a meaningful way from the language employed with regard to retaliation.

[14] *Fitzgerald v. Barnstable School Committee*, 553 U.S. ___ (January 21, 2009).

[15] Municipalities operating recreation programs, for example, can be held accountable for sexual harassment occurring in these programs.

[16] Summary judgment is a legal maneuver designed to dispose of a case prior to trial. A summary judgment may be granted if the court finds, based on facts presumed to be most favorable to the non-moving party, that the moving party is entitled to judgment as a matter of law. It is common practice for an employer defendant to seek dismissal using this device.

[17] In our federal court system, the trial courts (called District Courts) are required to follow rules established by relevant opinions in cases decided not only by the U.S. Supreme Court but also by the U.S. Court of Appeals for the Circuit in which the District Court is located. In this instance, the District Court was required to follow the ruling in a 2003 case which limited the protection of the participation clause to an employer's internal investigation only when that investigation occurred in connection with a formally pending EEOC charge.

[18] Often, cases reach the Supreme Court in this manner, i.e., there are conflicting ways in which several of the eleven federal circuits address issues and the need for a uniform rule of law is evident.

Public Employees and Constitutional Free Speech: 2014 Update

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On June 19, 2014, Justice Sotomayer, writing for unanimous U.S. Supreme Court began by stating:

> Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee's speech depends on a careful balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[2]

This recent 2014 decision continues the discussion and analysis of public employee speech in the context of job duties and responsibilities that seemingly assumed importance in *Garcetti v. Ceballos.*[3] This paper will conclude with further review of that case, but first it will review and summarize the evolution of public employee speech rights under the First Amendment.

Evolution of the Law. *Pickering* significantly changed the legal landscape. At the end of the 19th and beginning of the 20th century, when asked whether public employees had a constitutional right to speak out on public issues, courts resoundingly answered in the negative. For example, while serving on the Massachusetts Supreme Judicial Court in 1892, Justice Holmes wrote these famous words, "There may be a constitutional right to talk politics, but there is no constitutional right to be a policeman."[4] As late as 1952, the United States Supreme Court, in the words of Justice Vinson, opined "If they (certain public employees) do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[5]

The Supreme Court, however, cast a new light on public employee speech in cases arising from the efforts in the 1950s and 1960s to require public employees, particularly teachers, to swear loyalty oaths and reveal groups with which they associated, finding that the liberties of speech, religion and expression may be infringed by the denial of, or placing of conditions upon, a benefit or privilege associated with public employment. In 1967, the Court invalidated New York statutes barring employment on the basis of membership in subversive organizations. The Court observed that the theory that public employment – which may be denied altogether – may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected.[6]

Thus, since at least 1967, it has been settled that a state (or municipality) cannot condition at least some public employment on a basis that infringes on an employee's constitutionally protected

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[1] This paper is an update of an article originally written for Awareness in Action: The Journal of New Hampshire Public Risk Management in 2006. Over time, it has been updated for various IMLA seminars, including the Institute for Local Government Lawyers.
[2] *Lane v. Franks*, ___ U.S. ____ (June 14, 2014) quoting *Pickering v. Board of Ed. of Township High School Distr, 205, Will. Cty.*, 391 U.S. 563, 568 (1968).
[3] 547 U.S. 410 (2006), the initial and later impacts of which are reviewed later in this paper.
[4] *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216 (1892).
[5] *Adler v. Board of Education,* 342 U.S. 485 (1952).
[6] *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).

interest in freedom of expression. That concept received a broader formulation in *Pickering* which, in turn, was refined in *Connick v. Meyers*.[7]

> In *Pickering* . . ., we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem . . . was arriving at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

In addition to these primary opinions establishing public employee free speech rights, a number of decisions were issued that refined those rights:

- 1977: *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274. Confirmed that employers may use a defense based on non-speech related employee record.
- 1979: *Givhan v. School District*, 439 U.S. 410. First Amendment protects covered employee speech even if expressed privately and not broadcast publicly.
- 1976 & 1980*: Branti v. Finkel*, 445 U.S. 507; *Elrod v. Burns*, 427 U.S. 347. First Amendment protections do not apply to political, confidential, or policy-making positions.
- 1987: *Rankin v. McPherson*, 438 U.S. 378. Employee speech may be cause for employment action if it has a detrimental impact on the work environment.

Garcetti's "Wrinkle." Notwithstanding a relatively stable status of public employee free speech after the initial departure from prior law, federal circuit courts continued to assess and shape public employee speech. Then, the United States Supreme Court again entered the arena in 2006 when it issued its ruling in *Garcetti v. Ceballos* (supra, n. 3). It is always somewhat risky to try to summarize briefly the complicated issues involved in Supreme Court decisions. But, it can be said that this decision stands for the notion that:

> 1. When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.
>
> 2. Two inquiries guide interpretation of the constitutional protections accorded public employee speech: (a) determine if the employee is speaking as a citizen on a matter of public concern; (b) if that is the case, then determine if the government employer has adequate justification for treating the employee differently from any other members of the general public.
>
> 3. The First Amendment does not prohibit managerial discipline based on an employee's expression made pursuant to official responsibilities.

In essence, the two sides on the Court appeared to agree on Free Speech protections at the outer ends of the spectrum of First Amendment protections. At one end, open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection. At the other extreme, a government employee's statement about nothing beyond treatment under personnel rules

[7] 461 U. S. 138, (1983).

raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee.

In analyzing *Garcetti,* it should be remembered that the First Amendment limits the government's ability to control speech. The First Amendment does not impose such limits on private sector activities and conduct. Hence, private employers and not subject to the same restraints as are federal, state, and local government employers as "arms" of the state. Also, as discussed later, non-constitutional protections under federal and state labor laws and local government charter, ordinances, and personnel policies may provide protection for employee speech beyond constitutional protections.

To better understand the implications of *Garcetti*, it is helpful to have a basic understanding of the facts and the judicial proceedings that preceded the Supreme Court's ruling. According to the court's opinion, Ceballos was employed as a supervising deputy district attorney for Los Angeles County. As part of his duties as a "calendar deputy," he was asked by defense counsel in a pending case to review a search warrant which he claimed was based on an inaccurate affidavit. Ceballos' investigation led him to believe that was the case and he reported that to his supervisors (Najera and Sundstedt) and sent them a memo recommending that the case be dropped. After meeting with Ceballos, the deputy sheriff who filed the affidavit and others, Sundstedt decided to proceed with the prosecution. At a hearing on a motion to challenge the warrant, Ceballos was called by the defense as a witness and he recounted his observations about the affidavit. The court rejected the challenge to the warrant.

Ceballos claimed that in the aftermath of these events he was subjected to retaliation, including reassignment, transfer to a different courthouse and denial of a promotion. He filed an internal grievance that was denied and then filed a civil rights suit under 42 U.S.C. §1983 in the Federal District Court claiming a violation of First and Fourteenth Amendments by retaliating against him based on his memo.

The defendants, individual supervisors in the district attorney's office, asserted that the employment actions were all justified by legitimate reasons such as staffing needs and, in any event, the memo was not protected speech, and filed a motion for summary judgment. The court granted that motion, dismissing the case, on the basis that the memo was written pursuant to his employment duties and therefore was not protected First Amendment speech. The Ninth Circuit Court of Appeals reversed, ruling that the memo was protected speech, and an appeal to the United States Supreme Court followed.

Justice Kennedy's majority opinion first quotes language from *Connick* to the effect that it instructs courts to begin the analysis by considering whether the "expressions in question were made by the speaker 'as a citizen upon matters of public concern'." It then says the Ninth Circuit found that the speech in question was inherently a matter of public concern, but never considered whether the speech was made in Ceballos' capacity as a citizen. Having determined that the speech was the type that was protected, the Ninth Circuit then proceeded to the *Pickering* "balancing" test under which Ceballos' interest in making the speech is balanced against the employer's interest in responding to it. The Ninth Circuit ruled the employer could not assert such an interest as there was no evidence to suggest disruption or inefficiency in the DA's office resulting from the memo.

Kennedy said that *Pickering* and subsequent cases restricted public employee speech protection to instances in which the employee spoke as a private citizen. "A government entity has broader discretion to restrict speech when it acts in its role as an employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." He

acknowledged that analyses can be very difficult, but the "overarching objectives" of the doctrine are as follows:

When a citizen enters government service, the citizen must accept certain limitations on freedoms. Government employers, like private employers, need a significant degree of control over their employee's words and actions, as without that control there would be little chance for efficient provision of public services.

1. In other words, every government employment decision could become a constitutional matter.
2. Public employees occupy a trusted position in society and when they speak they can express views that contravene governmental policies or impair performance of governmental functions.
3. At the same time, a citizen who works for government is still a citizen.
4. Therefore, the First Amendment limits government's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties that employees enjoy as private citizens.

Both the employee as a citizen and the public can benefit from knowledgeable employees speaking on matters of importance to the public. Accordingly, public employees – when speaking as private citizens on matters of public concern – may face restrictions only as necessary to allow their employers to operate efficiently and effectively.

But the First Amendment has limits and does not serve to empower public employees to "constitutionalize the employee grievance." Applying these principles case, Justice Kennedy said:

1. That Ceballos reported his concerns about the affidavit internally is not decisive, as the First Amendment can protect some expressions made at work.
2. Although the memo concerned a subject dealing with Ceballos' employment, that is not decisive, either, as some expressions related to the speaker's job are protected, too.
3. The controlling factor, here, is that the statements were made pursuant to his duties as the calendar deputy district attorney. He made the statement as a prosecutor fulfilling his responsibility to advise his supervisor about how to best proceed with the case.
4. In such an instance, the employee is not speaking as a citizen and the constitution does not insulate the communication from employer discipline.

Ceballos' speech was part of what his job required. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." In effect, the opinion equates employer response to statements made as part of official duties as employer evaluation of the employee's performance. According to the majority, even with this restriction, public employees are not prevented from participating in public debate. That right to participate in public discourse does not free employees to perform their jobs without any restraint.

The majority also argued that public employers have a greater interest in controlling employee speech made by them in the their official capacity. Employees' "official" speech should be consistent, accurate and demonstrate good judgment.

To adopt a view that the Courts could intervene in matters like this would commit state and federal courts to a "new, permanent and intrusive role, mandating judicial oversight of

communications between and among government employees and their supervisors in the course of official business," resulting in a displacement of managerial discretion by judicial supervision.

The delicate balancing of competing interests when a public employee speaks as a private citizen is not required when employees are "simply" performing their jobs. To those who might argue that this will dissuade employees from addressing employment concerns, the Court suggested that public employers may institute internal policies and procedures that are receptive to employee criticisms. That internal forum might discourage employees from concluding that their "safest" avenue of expression involves public statements.

While there was no doubt that Ceballos wrote his memo as part of his official duties, cases may arise in which it is not so clear. The Court thus declined to venture into formulating a comprehensive framework to define the scope of an employee's duties. To address concerns raised by dissenting Justice Souter, the majority said that job descriptions that may establish overly broad scope of duty provisions are subject to practical review and unrealistic descriptions will not be controlling. It also said that this case did not involve academic freedom that might involve somewhat different analysis.

The majority concluded by acknowledging that exposing governmental inefficiency and misconduct is a matter of considerable significance; but it pointed to the existence of whistleblower protection statutes and protective labor codes. Additionally, government attorney cases may implicate professional conduct or responsibility codes that would provide additional protections and checks on inappropriate employer actions.

Justice Stevens' short dissenting opinion said that there can be no difference in constitutional free speech analysis based on whether the speech was made pursuant to job duties or as a private citizen.

Justice Souter, joined by Justices Stevens and Ginsburg, dissented, saying:

> " . . . private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's state in the efficient implementation of policy, and when they do, public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection."

Justice Souter, like Justice Kennedy, agreed as to the nature of First Amendment protection at either end of the spectrum as discussed earlier. It is with the area between these extremes that controversy arises. Justice Souter acknowledged that protection is not absolute. In his view, the protections arise not just for the employee, but because there is a "value to the public of receiving the opinions and information that a government employee may disclose." According to Justice Souter, application of past precedent in light of the majority ruling would allow a schoolteacher to be protected when complaining about a district's minority hiring policy, but the school's personnel officer would not be so protected. While lines of distinction must be drawn somewhere, he argued that this is not the place to draw the line. Here, he posited that public employers may seek to broaden their insulation from challenge by expanding the duties written in job descriptions.

Justice Souter also said categorically separation of citizen interests from employee interests ignored the notion that many public employees have high civic interests. Thus, both the employee and public interests in comment on matters of public concern were claimed to be ill-served by the majority.

Justice Souter did agree, though, that employer interests may not be served by employees speaking out, as that can create office uproars and fracture the government's authority to set policy to be carried out "throughout the ranks." It is true, after all, that "government needs civility in the workplace, consistency in policy, and honesty and competence in public service." He argued that a categorical rule about statements made as part of official duties is not needed to address those concerns, and therefore he suggests the need for only a minor "adjustment" using the basic *Pickering* balancing scheme. Thus, he would define the scope of public interest comments made in the course of official duties that can implicate First Amendment protection as those that pertain to "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety."

Justice Souter also disputed the concept that an employee's official duties statements should be considered to be those of the employer and therefore subject to control. That analysis might be appropriate if an employee in fact is hired to voice a particular government viewpoint but is not appropriate when the employee is not hired as a spokesperson or to promote such a viewpoint. Justice Souter then expresses his concern that the ruling would not extend to academic freedom as mentioned in this article's review of the majority opinion.

The dissent then moved on to the whistleblower protection argument. First, it notes that constitutional analysis should not rest on the vagaries of state and federal legislation. It goes further, though, by noting that speech may fall outside whistleblower protections, as the scope of statutes varies widely.

In a third dissenting opinion, Justice Breyer noted that government employers do need discretion that is not overly hampered by judicial supervision. But to say that employee speech made in the course of employment is "never" protected is erroneous, as such speech can be addressed using the usual *Pickering* balancing test. The results of applying that test, of course, will vary based upon the facts. Here, for example, the speech was made by a criminal prosecutor who is bound by case law governing disclosure in certain instances and by the legal profession's professional conduct rules that compel disclosure in some instances. These concerns would augment the need to protect the employee's speech while lessening the government's interest in controlling speech.

In summary, government employees do have substantial protections with regard to speaking out on matters of public importance that are not founded upon First Amendment Free Speech requirements. Among the most prevalent of these are whistleblower protection statutes. In addition, many states have limited employer discretion, even in at-will employment situations, so that an employee cannot suffer adverse consequences because the employee performed an act that public policy would encourage, or refused to do that which public policy would condemn.[8] This so-called public policy exception to at-will employment status is premised upon the underlying obligation to act in good faith in respect to contractual matters, including employment contracts (even those that are not in writing). This limitation upon employer discretion also would likely apply to most instances in which verbal or written statements by an employee could be seen to substantially involve a public interest.

These statutory and common law limitations on employer ability to discipline an employee for speech-related matters, though, are not based on the First Amendment or constitutional protections for free speech. The *Garcetti* majority opinion stated that it did not seek to alter the basic formulation of the law of public employee free speech now popularly known as the *Pickering*-*Connick* rule. The application of that standard rule has been subject to refinement over the course of the last few

[8] *Cloutier v. A. & P. Tea Co., Inc*., 121 N.H. 915 (1981).

decades. Reasoned analysis of this new decision would support the notion that the *Pickering-Connick* rule is still "good law."

Subsequent decisions supported the view that most courts have declined the opportunity to act as "super personnel review/arbitration boards" as Justice Kennedy mentioned in defense of his ruling. From a practical viewpoint, the existence of the good faith/contract obligations the availability of statutory remedies in whistleblower protection and other[9] statutes may provide public employees with any protection that might have been cut off by the *Garcetti* ruling. While remedies, therefore, may exist for certain situations, not all "free speech" issues will necessarily be covered by those remedies.

After *Garcetti*, as might have been expected, the Circuit Courts dissected its impact. While some employee speech advocates viewed *Garcetti* as effectively ending free speech rights, in this author's eyes, it really did not significantly alter the framework of employee speech rights.

2014: Evolution Continues. The 2014 *Lane v. Franks* decision (supra, n. 2) considered the further refinement of whether the First Amendment protects a public employee who provided truthful testimony, compelled by subpoena, outside the course of ordinary job responsibilities.

Lane had been hired by the Central Alabama Community College (CACC) as Director of Community Intensive Training for Youth (CITY). His duties included overseeing day-to-day operations, hiring and firing, and making program finance decisions.

CITY faced significant financial difficulties at the time Lane was hired. He began a program audit and discovered that an Alabama State Representative on City's payroll had not been reporting to her CITY office. After unsuccessful discussions with her, Lane reported his finding to the CACC president and its attorney. Their response was to warn him that her termination could have negative repercussions for him and for CACC.

Lane spoke to her again, instructing her to report to a different office to serve as a counselor. Shortly after she refused to do so, Lane fired her. She did not go quietly into the night, telling another employee she'd get back at Lane and, if he ever requested money from the legislature, she would tell him "[y]ou're fired."

The firing attracted attention as might have been expected, including the FBI, which launched an investigation into her employment with CITY. Lane testified about his reasons for her termination to a grand jury which later indicted her on federal charges (claiming she received over $175,000 in federal funds for which she performed virtually no services. To no one's surprise, her trial received extensive press coverage, and Lane, under subpoena, testified to the events leading to his firing her. The jury in this first trial failed to reach a verdict. On her retrial, at which Lane again testified under subpoena, she was convicted.

CITY's financial difficulties, meanwhile, continued. In 2008, Lane began reporting to Franks who became CACC president. Franks suggested that Lane consider layoffs and in January 2009, Franks decided to lay off 29 CITY employees, including Lane. Shortly thereafter, Franks rescinded all but 2 of the layoffs. A probationary employee and Lane were not included due to an

[9] For example, NHRSA 98-E:1 states "A person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings."

"ambiguity in their probationary status" and, as later claimed, Lane was in a fundamentally different category from the other employees since he was the Director. Later in 2009, CACC ended the CITY program and terminated all its employees.

Lane responded by filing a § 1983 action against Franks, individually and in his official capacity, for firing him in retaliation for his testimony, thus violating his First Amendment rights.

The District Court granted summary judgment – dismissing damage claims against Franks based on qualified immunity premised on a reasonable belief that Lane spoke as part of his official job duties. The 11th Circuit affirmed, reasoning that, even if the employee was not compelled to make his speech as part of his official duties, he enjoyed no First Amendment protection as his speech "owes its existence to [the] employee's professional responsibilities" and is "a product that the employer himself has commissioned or created."

Recognizing that discord among the Circuits existed, SCOTUS granted certiorari. Perhaps signaling the outcome, the opinion first notes that speech by citizens on matters of public concern lies at the heart of the First Amendment, which was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[10]

The notion that public employees should be encouraged, not inhibited, in speaking, is supported because government employees are "often in the best position to know what ails the agencies for which they work,"[11] and the "interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[12]

Reviewing *Pickering*'s balancing test and *Garcetti'*s two-step inquiry,[13] the Court asked if truthful sworn testimony compelled by subpoena, outside the scope of ordinary job responsibilities, is protected. One might characterize the issue, as so stated, as being rather predictive of the outcome.

Sotomayer's analysis first determined that Lane's trial testimony was speech as a citizen on a matter of public concern. This is so even when the testimony relates to the employee's public employment or concerns information learned during that employment. She said the 11th Circuit's rejection of Lane's argument gave "short shrift to the nature of sworn judicial statements and ignored the obligation borne by all witnesses testifying under oath." When the person testifying is a public employee, there may be certain obligations to the employer (e.g., dressing in a professional manner). But any of those obligations are distinct and independent from the paramount obligation, as a citizen, to speak the truth.

Thus, the 11th Circuit read and applied *Garcetti* far too broadly. The speech at issue there was an internal memorandum prepared by an assistant D.A. for supervisors recommending dismissal of a particular prosecution. "But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment." That case's critical question was whether the speech at issue was itself ordinarily within the scope of the employee's duties, not whether it merely concerned those duties.

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[10] Citing *Roth v. United States*, 354 U.S. 476, 484 (1957).
[11] *Waters v. Churchill*, 511 U.S. 661 (1994).
[12] *San Diego v. Roe*, 543 U.S. 77 (2004).
[13] (1) determine if the employee spoke as a citizen on a matter of public concern; if so, (2) determine if the government entity had an adequate justification for treating the employee differently from any other member of the general public.

Going back to *Pickering* and *San Diego v. Roe*,[14] the court has observed that public employees "are uniquely qualified to comment" on "matters concerning government policies that of interest to the public at large."

The importance of public employee speech is "especially evident in the context of this case: a public corruption scandal." It would be "antithetical" if the "very kind of speech necessary to prosecute corruption by public officials . . . may never be the basis for a First Amendment retaliation claim."

She concludes that Lane's testimony clearly was speech as a citizen. Sotomayer then moved on the prong that asked if the speech was on a matter of public concern. That inquiry turns on content, form, and context of the speech. The subject (corruption in a public program and misuse of state funds) obviously involves a matter of significant public concern.

Thus, the basic components of the speech test conclusively show Lane's truthful testimony was speech as a citizen on a matter of public concern. That did not end the inquiry as the next issue is whether the government had an adequate justification for treating the employee differently from any other member of the public based on "the government's needs as an employer."[15]

This was not too tough an analysis for the Court – Sotomayer said here the "employer's side of the *Pickering* scale is entirely empty."

The decision then discussed Franks' claim of protection from personal liability based on qualified immunity. To this, the Court noted that neither 11th Circuit precedent nor any Supreme Court decision was sufficiently clear to conclude that Franks could not reasonably have believed that he could fire an employee on account of testimony the employee gave under oath and outside the scope of his ordinary job responsibilities. [The court's review of 11th Circuit cases is omitted in this review.] While the Supreme Court said the 11th Circuit incorrectly decided that Lane's testimony was not entitled to First Amendment protection, that question had not been resolved conclusively in the circuit when Franks acted.

As the final part of its decision, the Supreme Court said the 11th Circuit improperly refused to address claims against the new CACC president in her official capacity seeking prospective relief. Thus, the case was remanded for consideration of those claims.

In retrospect, *Lane* does not appear to reach a result contrary to *Garcetti.* However, the clearer delineation of lines in this situation should help to further dispel the notion that *Garcetti* marked a retrenchment of public employee First Amendment speech protection.

Conclusion. In addition to remedies such as reinstatement, employees also may seek to assert free speech claims in hopes of prevailing in a civil rights action under 42 U.S.C. §1983, thereby potentially entitling a successful claimant to attorney's fees and damages. Thus, public employers are advised to be wary of issues that might involve protected public employee speech. Here are some words to live by when considering action that in any way might be considered as being related to public employee speech:

[14] 543 U.S. 77 (2004), adult video of police officer (wearing a generic uniform that was clearly a "police" uniform) posted on on-line was not encompassed within First Amendment free speech protection for public employees.
[15] Citing *Pickering* at 150-151.

- Think and examine employee speech before acting.
- Watch out for prior restraint issues that may arise from blanket prohibitions on speech.
- If the conduct does constitute protected speech, is there still legitimate justification for employer action?
- Consider "real" effects and impacts on the workplace
- Consider employee performance (but "*caveat user*," meaning be sure to have support for any disciplinary action that may be taken; and that support should exist and be documented prior to taking the action).
- Consider if there is a less restrictive/intrusive means of regulating speech/expression than termination or substantial discipline.
- Document! Document! Document!

Public Employment Relationships in New Hampshire and Their Effect on Discipline and Termination

At-Will Status: Definitions, Exceptions and Practical Concerns

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Editor's Note: *This article is derived from materials prepared for a* Primex³ Institute for Local Official Training (PILOT) *session held on September 18, 2007. The program was entitled* The ABCs of Human Resources for NH Local Government: The Unique (and Crucial) Role of Governing Boards. *The adaptation of materials for this article in* Awareness in Action *is intended for reading in conjunction with the article entitled* Creating an Employee Handbook – Not a Cure-All, But a Tool. *As with all articles in the* Journal, *this article is provided as educational material and is not intended as specific legal guidance or advice in particular circumstances. Naturally, Primex³ urges members to consult with legal counsel in particular cases for appropriate, specific legal guidance.*

I. Employment "At-Will" is the General Rule Governing Public Employment Relationships in New Hampshire (But, Like All Rules, It Has Exceptions).

(1) Definition and Meaning of "At-Will" Status.

(a) An at-will employee is not employed for a specific period of time or under specific terms and conditions that cannot be modified.

(b) An at-will employee can be disciplined or discharged for a good reason, a bad reason or no reason at all as long as:

- the reason is not an illegal reason;
- the reason is not encompassed within an exception or variation to the at-will rule;
- the employee, employer or employment relationship is not subject to an exception; or
- the employment relationship has not been altered from at-will status.

(2) Every Employment Relationship Involves an Agreement of Some Kind. While the term "contract employee" has come to have a connotation that differs from employment at-will, from a legal perspective, every employment relationship involves a contract. The key to understanding at-will employment is to understand:

(a) the circumstances under which the employment relationship (agreement) can be severed (terminated);

(b) the nature of the obligations assumed as part of the employment relationship by the employer and the employee; and

(c) the consequences of severing the employment relationship.

The foregoing description should not suggest that the term "contract employee" is meaningless in the real world. The purpose, instead, is to create a basis for understanding the nature of at-will employment, and what actions or conduct can transform at-will status into the common notion of a "contract employee."

...every employment relationship (public or private) is founded on an agreement of some kind between the employer and the employee...

(3) Good Faith Underlies any Relationship. New Hampshire, like other states, implies a "good faith" dealing obligation in any contract situation. The effect of this obligation is more fully examined in section II of this article, but it enters into the equation in a preliminary sense as well. For example, the more discretion an employer attempts to wield while holding an employee to strict terms[1], the less inclined courts will be to extend "equitable" treatment to the employer. Good faith has to be viewed as a two-way street that affects the volume and speed of traffic on the at-will employment "freeway."

II. At-Will Employment Means Freedom – to a Degree.

(1) Even "True" At-Will Status Does Not Imply a Totally Free Hand. New Hampshire court decisions discussing the nature of at-will status do vest the employer with a great deal of discretion in how the employment relationship is carried out and terminated. However, New Hampshire cases place limits on total employer discretion. The limits arise from:

(a) the obligation to deal in good faith inherent in all "agreements" – even those that are oral and not supported by a written agreement or "memorandum of understanding" and

(b) a requirement that agreements (even unwritten, oral ones) will not be enforced if enforcement is based on a violation of public policy.[2]

(2) Consequences. These two requirements inherent in all dealings between parties mean that the traditional description of "at-will" employment as vesting complete and unfettered discretion in an employer needs to be qualified to some extent. In employment law, therefore, even an at-will employee will be protected to some degree from completely arbitrary and capricious actions by an employer. Employers are bound, also, not to act maliciously or with bad faith intent. This element of good faith does not mean that "just cause" or some other specific standard is required in order to impose discipline or termination in true at-will situations. Yet, it does signify that employers need to think through the possible consequences of terminating an at-will employee for reasons that may be viewed as irrational or completely without basis.

In employment law, therefore, even an at-will employee will be protected to some degree from completely arbitrary and capricious actions by an employer. Employers are bound, also, not to act maliciously or with bad faith intent.

Another consequence of these limits on discretion means that an at-will employee cannot be disciplined or discharged for reasons that violate the sometimes vague concept of public policy. An example from case law may assist in understanding this concept. A grocery store manager was deemed an at-will employee and he objected to being required to physically take the day's receipts to make late-night, after-hours deposits at a local bank's night depository. Recognizing that such a requirement could place the manager in danger of physical harm from an attempted robbery, the New Hampshire Supreme Court ruled that terminating the manager from employment for refusing to make those night deposits was not a proper exercise of managerial discretion.[3] Placing employees in situations where harm is more likely to occur, particularly when reasonable, safer alternatives exist, would constitute a violation of public policy that cannot support an employment action, even for an at-will employee.

(3) The Concept of Equity. An extended review of contract law principles is beyond the scope of this article. But it should be noted that enforcement or interpretation of contract provisions (including those created by an oral, informal agreement to create an employment relationship) can invoke what are termed "equitable" principles in a court. These types of cases, rather than just strictly applying principles of law, allow a court to assess the relative positions of parties and can open the door to judicial review that could be kept closed by more equitable conduct on the part of one of the parties. Courts generally dislike being cast in the role of an "employment disciplinary board of review." However, one-sided arrangements, particularly where one party possesses all the bargaining power, can lead a court to decide, based on equitable principles, that normal contract remedies need to be altered to some extent.

At-will employers also must be careful of extending "unilateral" promises as contract law, under some circumstances, may enforce these as binding representations or may utilize some other remedy. Courts are prone to be sympathetic toward an employee whose employer has made representations and then seeks to negate those "promises" as not being enforceable because the employee is at-will or because the employee did not have the foresight to seek to have them reduced to writing.

While these limitations on total employer discretion do exist, at-will status is alive and well in New Hampshire, subject to the exceptions and alterations discussed in this section and the following section III. Thus, employers are well-advised to clarify employment relations to ensure retention of at-will status when possible and to the fullest extent possible, as suggested by some preventive actions reviewed in sections IV and V.

III. Exceptions, Alteration and Variations: At-Will Status Faces Many Additional Limitations.

(1) Introduction. Aside from the limitations on total employer discretion arising from implied obligations of persons dealing in good faith with one another and adhering to public policy considerations (as discussed

in parts I and II), the nature and extent of at-will employment, particularly in the public sector, is subject to modification by exceptions and alterations that are created by:

(a) operation of law,

(b) local governmental actions such as charters and ordinances,

(c) personnel policies and handbooks,

(d) employer practices, and

(e) collective bargaining and individual employment agreements (some of which may not be intended as such).

(2) Operation of Law. In our state and federal governmental system, local governments are required to conform to and comply with law enacted and regulations adopted by both the federal and state governments. Many of these laws and regulations affect employment. Several establish limitations on employer discretion to discipline or discharge even at-will employees. Other laws may create special procedures or protections for such employees that may come into play at any stage of discipline or termination (pre-action, during the process, or after the fact).

Thus, the protections of these citizen rights apply to public employment when they would not apply to private employment situations...

Constitutional Protections. State and federal constitutions protect certain rights of citizens from improper encroachment by government. Local governments are subject to such familiar "Bill of Rights" protections as those involving interference with rights of free speech, religion, and assembly; improper searches and seizures; and interference with property and liberty.

Local governments do not lose their identity as arms of the "state" in their capacity as employers.[4] Thus, the protections of these citizen rights apply to public employment when they would not apply to private employment situations (except in limited instances when private employers may be deemed to be carrying out governmental functions). These constitutional protections for governmental employees apply regardless of whether the employee is an at-will employee or not.

Accordingly, government employer discretion over at-will employment is limited where that discretion would interfere with the "panoply" of constitutionally protected rights. These include to varying degrees:

- The right of free speech;[5]
- The right of freedom of religion (including the right to exercise religion and to be free from governmental action imposing religious views on individuals);
- The right of freedom of assembly;
- The right to be free from improper and unjustified searches or seizures of their persons or property.

In New Hampshire as elsewhere, privacy rights exist in the workplace and are generally formed by legitimate and reasonable "expectations of privacy."

Although not stated expressly in most constitutions, individual rights of privacy now exist as a matter of constitutional right[6] and are also protected by statutes.[7] In New Hampshire as elsewhere, privacy rights exist in the workplace and are generally formed by legitimate and reasonable "expectations of privacy." Thus, as an example, an attempt to discipline an at-will employee for private, personal use of an employer's email system will more likely succeed if the employer has adopted and implemented a computer use policy advising employees that personal use is prohibited (or that

personal use may be monitored). The effect of such a policy would be to minimize employee expectations of privacy in electronic personal communications made during the workday or by using the employer's computer system.[8]

Another aspect of constitutional protection may arise if governmental action is taken which interferes with an employee's legitimate expectation of continued employment. Such an expectation naturally would be presumed not to exist in a true at-will relationship. But employer actions may create or support employee expectations that they have a legitimate reason to believe they will continue in their employment, absent some form of significant problem. In that situation, an employee may be deemed to possess what are called "property rights" in employment. If such an expectation exists, employees then obtain "due process" rights in their employment which can be adversely affected (taken away) only for cause and in accordance with appropriate procedural protections for the employees.

Yet another aspect of constitutional protections for public employees may arise through constitutional protections that prevent a government from interfering with a person's liberty. In this case, liberty does not mean the freedom to roam at will, but instead essentially refers to a person's ability to maintain a personal reputation free from unjustified defamatory actions. When an employer's actions are such that an employee's reputation may be adversely affected, the employee may possess a liberty interest that would require, at a minimum, the opportunity to have a "name-clearing" hearing to attempt to set the record straight. An at-will employee may still be discharged or disciplined in such instances within broadly defined discretionary guidelines, but the employee's post-termination rights need to be considered.

Thus, navigating the waters of constitutional protections, even in at-will currents, can be treacherous for public employers. If any questions exist as to the status of employees or as to the real basis for an employment action (see protective guidance under section IV), employers should

seek legal guidance and the time to do so is before, not after, an employment action is taken.

Discrimination: Protected Status. Perhaps the most notable and visible statutes and regulations affecting employment are the anti-discrimination laws enacted on both the federal and state levels. These laws prohibit discrimination by both private and public employers (subject to some threshold requirements) on the basis of prohibited criteria such as race, religion, national origin, and gender. These laws and others also prohibit discrimination on the basis of age and physical or mental disability. The impact of these types of laws on at-will employment is to limit the discretion of employers to take action that adversely affects a protected employee on the basis of prohibited criteria.

Importantly, though, an at-will employee in a protected class is still an at-will employee and can be discharged or disciplined at-will in the same manner as other employees. Problems may arise, however, if it can be argued that the employment action is tied in some manner to the criteria in question. The mere fact that an employee is within a protected class should not prevent an employer from acting as an employer. It suggests, though, that some additional homework might be needed to prevent or defend against a discrimination charge.

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Other Statutory Protections. Beyond discrimination laws, state governments, including New Hampshire, have enacted limitations on employer discretion in at-will employment. Some of these laws entirely negate at-will status, while others may impose specific procedural requirements instead of modifying employment status. More than a few

laws impose, for example, a requirement that discipline or termination may be imposed only for "just cause" or "due cause" or some similar notion that employers need a "good" reason to act. The list of such statutes is long and is constantly subject to change or "tweaking" any time the legislature is in session.

A list of some of the primary statutes affecting local government employment in this manner is included as Appendix 2. It is doubtful that a complete list of all possible statutes could be compiled at any given time since employment statutes and local government laws are spread over virtually the entire multi-volume set of the New Hampshire Revised Statutes Annotated. A good risk management practice, therefore, is to analyze any proposed employment action in light of statutes applicable generally and to particular positions at the time of the proposed action. Once again, legal guidance in advance is a good risk management tool.

Federal laws in this category are less evident in that Congress has, as of now, not seen fit to so directly affect local employment status other than in those instances identified above and perhaps others. Congress, though, has considered but not adopted legislation that would, in effect, all but eliminate at-will employment in the public sector.

While the most visible protection for employees is the imposition of a "for cause" or similar limitation on employer discretion, the New Hampshire Legislature also has imposed a variety of what might be termed indirect protections. These can range from protections set forth in laws allowing municipalities to adopt the "Manager" form of government to those setting out collective bargaining rights for public employees. The latter law, known as the Public Employee Relations Act and contained in RSA 273-A, does not directly mandate a "for cause" requirement for discipline or discharge. However, public employee unions that represent employees pursuant to that law will seek to include a "for-cause" requirement as one of their proposed essential components of a collective bargaining agreement.

(3) Charters. Local government charters can be more flexible under current laws than under some of their predecessor laws and may include requirements pertaining to employee status and employer freedom to act. Charters adopted under prior law and many charters adopted under current law may contain protections for employees that may not extend to full "just cause" modification of at-will employment, but will significantly alter employer authority and discretion in a procedural, if not substantive, manner.[9]

(4) Ordinances. Local governments have many ordinances on a variety of subjects, some of which may affect internal personnel administration. In most instances, local governments will regulate personnel administration through personnel policies, as noted in the next subsection of this article. However, some legislative bodies – perhaps more so in cities than in towns – will have adopted ordinances or by-laws that seek to impose procedural requirements or substantive rules that may alter traditional employer discretion as to at-will employees.

(5) Handbooks and Personnel Policies. As noted in the previous subsection, most employers today have adopted personnel policies that seek to set out the "rules" governing employees, including provisions addressing benefits, terms and conditions of employment, and procedures. Sometimes policies may be adopted in piecemeal fashion, or specific policies may apply only to certain departments or positions. In some instances, these policies (perhaps along with other relevant information) are contained in an employee handbook.

All too often, these policies or handbooks are out of date and may reflect procedures and personalities and practices that changed a long time ago. They also may be out of step with current legal requirements as discussed above. When a deviation exists, it is a fair conclusion that any reviewing entity (e.g., a court, arbitrator, or governmental administrator) will adopt (or create) an interpretation most favorable to employees. The justification for this result lies in the fact that

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employers state that they retain the control over the policies (which, of course, is appropriate). Since the employer has the control, and since the employer has written the policies and has the ability to correct problems or inconsistencies, the general rule of law is to construe ambiguous or vague documents against the person or entity that wrote them.

Both policies and handbooks routinely contain statements that purport to state that they do not create contractual obligations that can be enforced against an employer. Notwithstanding the essential nature of such language (often called "disclaimers"), employers need to craft policy and handbook language carefully to avoid creating enforceable obligations. At the same time, policymakers need to understand the impact of policies that appear favorable to employees who may then be told "Oh, that's not what we meant." Increasingly, today, employees are much more aware of their "rights" and constantly have access to advertisements telling them to be aware of their legal rights.

The purpose of the foregoing is not to denigrate the importance or utility of policies or handbooks, but rather to emphasize the importance of adopting and using them properly. More than one unhappy employment situation has been caused, for example, by a change in policy being floated, temporarily implemented, and then rescinded. Even more unhappy are the situations in which practices do not adhere to policies. For more guidance on employee handbooks, please consult the article in this issue entitled *Creating an Employee Handbook – Not a Cure-All, But a Tool.*

(6) Employment Practices. Nicely crafted, legally protective language in policies actually might work to protect an employer in a legal setting. But the nicest language in the world is not going to protect an

employer from improper practices in the workplace. As a rule of thumb, it can be said that practice will "trump" policies. Employers have the obligation to know what is happening in the workplace and must hold supervisors, department heads, and others accountable for what happens on their watches.

Inconsistent application of policies can lead to trouble and has been the source of more than one petition for union certification as a collective bargaining agent or adverse results in grievance resolution or litigation.

As a rule of thumb, it can be said that practice will "trump" policies. Employers have the obligation to know what is happening in the workplace and must hold supervisors, department heads, and others accountable for what happens on their watches.

One continuing difficulty can arise when an employer seeks to modify past or current practices that have come into being that are either at variance with or not addressed in employment policies or handbooks. As yet, no one has written the all-encompassing personnel policy handbook that will insulate an employee's at-will status from any legal challenge. The challenge for employers is to maintain sufficient awareness of the workplace to understand when action is needed and to hold accountable those responsible. Solutions are not found by copying policies from a reference manual or library. Policies and practices need to be viewed as a unitary whole that creates and forms the working environment and the legal status of the participants.

(7) Employment Agreements. Modifications to at-will status resulting from collective bargaining agreements have been mentioned previously. However, individual employment agreements, whether written or oral, can affect at-will status, as well. Even when a written agreement refers to and incorporates employment policy language regarding at-will status,

employers may find that a poorly written or administered individual employment agreement will render the "boiler plate" policy disclaimer ineffective.[10] Just as language in a handbook or policy can make "cause", for example, more than just a word to be used at an employer's discretion, an employment contract that speaks to a definite term, or that promises employment on a basis other than at the total discretion of the employer, may result in unintended consequences.

IV. So, What Does It All Mean? What's a Poor Employer To Do?

Recent Primex[3] work plans have used the phrase "Awareness, Action and Accountability" to denote risk management, claims management, and education and training program goals. It is these hallmarks that can serve to assist employers in retaining and utilizing at-will employment to their real advantage and ensuring that employment discipline and termination do not deviate from accepted norms based on an erroneous perception of retained employer discretion.

At the outset, employers should seek to make all parties fully aware of the circumstances under which an employment relationship is created. Vagueness or uncertainty will not prove to be an asset in this regard. Employers need to be aware of conduct in the workplace, including the actions and effectiveness of supervisors in adhering to policy directives. When problems arise, employers need to be prepared to act to remedy situations. Failure to act ultimately will result in employer acceptance of problematic conduct. Not every employee action will mandate severe discipline or discharge, but employers need to be wary of

At the outset, employers should seek to make all parties fully aware of the circumstances under which an employment relationship is created. Vagueness or uncertainty will not prove to be an asset in this regard.

creating situations when an employee's defense asserts that "No one ever said there was a problem." If problems arise, action needs to be taken and the employee's record should contain documentation of the event and the actions taken. Finally, employers need to hold supervisors accountable. But more importantly, employers need to hold themselves accountable for administering personnel systems to retain control and effectiveness.

To that end, this article includes practical guidance and tips for administering discipline and termination in the public sector that are set forth in section V. Any set of guidelines should be reviewed and incorporated/adapted as appropriate to each member's individual workplace needs. Once adopted, guidelines should be reviewed for effectiveness and to ascertain if the guidelines are being followed. The important point is not to adopt and administer guidelines without change; rather, the goal is to engender and encourage consideration of the need to know and understand employment laws and rules and to properly apply employer discretion when it exists.

V. Suggested Guidelines for Public Employment Discipline or Termination.

At some point in virtually any municipal or school employment situation, there will be instances in which discipline or termination of an employee appears to be the only acceptable option. The possible negative consequences of discipline or termination for both the employer and the employee mean that such an action should occur when necessary and appropriate.

Improper terminations are a source of liability. Proper terminations avoid that liability and also may assist in preventing unnecessary liability for unemployment compensation.

The following ten guidelines are intended to assist in making decisions to discipline or terminate an employee that are correct and defensible and so that the consequences of such decisions will be as positive for both parties as possible. These guidelines are not intended to be a

comprehensive guide to action and certainly should be supplemented by a review of the procedures and standards set forth in personnel policies. Additional tools to assist in proper employment decision-making include:

- A discipline or termination checklist; and
- A review of state statutes to determine if specific provisions apply to discipline, suspension, or termination of local government employees.

[Note: A sample discipline/termination checklist is attached as Appendix 1. A sampling of statutory provisions is set forth in Appendix 2. There is, of course, no substitute for specific legal guidance in any particular situation.]

Guideline #1: Assure Accurate Job Expectations.

Make sure that employees understand their job and the expectations of them. Meaningful and accurate job descriptions and communications about job content and performance may eliminate or lessen problems that could otherwise result in discipline or termination.

Guideline #2: Follow Correct Procedures.

Have proper personnel policies in place and follow them, as well as any procedures mandated by state law or local ordinance or charter. Personnel rules should be applied consistently to all employees subject to them. If notice or hearing is required prior to any action, make sure it is done, and done in a timely fashion. If an employee's status is subject to a state law, charter provision, individual employment contract or a collective bargaining agreement, make sure that any required procedures are followed, and that the proper grounds for termination or discipline exist.

Guideline #3: Communicate Properly.

Determine the proper lines of communication, supervision and discipline, before an incident occurs, and follow these lines consistently. Inconsistency in communication can be a major frustration for

employees and supervisors. When required, communicate with employees in a timely fashion, close to the time of the incident giving rise to the need for communication. Make sure that the person making the employment decision is, in fact, authorized to do so.

Guideline #4: Allow Correction.

Give the employee a fair chance to correct performance. Unless an employee incident involves insubordination, criminal acts, or other serious conduct, it is generally expected that discipline will be imposed "progressively," first providing oral notice, followed by written reprimand, and then consequences such as suspension or termination.

Guideline #5: Be Consistent.

Be consistent. The requirement to be consistent does not mean that each incident is necessarily treated in exactly the same way. Instead, persons who are similarly situated, and instances which are similar, should be treated consistently. This can usually be achieved by following procedures and standards in policies. Consistent application of the rules is often a good way to avoid and defend against discrimination or wrongful discipline or termination claims.

Guideline #6: Document, Document, Document.

Document your actions before, during and after disciplinary action is taken. Documentation serves two major purposes. First, it ensures that an employee will be formally advised when performance is unacceptable and will record that the employee has been so notified. If further disciplinary action is required, the personnel record will then show that the employee is not surprised that performance has been unacceptable and that the imposition of discipline is not arbitrary or unjustified. Above all, make sure that the reasons for the disciplinary action are those that have been documented and that other undocumented reasons are not the real source. Prior to making the decision to discipline or terminate, and certainly before speaking with the employee, it is wise to create a written "fact base" which outlines the employee's history and,

most importantly, contains all facts relevant to the decision. In a related vein, make sure that the reasons used for the action are the real reasons why action is being taken and are not a "pretext" for action.

Guideline #7: Get a Second Opinion.

Consider obtaining guidance. Major employment decisions should not be made in a vacuum and certainly never should be made without a full investigation of the incident. When possible, the perspectives of others may be helpful to assure that the decision is based on a correct view of the facts. If stress between the employee and the immediate supervisor is evident, the use of another individual to communicate with the employee may be advisable. An exit interview might be used as a final opportunity to catch wind of, or defuse, any potential claims of improper termination. Participation of others, however, must be used in a manner which respects employee privacy.

Guideline #8: Be Humane in Your Human Relations.

Treat employees with sincere respect when they are being disciplined or terminated. In most instances, an employee does not enjoy being disciplined or terminated, and the event is stressful and upsetting. Focusing on the employee's conduct rather than self-image or personality can make the circumstances of discipline or termination appear to be based on facts and, thus, it is less likely that the employee will respond to discipline with a grievance or other claim of improper action.

Guideline #9: Think "Liberation," Not "Discipline" or "Termination."

View discipline or termination as a step in development. Most people would agree it is unfair to all concerned to retain an employee who cannot succeed or who is unhappy in the work place. While most employees will view discipline or termination as a negative occurrence, a frank discussion of the reasons why it is necessary might lead the employee to re-evaluate matters and could result in a long-term positive event. Selective encouragement of self-examination of an employee's

career path may be appropriate in some instances. Disciplinary action can be characterized as an opportunity to assist the employee in achieving acceptable behavior.

Guideline #10: Document the Discipline or Termination Action.

Document the circumstances under which the discipline or termination is implemented. When a decision has been made that discipline or termination is the appropriate action, the manner in which that decision is communicated to the employee should be documented carefully, including any statements made by the employee. In some cases, it may be appropriate to have a third person present as an independent witness to the circumstances. While documentation is a good thing, documenting that is done judiciously and with consideration of the possibility that others may read the documentation is an even better thing.

Summary

Following these guidelines will not guarantee that employee discipline or termination will be trouble-free; nor are these suggestions exhaustive of all the "correct" procedures that may be appropriate in all instances. However, following these guidelines should help to create a "fact base" which should assist in assuring that a disciplinary decision is:

1. procedurally correct;
2. premised upon consideration of appropriate facts; and
3. supported by sufficient documentation to prevent or prevail in appellate review of the decision whether that review takes the form of a grievance, an action before an administrative agency or department, or by legal action in a court of law.

Endnotes

[1] Example: "I can fire you with no notice whatsoever; but you have to provide me with two weeks' notice before you quit!"

[2] For example, see *Monge v. Beebe Rubber Co.*, 114 N.H. 130 (1974); *Cloutier v. Great Atlantic & Pacific Tea Co., Inc.*, 121 N.H. 915 (1981).

[3] *Cloutier v. A & P, supra*.

[4] *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[5] For example, see *Public Employees and Constitutional Free Speech: Maybe a Little Less Free?* in *Awareness in Action*, Issue #3 2006 and *Blogging in the Public Sector Workplace* in Issue #4, 2006.

[6] *Hamburger v. Eastman*, 106 N.H. 107 (1964).

[7] Including, for example, New Hampshire's Invasion of Privacy law, RSA 644.9.

[8] Electronic communications and policy considerations were reviewed in two articles in *Awareness in Action*, Issue #1, 2005: *E-Government in New Hampshire* and *Can You See What I See?*

[9] RSA 49-D:4, for example, requires that local option town charters include provisions prohibiting individual elected body members from seeking to influence personnel decisions.

[10] For an example, see *Dillman v. New Hampshire College*, 150 N.H. 431 (2003).

While Appendix 1 is a sample discipline/termination checklist, it is advisable to create an employer-specific checklist incorporating appropriate statutory, ordinance, charter, policy, or local employment or collective bargaining contract provisions as needed. That checklist should then be utilized in any instance in which discipline or termination may occur. Variations of checklists may be needed for different departments or positions.

Appendix 1: Sample Employee Discipline and Termination Checklist

1. Prior to action, review all documentation and applicable records:
   (a) Were policies and procedures properly followed?
   (b) What justifies action at this time? Are the reasons and prior discipline consistent with the action proposed now?
   (c) How recent is the conduct which justifies action? Have other events intervened that may affect the perception or success of this employment action?
2. Has there been personal contact with all persons who have material information? How recent was this contact?
3. For what reason(s) will this decision be made? Are these the stated reasons?
4. Has the employee been made aware, previously, that termination was possible or probable for the conduct complained of? Can the employee's awareness be documented? Is this decision made as a result of continuation of prior complaints?
5. Was the employee provided an opportunity to improve performance or change the conduct complained of? If so, what was the result?

6. Is there a basis for discipline or discharge for the reasons cited? What has been the record in similar situations? Have employees been disciplined or discharged for similar reasons? If not, why not?

7. Discharges should be made by telephone or by letter only when absolutely necessary, and never by email. It is advisable and preferable to meet personally with the employee. However:

   (a) Consider whether it is advisable for a competent "friendly" witness to be present at the discharge meeting.

   (b) The meeting should be conducted in private, out of the hearing or sight of other employees.

8. The person conveying the decision to the employee and the witness should each prepare written memoranda concerning the statements made at the meeting and copies should be retained as permanent records. But, the contents should be compiled with the understanding that they may be subject to disclosure if the employee contests the action.

9. When appropriate, the reasons for action should be stated to the employee at the meeting. The reasons should be truthful and not "sugar-coated." The reasons should coincide with those specified under checklist item #3. Failure to tell an employee why an action is occurring can be a source of employee dissatisfaction which leads to challenge. On the other hand, when an at-will employee is discharged for "discretionary reasons" (e.g., not for cause), it may not be advisable or feasible to disclose reasons. The script/scenario should be planned well in advance with due regard for post-termination risk management.

10. Payment of wages and accrued benefits, vacation and the like, should be discussed. Explanation of the opportunity for continuation of health insurance coverage and other benefits also

should be reviewed. All of these items should be reviewed carefully prior to the termination meeting so that the discussion of them is accurate, timely and complete.

11. Are there any special considerations applicable to this employment situation? For example, is the employee in a specially protected classification which merits additional documentation?

Appendix 2: Selected Statutory Provisions Relevant to Local Government Employee or Officer Discipline or Termination Proceedings

[Note: This document has been prepared with the intent of listing some of the relevant items pertaining to employment situations which Primex³ members may encounter. While it addresses many municipal, county and school employment situations, it should not be viewed as a completely exhaustive compilation. Instead, it instead should be considered to be a selected listing. In addition, the statutory references in it are subject to change by legislative amendment or judicial interpretation. Caution should be used in making any employment decision. Statutes, local charters or ordinances, personnel policies and individual or collective bargaining contracts must be reviewed as applicable to any position or employee prior to taking any employment action. This listing should not be viewed as a substitute for competent legal guidance in any situation.]

GENERAL PROCEDURES AND STANDARDS

Right-to-Know Law (RSA 91-A)

Access to Personnel Files (RSA 275:56)

Whistle-Blower Protection Act (RSA 275-E)

Municipal Charter Requirements; Personnel Policies

Collective Bargaining Agreements; Individual Employment Contracts

Anti-Discrimination Statutes (RSA 354-A and Federal Laws such as the Civil Rights Act, Age Discrimination in Employment Act, and Americans with Disabilities Act)

POSITION-SPECIFIC PROCEDURES, NOTICE AND STANDARD REQUIREMENTS

Town Manager (RSA 37)

Town Officers (RSA 42:1; 42:1-a)

City Officers (RSA 48)

City Charter Provisions (RSA 49-C:17 - :21; RSA 49-C:30)

Town Charter Provisions (RSA 49-D:4)

Police Officer (RSA 41:48)

Police Chief (RSA 105:2-a)

Police Officer in Unincorporated Places (RSA 53:2)

Police Officer under a Police Commission (RSA 105-C:4)

Fire Chief (RSA 154:5)

City Fire Chief and Deputy (RSA 47:9)

Village District Fire Official (RSA 52:11)

Local Emergency Management Director (RSA 21-P:39)

Health Officer (RSA 128:4)

Housing Authority Commissioner or Employee (RSA 203:5 and :7)

Road Agent (RSA 231:65)

Teacher and other School Employee (RSA 189:13 - :14-g; RSA 189:31 - :32)

School Superintendent and Administrative Employee (RSA 194-C:5, III)

Truant Officer (RSA 189:35)

Library Employee (RSA 202-A:17)

City Sealer of Weights and Measures (RSA 438:16)

Discontinuance of Optional Elected Town Office (RSA 669:17-b)

Discontinuance of Elected Treasurer Office (RSA 669:17-d)

Planning Board or Local Land Use Board Staff (RSA 673:16)

Planning Board or Local Land Use Board Member (RSA 673:13)

County Employee (RSA 28:10-a)

POST-EMPLOYMENT ACTIONS

Wage Payments (RSA 275, including RSA 275:43 - :55)

Unemployment Compensation Law Non-waiver Requirement (RSA 282-A:157)

Response to Unemployment Compensation Claim

Additionally, notices regarding termination of employment may be required to be sent to state agencies for certain positions such as Police Officers, Teachers, Local Emergency Management Directors.

Green Book Awakens

by Richard Weintraub, Office of the City Attorney

May 29, 2015

Contents

CHAPTER A – INTRODUCTION AND HOW TO USE THIS BOOK

110 Introduction.

I have prepared this book to help City staff write contracts, have them approved by Council, and get them signed. This book pertains to contracts and the usually equivalent word, agreements. A contract is a promise or agreement that is enforceable in court. If it meets that standard, calling it a "memorandum of understanding" will not prevent it from being enforceable in court or from being a contract. This book also includes some information on state bid law. I hope that these guidelines will be given to the individuals responsible for those tasks. If a particular contract is to be reviewed by an attorney in our office other than me, you should consult with that attorney about the use of these guidelines.

This book entirely replaces *Green Book Strikes Back (GBSB)*. Please note the revision date on page 1 above and use the most recent version. A copy of this book is on the City Attorney's CODI page under the CODI title Contracting Guides and Forms.

Once the contract has been signed and filed away, much work remains. The best contract will not insure that the goods and services are delivered as specified. Whoever is to administer the project must see that the contractor complies with the contract.

Please tell me about problems and concerns regarding this book and with other contract-related items on the City Attorney's CODI page. If something does not make sense, it may be a mistake that can be corrected.

120 Guide to using this book.

120.1 Finding it.

The table of contents and the search function can sometimes help you find what applies to your project.

120.2 Communicating with attorneys.

When you have questions that our office can answer, find out which attorneys handle which departments and subjects by consulting the Departmental Assignments list on the City Attorney's CODI page. Also, if something in this book is murky, wrong, or worse, please tell me. Dealing with an attorney will be the highlight of your week. Some thoughts: (1) When a contract is being worked out between the City and a vendor, and the attorney sends you advice, sometimes the attorney does not want you to voluntarily send that advice to the vendor; ask the attorney before doing so. (2) If you keep the email string as part of your response, it is easier for us – at least it's easier for me -- to know what was already written about the matter; that's better than starting a new email. So, if you use <reply> or <forward>

instead of starting a new email, I'll appreciate it. Keeping the email attachments with the reply or forwarded email saves the recipient (again, that's me!) time in having to locate them in older emails. (3) A descriptive subject line in email helps; a subject line that says only "question" or "contract" is a waste of pixels. Once the item is in the Onbase Agenda Workflow module, adding the Onbase PR number (the agenda item number) to the subject line is a real plus. If it's a signed contract, the PR number and the contract number are both useful.

120.3 Onbase. This book speaks of two different Onbase modules: (1) the Agenda Approval Workflow module = Agenda Approval module = agenda module; and (2) the Contract Approval Workflow module = CAW = contract module.

120.4 References to this book. When I refer to sections or subsections of this book, I will be including all subsections. For instance, a reference to GBA 240 includes section 240 and subsections 240.1, 240.1.1, 240.2, etc. A reference to GBA 240.1 includes subsection 240.1 and subsection 240.1.1. Once you have the section number or title, a quick way to locate a section can be to use the Find function.

When I make a cross reference, I generally include the title, as in "see section 120.3 (Onbase)."

120.5 Meaning of "contractor" and "Contractor". Throughout this book, the word "contractor" is used to mean the person or entity that is making a contract with the City. As used in this book, small-c "contractor" is not limited to a construction company, but includes a service provider, a professional, a unit of local government, a seller of goods, etc. In a particular contract, capital-C "Contractor" means the party to that particular contract.

120.6 Meaning of "execute a contract". Generally, to execute a contract means to sign the contract. When the City Manager signs a contract for the City, the City Clerk normally attests, and occasionally that's notarized. In that example, the City Manager's signature, the City Clerk's attestation, and if applicable the notarization collectively constitute the contract's execution. Sometimes a designee, such as a department manager, signs for the City, and that signature is attested by the City Clerk, in which case the designee's signature and the City Clerk's attestation together make up the City's execution of the contract. When the City Council authorizes the City Manager or designee to execute a contract, the City Clerk's attestation will happen as a matter of course and does not need to be mentioned in the motion. A lot of this book discusses how the decision is made that a contract can be signed and what the forms for signing look like.

120.7 Copying from the appendix. When you copy and paste from a GBA appendix, please take care to look at what you've pasted to see that the formatting doesn't gang agley. The GBA appendixes are on the City Attorney's CODI page. They are found there under the CODI title Contracting Guides and Forms.

120.8 Essential. The most important part of the contract cannot be copied from GBA or its appendixes. It is the detailed description of what the contractor must do, such as paint a room, do a study and report, or design a water-treatment plant. If a lawsuit is filed, a court will focus on what is written in the contract. As a general rule, do not assume that you will be able to explain orally to a court what the contractor was supposed to do, or even to point to correspondence from the contractor. The judge will want to see the requirements spelled out in the contract (which includes exhibits to the contract) and may not be interested in hearing you talk about it. Another way to think about what needs to go into the contract is to imagine that you and all others who worked on the contract are on an extended vacation in the south Pacific when a dispute arises over what work the contractor is required to do, and the dispute must be resolved without asking you or the others. If your contract lacks the essentials, you may still get the extended vacation – very extended -- but it will not be in the south Pacific, and it will be without pay.

120.8.1 Project manual; items prepared by consultants. Even if a consultant architect or engineer prepares bid documents or project manual, the City staff person responsible for the project should study the documents and project manual. That City staff person should question everything that seems contradictory, confusing, or wrong. Question anything that's questionable!

120.9 Sources of rules. In working with contracts, we may need to deal with federal and state law (including statutes, court decisions, and regulations), grant agreements, the City Code, City Council resolutions and ordinances, and the City Manager's instructions, including Finance Policies. Added, one hopes, are judgment and common sense.

CHAPTER B – CHOOSING THE CONTRACTOR, SETTING THE PRICE, AND MAKING THE DEAL

210 Standard provisions.

Clauses that belong in most contracts can be found in the model contract that is Appendix A on the City Attorney's CODI page. However, if you are preparing a service contract, look at the Model Services Contract on the City Attorney's CODI page, instead of Appendix A. Nevertheless, if you are preparing a construction contract or a contract with an architect or engineer, see GBA section 320 (Contracts for construction and for architects and engineers), instead of Appendix A or the Model Services Contract.

220 Word-processible documents.

If a vendor sends its own contract that you want to start with in order to create the final version, or if a vendor sends exhibits that need to be tweaked, ask the vendor to send them in Microsoft Word. In the solicitation you can tell vendors this is a requirement, to prepare them for the request if they are selected.

230 Title.

Give the contract a short descriptive title, such as "Contract for Architectural Services on the Bobsled Building Project" or "Agreement between XRA Corp. and the City of Durham for Joint Use of the Harold Lloyd Wall Clock." Calling it merely "Contract" doesn't help later if you want to refer to it. Your approach to naming shouldn't be George Foreman's, but don't tell Big George that I said that. The title shouldn't try to summarize everything the contract does or it will be too long to be useful.

240 Numbers and titles.

240.1 Headers and footers.

Put a header or footer on each page (after page 1 of the contract) in this format:

> Contract for Construction of Fire Station #9 between City of Durham and BC Corp. – Page 3 of 6

If you like, you can also make that a footer on page 1. I discourage headers on page 1 because they look odd.

To insert a header or footer in MS Word, click <Insert>, then <Header> (or <Footer>), then <Blank>. Type the text of the header, except for the page number (that's 3 in the example). Put the cursor where the page number will be, click <Page Number>, <Current Position>, <Plain Number>. To prevent a header or footer on the first page, click <Different First Page>. To see how it looks, click <View>, <Print Layout>. To edit, click <Insert>, <Header> (or <Footer>), <Edit Header> (or <Edit Footer>). To exit the header and footer function, click <Close Header and Footer> or press the <Esc> key on the keyboard.

240.2 Page numbering.

If the header or footer described in section 240.1 (Headers and footers) omits the page number, then number the pages at either the top or bottom of the page. In MS Word, click <Insert>, <Page Number>, <Current Position>. I prefer the method in section 240.1, since the header or footer can include the total number of pages.

240.3 Section numbering and titles.

Numbering paragraphs or sections, and giving each a short title makes it easier for everyone to like your contract. For an example, see GBA Appendix A in the City's Attorney's CODI page.

240.4 Bullets.

Think about how awkward it is for someone to refer to a bulleted point. Instead of saying "see section 12.4," the person has to say "see the 4th bullet point in section 12." And that's assuming both the writer and the reader can count. Remember how sparing the Lone Ranger was with his bullets, and copy him. It's better to number or letter the points, with no risk of explosion, almost.

250 Parties.

250.1 Short names.

It's convenient to refer to the contractor by a short, easy-to-say name. It's best to use "Contractor." If you really want to use an abbreviation of the contractor's name, that is all right, but still allow "Contractor" to also be used. That's the 2nd example below.

Thus, the best way to do this is:

This contract is dated, made, and entered into as of the _____ day of _____, 20_____, by the City of Durham ("City") and Truman Fertilizer Corporation ("Contractor"), a corporation organized under the laws of Missouri.

The second-best way is (use this for the contractor who dislikes being called "Contractor"):

This contract is dated, made, and entered into as of the _____ day of _____, 20_____, by the City of Durham ("City") and Truman Fertilizer Corporation ("Truman" or "Contractor"), a corporation organized under the laws of Missouri.

Avoid the following, because it fails to let the word "Contractor" refer to the company:

This contract is dated, made, and entered into as of the _____ day of _____, 20_____, by the City of Durham ("City") and Truman Fertilizer Corporation ("Truman"), a corporation organized under the laws of Missouri.

The word "contractor" is not limited to construction firms. It means a party to a contract. If you refer to the contractor by *only* its preferred abbreviation, such as "Truman" in the example, you will have problems when you come upon standard already-prepared clauses that use the word "Contractor." In the pattern contract in GBA Appendix A those provisions include, for instance, a section titled "Notice" and a section titled "Indemnification." You can't get away with a global replace of the word "contractor" with "Truman" because sometimes the word "contractor" is used in a different way in the standard provisions, such as in references to a "subcontractor." If you do a global in that example, you'd get "subTruman"!

250.2 Exact name.

Ask the contractor its exact legal name and its status. You will need the name to identify the contractor (usually in the contract's first paragraph) and the status to prepare the signature portion.

Some points in random order: (i) Entities change names from time to time. (ii) Watch each word: "B.P. Plate Co." is not the same as "B.P. Plate Co., Inc." "G. Mendel" is not the same as "G. Mendel, P.A." By the same token, Smith Foundry, Inc. is different from Smith Foundry, L.L.C. Some actual examples: the name of the Durham Arts Council is "The Durham Arts Council, Inc." It's "City of Durham" not "The City of Durham, North Carolina." (iii) Some companies use one name in some states but have to adopt a variation for their North Carolina operations. (iv) Some computer databases will treat "The" as being as important as any other word -- one more reason to use the exact name. (v) The words Incorporated, Inc., Company, Co., Corporation, Corp., Association, Ass'n, Limited Liability Company, L.L.C., L.L.P, R.L.L.P., P.L.L.C., Professional Corporation, P.C., Professional Association, and P.A., are important words. When you're identifying the contractor, use them if they are part of the firm's name; otherwise, don't use them.

Keep reading for examples of more words to get right. Just do it perfectly and you can relax!

250.2.1 Assumed name.

See an attorney if the contractor has filed an assumed name certificate and uses an assumed name.

250.2.2 Status.

The contractor's status is whether it is a corporation, nonprofit corporation, general partnership, limited partnership, limited liability partnership, registered limited liability partnership, sole proprietorship, limited liability company, professional corporation, professional association, or whatever other favored creatures the legislature creates in response to lobbyists for people who want to avoid taxes and liability.

A general partnership and a sole proprietorship can be fully created in your kitchen or while walking down the sidewalk; they need no official paperwork from state government.

For all kinds of entities, including limited partnerships but excluding general partnerships and sole proprietorships, ask the contractor which state the contractor was formed or organized in. In most states, the other kinds of entities (other than a general partnership or sole proprietorship) are formed or organized by filing papers with the secretary of state. If it was formed or organized in a state other than North Carolina, the contractor may need a certificate of authority issued by the N. C. Secretary of State in order to transact business in North Carolina. To get the paperwork right for entities formed in a state other than North Carolina, you may need to ask for two documents: the document issued by the secretary of state of the other state (for example, Delaware) that recognizes that the entity was created, and (if it was issued) the certificate

of authority issued by the N. C. Secretary of State. These papers will not be part of the contract but will go into your file.

250.2.3 Authority to work in this state. If the contractor was formed out of state and needs to get a North Carolina certificate of authority, it can find information at http://www.secretary.state.nc.us/corporations/corpfaq.aspx Click on Professional Corporation. (That can apply to professional corporations and professional limited liability corporations.) Is the contractor a professional corporation? Will the contractor provide professional services (such as architecture, engineering, landscape architecture, land surveying, geology, psychology), or any other service for which a provider needs a license from a licensing board? If so, the contractor has to follow additional procedures to be allowed to practice in North Carolina. That is different from the certificate of authority issued by the N. C. Secretary of State discussed in the preceding paragraph. Some information on those procedures is at the webpage cited in this paragraph. Part 2 (Legal Status of the Candidate and Signers) and Part 3 (Qualifications, References, and Licenses) of section 240 of the model RFP on the City Attorney's CODI page address these issues.

250.3 Divisions. If the contractor is a division within a corporation, use the name of the corporation. A division is a part of a corporation and usually lacks the power to sign a contract. For example, the contractor's name should be on the contract as "XYZ Corp." or "XYZ Corp., through its Ace Chemical Division" but neither "Ace Chemical Division of XYZ Corp." nor "Ace Chemical Division."

250.4 Abbreviations. The official name of a corporation may be, for example, "Southern Ry. Co.," which you should think of as different from "Southern Railway Company." Use the exact legal name of the contractor; don't change that name by abbreviating or dilating any words or adding or deleting punctuation. The symbol *&* is not necessarily equal to *and*. (If you must abbreviate anything, the only words that you can safely abbreviate are "Co." for "Company"; "Corp." for "Corporation"; and "Inc." for "Incorporated.") Still, it is best and simplest to use the exact name with no changes. It's not a burden, since you probably need to write the official name only at the beginning of the contract, in the signature line, and in the notarization, if you use a notarization.

You'll start with this:

> This contract is dated, made, and entered into as of the _____ day of _____, 20_____ by the City of Durham ("City") and (*name of firm*) ("Contractor"), (*Indicate type of entity, for instance:*)
>
> a corporation organized and existing under the laws of (*name of state*)*;*
> a professional corporation organized and existing under the laws of (*name of state*)*;*
> a professional association organized and existing under the laws of (*name of state*)*;*
> a limited liability partnership formed under the laws of (*name of state*)*;*
> a registered limited liability partnership formed under the laws of (*name of state*)*;*
> a limited partnership organized under the laws of (*name of state*)*;*
> a sole proprietorship; or
> a general partnership.

Note that sole proprietorships and general partnerships are not considered to be organized and existing under the laws of a state.

Next, delete the portions that do not describe your contractor. Thus, an opening sentence looks like this:

> This contract is dated, made, and entered into as of the _____ day of _____, 20_____, by the City of Durham ("City") and Hoover Rescues, L.L.C. ("Contractor"), a limited liability company organized under the laws of Iowa.
>
> *or*
>
> This contract is dated, made, and entered into as of the _____ day of _____, 20_____, by the City of Durham ("City") and Adams Publishing Co. Limited Partnership ("Contractor"), a limited partnership organized under the laws of Massachusetts.

In the first example, “L.L.C.” is part of the official name. It stands for limited liability company. In the latter example, “Limited Partnership” is part of the official name as recognized by the secretary of state.

250.5 Pronoun for contractors. When the contractor is a corporation, limited liability company, partnership, or other non-human, refer to it as an “it” instead of as a “him.” While you’re at it, write “its duties” instead of “it’s duties,” because the possessive form of “it” has no apostrophe. The word *it’s* is short for *it is*.

260 Exhibits. If you attach anything -- papers, lists, diagrams, maps, whatever -- to the contract, label each piece and make clear how many pages it is. For example, a three-page exhibit you can label the first page "Exhibit A, page 1 of 3," label the second page "Exhibit A, page 2 of 3," and label the third page "Exhibit A, page 3 of 3." In the body of the contract, state what each exhibit has to do with the parties' obligations or why it is an exhibit. For example:

Section *. Locations. The Contractor shall install the poles at the locations shown on Exhibit A.

Section *. Scope of Services. The Contractor shall perform all the services set forth on Exhibit B.

Section *. Qualifications. The Contractor represents that its personnel have the qualifications stated on Exhibit C.

However, if the exhibit contains more than what you say it does, you’ll create confusion. For instance, using the first example, supposing Exhibit A lists the locations for the poles but also contains a set of deadlines, is it intended for those deadlines to apply to the contract? Ultimately, you’ll need to apply section 120.8 (Essential) above to the exhibits. You may need to add an explanation to the exhibit or to the body of the contract. If you are *sure* that *everything* in the exhibit is properly written and could just as well be in the body of the contract, you can say this:

Section *. Exhibit D. Exhibit D is incorporated into this contract.

You can use the word “exhibit” or “appendix,” but once you choose one of those words, use the same word each time in the contract, and see that the header on the exhibit or appendix uses that word, too. I used to like “attachment,” but that word has a certain meaning with respect to email, and it gets confusing to read an email that refers to an “attachment” when the email is discussing a contract.

260.1 Contents of exhibits. The purpose of an exhibit, like the purpose of any part of the text of a contract, is to tell a party its rights and duties. Exhibits can be used if they do that. Read every word of every exhibit and decide whether anything at all should be changed or deleted. You are almost never required to use an exhibit exactly as the contractor submitted it. Don’t simply attach whatever papers the contractor gives you, because some of those papers may contradict what you want to require or may be extraneous to the purpose of an exhibit. The contractor may have written the City a letter offering to do certain work. Attaching that letter may leave unclear to what extent the contract requires the contractor to do that proposed work as part of the contract. A document may speak of the “proposed” transaction, but the word “proposed” no longer applies once the contract is entered into. Even some of the documents that you yourself prepared do not belong in the contract. For instance, instructions telling bidders where to submit their bids have nothing to do with the goods and services the contractor is required to provide.

The purpose of making exhibits is to show what the deal is, not to create a historical record of the solicitation process. If the proposed exhibits are in word-processible format, you can revise them easily before making them exhibits. If they are unchangeable graphics or only in hard copy, you can use old-fashioned cutting and pasting – with scissors, Wite-Out, tape, and photocopying To avoid misleading or confusing the contractor, you need to alert the contractor to your changes, because the contractor will expect that a paper that looks like something that it submitted or had seen remains unchanged. You can also type the relevant portions of an exhibit from scratch.

260.2 Problems with exhibits. Inserting the contents of exhibits directly into the body of the contract can be better than sticking them at the end. That’s because exhibits can be accidentally dropped or separated from the body of the contract, and it can be tiresome to have to leaf back and forth between the body of the contract and the exhibits. The careless among us forget to number every page of an exhibit. But read on.

260.3 Should you use an exhibit? If any individual insertion is half a page or less, it’s most excellent to insert it into the body of the contract instead of placing it in an exhibit. By contrast, when you are

using a City of Durham form contract, *and* an individual addition of text is the length of a page or more, some think it's better to use an exhibit for that text, instead of inserting it directly into the body of the contract. Their reason is this: A form contract's advantage is that we know what the "standard" terms are and do not need to read the entire contract in order to know what it says. If you plop a big lump into any single spot in the contract, it can be hard to tell whether we're still using the City of Durham form contract. Still, the attorney involved may, in a particular instance, prefer that you insert even more text in a City of Durham form, and I tend to be in that group (because of what's said in section 260.2 (Problems with exhibits)) so ask regarding your specific situation. Indenting the inserted text so that it stands out from the form contract can help. For reasons stated in section 260.2, when you are using a contract that is *not* a City of Durham form contract, it is generally best to insert whatever you can into the body of the contract, even if the portion to be inserted is pages in length.

A table of contents for the contract can solve the bulkiness problem created by big insertions and make it even more attractive to avoid exhibits.

270 Date of contract; term of contract; date of performance.

270.1 Date of contract. Every contract should be dated. The date helps identify the contract and distinguishes it from other contracts with the same contractor. On most City contracts, the date doesn't indicate when anyone is supposed to start work or do anything else. On most, you may fill in a date before sending the contract to the contractor for its signature or fill in the date when the City signs. On a very few contracts, however, the contract says that the contractor must begin or complete the work within a certain number of days from the date of the contract. In those contracts, therefore, the choice of the date is meaningful in itself, and you must choose the date more carefully.

See the samples in section 250.1 (Short names), above, for how to show the date. Dates need to be written in a contract before it goes into the Onbase Contract Approval module, because dates cannot be inserted in that module.

270.2 Term of contract; expiration of term. It is best for a contract *not* to say that it terminates or expires on the date that the duty to provide the goods or services ends or on the date that the goods or services are due. Likewise, it is generally best *not* to say in the contract that it will terminate or expire on a certain date or that the contract will have a term of a certain period. I say that because some duties (some of which may be unwritten and implied by the law) should remain in effect after the delivery of the goods and services -- sometimes several years after -- and we generally do not want to face an argument that those duties "terminated" when the contract terminated. Examples are warranties, duties to indemnify, and procedures to give notice to the other party. Instead, let the contract specify when the contractor is to provide the goods or services. If appropriate, let it state when the duty to provide the services ends. If you want to say that the contractor must complete the work by a certain date, or that the contractor must stop work after a certain date, that is what the contract should say. For instance, instead of writing either "The term of this contract is June 15, 2014 through August 15, 2015" or "This contract terminates on August 15, 2015," you might write something like, "The Contractor shall provide the services listed in section 2 during the period of June 15, 2014 through August 15, 2015." That clarifies that the rest of the contract remains in effect after August 15, 2015 but the services are not due after that date.

270.3 Date of performance. When not defined, "date of performance" is a vague expression. It can mean, for example, when the contractor must begin work, when the contractor must do some specified part of the work, or when the contractor must complete the work. If you want certain services done by a certain date, you may need a sentence like: "The Contractor shall perform the services listed in Section 2 by November 16, 2014." If you simply need all the services completed by one date, try this: "The Contractor shall perform all the services required by this contract by April 15, 2015." If there's any chance of confusion, you can specify which goods and services are due by which dates.

270.4 Postponement or cancellation. Where the contractor is to do something at a particular date or time specified in the contract, such as to perform at a concert or teach a class, the contract should provide for what happens if postponement or even cancellation is necessary. In writing the clause, consider such matters as: who decides about a substitute date, how and when the new date will be decided, whether there are limits on what date can be picked, and whether compensation is affected.

300 SPECIAL TYPES OF CONTRACTS

310 What a grant requires. If your project receives grant money, the grantor will have demands. Sometimes its demands apply instead of normal requirements, but you may need to check with our office before dropping the normal requirements, even if dropping them is what the grantor insists on.

320 Contracts for construction and for architects and engineers. Whether you are working on (1) a contract between the City and an architect or engineer or (2) a contract between the City and a construction company, you may use a "standard" construction contract from the American Institute of Architects (AIA) or the Engineers Joint Contract Documents Committee (EJCDC). These may be known as A101, B141, EJCDC documents, etc. In creating the agreement, you need to include the supplemental conditions that our office has prepared to go with the "standard" forms. Small construction jobs may not use these forms. Contact Fred Lamar in the City Attorney's office for help with the forms.

330 Lease-purchase contracts. A "lease-purchase" contract allows the City to buy now and pay later. A more accurate name is installment sales contract, because it involves no leasing. It is a purchase contract that is subject to the laws about purchase contracts and also additional laws. These contracts can be complicated and time-consuming, and lenders and sellers will innocently try to impose requirements that North Carolina cities are prohibited from complying with. Contemplate whether the City should just pay cash and use a regular purchase contract, rather than cash plus implicit interest involved in a lease-purchase contract. Consult our office before thinking about beginning to consider the possibility that you may want to use a lease-purchase contract.

340 Economic development incentives. Special requirements apply to these contracts. See G.S. 158-7.1.

350 Equipment rental agreements. I have prepared two standard agreements to use when the City wants to rent or lease personal property (vehicles, pumps, etc.). The fine print (sections 13 – 29 of those agreements) has to be included on the back of the agreement. The Purchasing Division can provide copies.

360 Contracts to purchase. I have prepared a standard contract to purchase goods. The Purchasing Division can provide copies.

370 Contracts with other governmental entities. I address this topic in section 605 (Contracts with other governmental bodies).

380 Amendments. I address this topic in section 615 (Amendments to contracts) and in various other places in this book.

400 PARTICULAR CLAUSES

405 Anti-discrimination policy. The City Council has directed that this notice appear in all contracts. The notice is supposed to be prominent, so I wrote it in capital letters. This clause already appears in most model contracts. As with most required clauses, if it is in the original contract or an amendment, it need not be repeated in subsequent amendments.

> Notice of City Policy. THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

410 Arbitration, mediation, and dispute resolution.

410.1 Arbitration. The City's general practice is to delete all proposed provisions requiring arbitration of disputes. Sometimes references to arbitration are scattered throughout a contract. As I use the term, "arbitration" is a process in which one or more individuals (other than architects or engineers hired by the

City to administer the project) have the power to impose a binding decision on the City and the contractor. After arbitration, the parties generally cannot go to court over the dispute that was decided in arbitration.

410.2 Mediation and dispute resolution. In contrast with arbitration, mediation is a process in which a mediator tries to get the parties to agree but lacks power to impose a decision. After mediation, the parties can still go to court. In all contracts for building projects (erecting, constructing, altering, or repairing a building) of any dollar amount, State law mandates that a dispute resolution process be available before resort to a lawsuit. (The non-lawsuit process is often called "alternative dispute resolution.") The available process must include mediation.

State law allows a city to insert a contract clause that exempts disputes involving less than a stated dollar amount from this process. The exempted dollar amount may be as much as $15,000, which is the amount the City normally uses. The AIA and EJCDC construction contracts that the City Attorney's office has approved for general use satisfy the construction-of-building type of dispute resolution provision. For instance, it's in paragraph 4.6 of the supplementary conditions to the AIA A201. If the contract is silent on this topic, the State Building Commission's mediation process applies by default and mediation is required even on disputes of less than $15,000 when any party asks for mediation.

Appendix R contains a clause titled "Dispute resolution process," which you should insert in contracts for building projects, if you're not using an AIA and EJCDC construction contract approved by our office. Appendix R adopts the State Building Commission's mediation process but creates the $15,000 exemption.

Another reading of the statutes is that cities need not include the contract provision for dispute resolution when the city signs separate prime contracts, but the safer route is to include the clause in Appendix R even in these contracts.

415 Confidential information and trade secrets.

The law requires that most documents in a city's possession be open for the public to examine and copy. That generally includes contracts, which thus includes exhibits to contracts. On the other hand, the law allows, and sometimes commands, cities to keep confidential some, but not all, information that a bidder or contractor may desire to keep secret.

Before even asking for social security numbers, ask an attorney.

If it's possible that bidders and potential contractors may send the City information that they expect the City to keep confidential, go to the City Attorney's CODI page, open the model RFP, and read section 80 (Trade Secrets and Confidentiality). You can address the situation by including that section 80 in your RFP or other bid documents. If you include it, you'll also need to read section 250 (Cover Letter) of the model RFP and adapt it for your situation; for instance, if you're soliciting competitive bids instead of using an RFP, you'd change the references to "RFP" to refer to whatever your solicitation for bids is called, and since you'd be getting bids instead of proposals with cover letters, you'd need to change the material in section 250 of the model RFP so that the statements by bidders would be placed in their bids, not in cover letters. To round it out, you'd see that your contract includes section 15 (Trade Secrets; Confidentiality) of the Model Services Contract, also on the City Attorney's CODI page. If you are soliciting bids instead of issuing an RFP, you'd need to change section 15 accordingly.

420 EEO provisions.

The "EEO Provisions" section that has long appeared in City contracts is to be deleted from contracts because of a 2013 change to State law. Instead, the City Manager has directed that the notice in GBA Appendix T be placed in all RFPs and solicitations for bid. Appendix T is titled "Values of City of Durham regarding Treatment of Employees of Contractors." Section 330 of the model RFP document on the City Attorney's CODI site already includes the notice. That model RFP document is found under the CODI title Contracting Guides and Forms.

425 E-Verify.

425.1 E-Verify compliance for contracts entered into on or after October 1, 2014.

425.1.1 Summary of this section 425.1. This section explains how to comply with the law as amended as of October 1, 2014. As amended, it requires cities to impose requirements on their contractors regarding E-Verify. E-Verify is a means employers can use to discover whether individuals are allowed to work.

As of October 1, 2014, the law was changed to reduce the kinds of contracts that need an E-Verify clause. The change applies to contracts entered into on or after October 1, 2014.

For contracts fully signed before October 1, 2014, see section 425.2 (E-Verify compliance for contracts fully signed before October 1, 2014).

425.1.2. In general. As of October 1, 2014, the law requires that the City insert an E-Verify Compliance clause into certain contracts. By contracts, I mean contracts, agreements, and purchase orders, but only if they are required by State law to be formally bid. **A contract is "required by State law to be formally bid" if it is**

(a or b) + (i):

(a) for construction or repair in the amount of $500,000 or greater,

or

(b) for purchase of goods in the amount of $90,000 or greater

and

(i) it is not made under an exception from the State formal bid law.

Exceptions to the State formal bid law can be found at section 744.2 (ARRANGEMENT OF EXCEPTIONS).

The City may choose to bid out whatever contracts it wishes to, but unless a contract is "required by State law to be formally bid," no E-Verify Compliance clause is needed.

If a contract entered into on or after October 1, 2014 must contain an E-Verify Compliance clause, here it is:

> Section ___. E-Verify compliance. The contractor represents and covenants that the contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (NCGS). In this E-Verify Compliance section, "contractor," "its subcontractors," and "comply" shall have the meanings intended by NCGS 160A-20.1(b). The City is relying on this section in entering into this contract. The parties agree to this section only to the extent authorized by law. If this section is held to be unenforceable or invalid in whole or in part, it shall be deemed amended to the extent necessary to make this contract comply with NCGS 160A-20.1(b). This section is valid only if it is in a contract subject to NCGS 143-129.

A copyable version of that clause is in GBA Appendix S.

425.1.3 Procedure. If you are handling a contract that State law requires to be formally bid, insert the E-Verify Compliance clause into the contract. If you're not sure whether a contract is required by State law to be formally bid, it is all right to put the new clause in the contract; do not put another version of the clause in the contract.

425.1.4 Amendments and change orders. A normal change order, discussed in section 744.4.7 (Change orders) is not required by State law to be formally bid, so even if it is a change order to a contract that itself needed to be formally bid, the change order does not need the E-verify Compliance clause.

An amendment to a contract normally is not required by State law to be formally bid, so the amendment does not need the E-verify Compliance clause.

If the original contract needed to be formally bid and it lacks an E-Verify Compliance clause because it was fully signed before September 4, 2013, an amendment or change order done on or after October 1, 2014 does not need an E-verify Compliance clause, if -- as is the usual case -- the amendment or change order does not need to be formally bid.

If the original contract (i) was required by State law to be formally bid, (ii) was fully signed on or after September 4, 2013, and (iii) lacks an E-Verify Compliance clause, it may need to be amended now to add an E-verify Compliance clause. Approval by the City Council is generally not needed for such an amendment.

425.1.5 Numbering the clause. The E-Verify Compliance clause needs to be given its own section number, to be consistent with the text of the clause, which refers to itself as being a separate section.

425.1.6 Invitations to bid. In future invitations to bid for a contract required by State law to be formally bid, insert a statement to this effect:

> The contract requires compliance by the contractor and its subcontractors with respect to the N. C. E-Verify law. Please see section (*insert the section number here*), which is titled "E-Verify Compliance."

425.1.7 Affidavits. If the City signs a contract with another unit of government, the other unit may ask someone with the City to sign an E-Verify affidavit. Such a request may have been appropriate before the October 1, 2014 change to State law but no longer applies because a contract with another unit of government is not required by State law to be formally bid. You may tell the other unit that it should look at N.C.G.S. 160A-20.1(b) as amended as of October 1, 2014.

425.1.8 Stay tuned. Some members of the General Assembly care a lot about E-Verify, so the laws on this topic may change yet again.

425.2 E-Verify compliance for contracts fully signed before October 1, 2014.

425.2.1 Summary of this section 425.2. This section applies only to contracts that were fully signed before October 1, 2014. Such a contract may need to be amended to comply with the E-Verify law. If a contract was not fully signed before October 1, 2014, see section 425.1 (E-Verify compliance for contracts entered into on or after October 1, 2014) instead.

425.2.2 What to do. In this section 425.2, by "contract" I mean contract, lease, agreement, memorandum of understanding, purchase order, and so forth.

If a contract was fully signed by both the City and the other party before September 4, 2013, nothing needs to be done to comply with the E-Verify law.

With few exceptions, all contracts that were fully signed on or after September 4, 2013 but before October 1, 2014 need an E-Verify Compliance clause.

If a contract that was fully signed by both parties before September 4, 2013 was then amended, and the amendment was fully signed on or after September 4, 2013 but before October 1, 2014, and the amendment lacks an E-Verify Compliance clause, the amendment may itself need to be amended to comply with the E-Verify law. Got that?

If an E-Verify Compliance clause must be added to a contract or amendment that was fully signed before October 1, 2014, the clause to add may differ from the clause shown in section 425.1. Consult an attorney for further advice.

430 Indemnification. If someone sues the City about something related to the work, this provision can make the contractor defend the City. In the pattern contract in GBA Appendix A in CODI is an indemnification paragraph that will work in about any contract. Please don't put any additional indemnification (or "hold harmless") language in the contract without clearing it with our office. Indemnification is governed by special laws, and an indemnification paragraph that looks better for the City may in fact be worse. If you think the indemnification paragraph in Appendix A is not right for your contract, discuss it with our office. The City generally avoids agreeing to indemnify contractors.

435 Insurance. Before preparing the contract, you ought to discuss insurance with the City's risk manager. Once you have the City's insurance requirements, direct the bidders' and then the contractor's attention to them so that they can be shown to the contractor's insurance agent. Otherwise, the insurance agent may prepare an insurance certificate and an endorsement that fail to meet the contract's requirements. Look at the certificate and endorsement to see if they appear to comply with the contract's mandates. You need either an endorsement in addition to the certificate or a souped-up certificate. See GBA Appendix J for the risk manager's memorandum explaining this requirement. The certificate and endorsement, if any, will not go in the Onbase agenda module but will go in the Onbase contract module.

440 Liquidated damages. A liquidated damages clause (incorrectly called a penalty clause; if you really need a short name, use "LD clause") charges a contractor a specified dollar amount, usually per day, for completing work late. Another kind charges the contractor a specified dollar amount for violating obligations other than missing the completion date. Liquidated damages clauses can be tricky. If you want one, let us know before showing it to potential contractors or bidders. If you want a clause placed in a contract to be competitively bid, come to us before soliciting bids. Do not give in to the urge to copy one from another contract.

445 Livable wage. (also known as liveable wage and living wage) The intent of the Livable Wage Ordinance was to see that the employees of some City contractors and their subcontractors receive at least the minimum hourly wage paid to City employees. The ordinance, which is sections 18-19 through 18-23 of the City Code, which is the same as Article II of Chapter 18 of the City Code, applies to contracts designated by the City Manager to be subject to the ordinance. In Finance Policy 505-1 (Contracting for Services) sections IV.B.5 and IV.C, the City Manager has directed the Purchasing Division to act in his behalf in determining whether the ordinance applies.

The ordinance states:

> "These shall include only those contracts for services to the City and its agencies which the City could provide for itself with its own employees, should it decide to do so, and shall not include contracts governed by state or federal procurement or bidding requirements, or those where services are performed by non-profit, tax-exempt organizations. Notwithstanding the foregoing, the city council may make a determination that a contract with a non-profit tax exempt organization is one for which the City could have provided the contracted service with its own employees, and that the contract shall be subject to the provisions of this ordinance."

When the City Manager designates a contract as subject to the ordinance, the Livable Wage paragraph in GBA Appendix Q on the City Attorney's CODI site is to be placed in the contract. The City Council has mandated all of that paragraph except the last three sentences. I added those last three sentences and recommend that they be used. Section IV.C.2 of Finance Policy 505-1 Revision 1, dated 5/18/2012, contains the same paragraph as Appendix Q.

However, because of a 2013 change to State law, the City will rarely apply the livable wage ordinance in the manner described above. Instead, the City Manager has directed that the notice in GBA Appendix T be placed in all RFPs and solicitations for bid. Appendix T is titled "Values of City of Durham regarding Treatment of Employees of Contractors." Section 330 of the model RFP document on the City Attorney's CODI site already includes that notice.

450 Non-collusion affidavit. If a grant, law, regulation, or anything else tells you to include a non-collusion affidavit, use GBA Appendix N, in the City Attorney's CODI page. Regarding giving notice of this requirement, see also section 724.3 (Non-collusion) and section 798.10 (Non-collusion). (I don't claim to be imaginative in naming sections.)

455 Retainage. While the flexibility to write retainage clauses in construction contracts is limited by law, retainage can be an effective part of the plan to get on-time work. Retainage clauses in non-construction contracts can be almost whatever the City wants, if the contractor is willing to sign the contract.

460 Schedule for deliverables. Including a schedule with deadlines is generally a good idea. The starting date can be the date of the contract, a date specified in the contract, the date given in a notice to proceed (which the City sends after the contract is signed), a date triggered by some specified event, or maybe something else. Depending on the project, an appropriate schedule may detail when the deliverables must be completed or it may specify milestones in some other manner, or it may state only the completion date. Intermediate deadlines

along with the completion date can be specified dates or stated periods of time after previous deadlines. For example: deliverable B is due 30 days after deliverable A is due. If you state intermediate deliverables or milestones, be clear on what the contractor needs to do in order to meet the deadlines, that is, the content of the deliverable or milestone. With the delays that happen between the when a contract is written and when it is signed, make sure the schedule still is right before sending the contract for signature. That applies especially if specific dates are written in the schedule, in contrast with periods of time.

465 Scope. A crucial task for the project manager is to write down what the contractor must do in order to be paid. That includes the work to be done, the materials to be used, the standards to be complied with so that the parties know that the work has been done correctly, etc. You need to see that all of that gets in the contract. Remember section 120.8 (Essential), above.

470 Small Disadvantages Business Enterprises (SDBEs). You can start by reading "Small Disadvantaged Business Enterprise Program Guidelines" on the Department of Equal Opportunity/Equity Assurance's website. It comes up when you click on Guidelines. For more information, consult that department.

475 Small Local Business Enterprises (SLBEs). When it is found that at least three small local firms may compete for certain City work, competition may be restricted to "small local business enterprises" (SLBEs). The program can apply to construction or repair work for less than $500,000; architectural, engineering, and surveying services for less than $100,000; and other services for less than $500,000. If a contract is placed in the program, only firms that EO/EA certifies to be SLBEs may compete. The City Code provisions begin at City Code section 18-80, found in article IV of chapter 18 of the City Code.

480 Terminating without cause or for convenience. In some contracts, you may want the City to have the right to terminate the contract without cause (also known as terminating "for convenience"), in the event that the City decides to abandon or postpone the project, or it has run out of money, or it gets disgusted with the contractor, or otherwise. (The City may be able to terminate when the contractor breaches the contract, and that is the right to terminate for cause. At times we may contend the contractor has breached but would prefer to just terminate and not have to prove breach, and terminating for convenience is, well, convenient.) The usual termination–for-convenience clause gives the right to the City and does not give the contractor that right. The clause should not be used in every contract, because some potential contractors may balk at such a clause or submit a higher bid because of the risk that the rug will be pulled out after the contractor has hired personnel, bought supplies and equipment, turned down other work, etc. to carry out its commitment to the City. Depending on how the clause is written, a terminated contractor – who may have done good work up to the time of termination -- may make no profit. If you use such a clause, it may need to indicate what steps must be taken before a termination can occur, provide a method to calculate compensation, arrange that papers and other work-in-progress will be delivered to the City (perhaps with limitations on the contractor's liability for the City's later use of those items), indicate any limits on the City's use of those items, and require the contractor to cooperate in turning over information to a replacement contractor. Before deciding to use any termination for convenience clause, you need to think about what might happen if the contract is terminated soon after the contractor starts, or well after the work is underway, or if the work is mostly done. Does the language adequately address all possibilities regarding the site of the work (for instance, if it is a construction or repair job); designs and reports; the safety of stopping work partly done; etc., etc.? If you decide that the cost to the City for allowing the City to terminate at will is not too high, you could begin with the TFC section of the contract in Appendix A of GBA, on the City Attorney's CODI site. In that TFC section, the third sentence in subsection (c) (Payment) is ripe for alteration to suit your situation. Also, you can copy and paste that TFC section into another contract, if for instance, you're starting with a contract other than Appendix A.

485 Unions. If you are considering bid or contract provisions relating to unions in the context of a construction project, consult an attorney. (G.S. 143-133.5)

490 Warranties. In all kinds of contracts, the City may want to require the contractor to stand behind its goods and services. Some vendors will offer printed warranties, perhaps from a manufacturer and not from the contractor itself, and some of these warranties are insufficient. One manufacturer's warranty may be much better than another's. Many are worse for the City than if they gave no written warranty. To make comparison of bids easier and to get the warranty you need, it is good for the City to specify in detail what the warranty will cover, how long it will last, etc. To use this approach, write a proposed warranty in non-legalese, for an attorney to revise into

legal format. The City's model supplemental conditions to contracts with architects, engineers, and construction companies, discussed in section 320 (Contracts for construction and for architects and engineers) above, contain warranties.

500 ORGANIZING AND WRITING.

505 Definitions. If the contract is long, it is often good to define a word and then to use that word throughout the contract. *(Humpty Dumpty said, "There's glory for you!" "I don't know what you mean by 'glory,' " Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't -- till I tell you. I meant 'there's a nice knock-down argument for you!' " "But 'glory' doesn't mean 'a nice knock-down argument,' " Alice objected. "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master -- that's all.")* Make the defined words distinctive from everything else in the contract by capitalization, underlining, or italics, so that wherever they appear, the reader will know that they have been defined in the contract. Using an initial capital is a common method. When you use the initial-capital-letter method, don't place the word at the beginning of any sentence in the document, so that the reader will know that it's capitalized because it's a defined word. I do not understand why some people use all caps for the names of the parties. Using ALL capitals FOR these words CAN ANNOY and distract. Instead of CONTRACTOR, write Contractor. Isn't that quieter and soothing? (Speaking of capital letters, in this book I try to use "City" to refer to Durham and "city" to refer to a city in general. So even though it looks it, my choice of city or City is not random. Likewise, the practice in Durham is to refer to *our* city manager, city council, city attorney, etc. with initial capitals: thus, in this book you see City Manager, City Council, and City Attorney. When in Rome. . . .)

Here's an example of a definition:

> Sec. *. Definitions. When the following words appear with an initial capital letter in this contract, they are used with the indicated meanings. When the word appears without an initial capital letter, the meaning does not necessarily apply. (a) Day -- a calendar day. (b) Schedule -- the schedule for delivery of services, set out in section 4.

Giving examples can clarify a definition. Indicate they are only examples by such words as "for example," "such as," or "including." You don't need to write "including but not limited to" because "including" already implies "but not limited to."

If a defined word is used in only one section of a contract, consider placing the definition there. Definitions that apply to words used in more than one section should be gathered into a "Definitions" section. An exception commonly made is in creating nickname for the parties; that's usually done as described in section 250.1 (Short names) above.

510 Clarity.

510.1 Active voice. Use the active voice (in this order: subject, verb, object), as in "The Contractor shall deliver the widgets," unless there is a reason not to. When you use the passive voice, such as "The widgets shall be delivered," how can the reader know whether the City, the contractor, or somebody else will deliver the widgets? Occasionally the passive voice should be considered, such as when the identity of one who causes an event is irrelevant. For instance, the contract could say, "If any windows are broken, the Contractor shall promptly repair them." (In that sentence, the clause with "windows are broken" contains the passive, while the "Contractor shall" clause contains the active.) That sentence covers more than saying, "If any person breaks any windows, the Contractor shall repair the windows," because a window could be broken by a falling tree limb or a raccoon swinging a baseball bat. Better still might be the active, with "The Contractor shall repair all broken windows."

510.2 Shall or must. To impose a duty, use "shall" or "must," not "should."

510.3 Sentences. The body of the contract should be in complete sentences. Using sentences clarifies who is to do what. When you insert a table or chart or attach an exhibit, the body of the contract should contain a sentence that says why the heck the table, chart, or exhibit is there. For instance, a table showing

quantities of various goods could be introduced with the sentence, "The Contractor shall deliver the goods as specified in this table."

510.4 The symbol "/". The virgule or slash can be ambiguous. Does it mean *and* or does it mean *or?* It can even signal only that a word has been abbreviated. If the contractor is to report on "stormwater/wetlands/floodplain issues," isn't it better to say that the contractor must report on "stormwater, wetlands, and floodplain issues"? That's a rhetorical question.

510.5 Bi- and semi-. Do not write biweekly, bimonthly, biyearly, biannually, biannual, biennually, biennual, semiweekly, semimonthly, or semiannually. People get confused what means what, whether bimonthly means twice monthly or once every two months. (*Semi*nole is just fine, if the need presents itself, as long as you let me know when that is. *Bi*ttersweet and *biz*arre are okay, too.) My advice here is to write whichever of the following is meant: once every two weeks; twice a month; once every two months; twice a year; once every two years. It's arguable that "once every two weeks" would allow the action to be taken on a Wednesday of the first week, a Monday of the third week, a Saturday of the fifth week. "Monthly" might allow the action on the 20th of month 1, the 3rd of month 2, and the 12th of month 3. If you want more regularity, you should write that into the text.

510.6 Dates and time. In an advertisement on the web or in a newspaper, or in a contract, or anywhere else, do not describe times as EST, EDT, standard, daylight, or local; each of them can cause trouble. If the urge to say something overcomes you, writing "Eastern Time" or "ET" will be fine. If you're speaking of midnight or noon, write midnight or noon, not 12:00 A.M. or 12:00 P.M. I also advise against specifying the day of the week; write February 9, 2015, not Monday, February 9, 2015. Too often someone changes the date but forgets to change the day. If the day doesn't match the date, which is it?

Writing a date in military style (9 February 2015 or 9 Feb. 2015) is fine.

A word or abbreviation for the month is better than a number. Especially if the other party is not in the US of A, there's a very slight chance that 2/6/2015 could be understood to be June 2 instead of February 6, since most of the world outside the United States reads x/y/zzzz as date/month/year. They also use the metric system, but that's another story.

510.7 The abbreviations "i.e." and "e.g." Because people misuse "i.e." (they incorrectly think it means "for example") it's best not to write "i.e." Write "that is" or some English equivalent when that's what you mean, and write "for example," "for instance," "such as," or the equivalent when that's what you mean.

510.8 Adjectives and series. An adjective at the beginning of a series of nouns may or may not modify every noun. In "big potatoes and apples," does "big" modify "apples"? The following is a real example by someone who should know better: " 'Authorized person' means an attorney for the borrower, a title insurance company, and the new lender." Which of these is an authorized person: a title insurance company or *an attorney for* a title insurance company? the new lender or *an attorney for* the new lender?

A modifying clause at the end of a series creates the same problem. For example, with "peaches, bananas, and pears that weigh less than 10 ounces," does the weight limit apply to peaches and bananas, or just to pears?

You can avoid those problems by inserting numbers or letters next to each item. Other methods include using a vertical list and artfully adding semicolons with commas.

510.9 Commas. In a series of three or more items, in nearly all instances it's best to put a comma before the word "and." An example: "The Contractor shall supply all of the following as need to keep the Equipment in good working order: belts, hoses, and lubricants. Without the comma you write, "I dedicate this book to my parents, Saint Francis and Mother Theresa." That can be quite a claim, in several dimensions. And: "The country-and-Western singer was joined onstage by his two ex-wives, Kris Kristofferson and Waylon Jennings." On the other hand, if you add a comma, you might read, "I dedicate this book to my father, President Kennedy, and Mother Theresa," which, with commas surrounding "President Kennedy," could be read to claim a special connection with JFK. So, read lists with care. When there is a chance of misunderstanding, put the items in a column, or make artful use of a combination of commas and semicolons.

515 Blanks and spaces. If there are blanks and spaces in the contract or exhibits where anything was to be inserted or could be inserted, write "N/A," "not applicable," slash across the blank, or fill up the area with *x*'s. (This assumes that you don't want to write anything in those areas!) Sometimes writing a "0" in a blank is the right thing to do, and sometimes it's a big mistake, so if in doubt, do the N/A, slash, or *x* thing.

520 Basics. After you have drafted the contract, read it to see if it includes such basics as (a) What goods and services will the contractor provide? (b) Which party is responsible for what? (c) When is the work to be done? and (d) How much will be paid or how will payment be determined? If you were not around, would someone else reading the contract reach the same answers that you did to those four questions? If not, you should revise. If you're managing the project, you need to read every word of the contract, which includes all the exhibits. Look at section 465 (Scope) above.

525 Line spacing. To save paper and to make it easier to read, in my opinion the final version of the contract should be single-spaced.

530 Attorney's signature. No one in our office signs a statement that a contract is approved "as to form" or "as to legal effect." If such a blank is for our office to sign, delete it. If there's one for only the contractor's attorney to sign, let it stay.

535 Additional proof that contractor is bound by contract. In some instances, it can be worthwhile to be sure that those in control of the Contractor, who may be its board of directors, shareholders, members, or partners, have approved the transaction. A resolution or document with a like function is the solution. If it's leasing or selling most of its assets or otherwise doing something not part of its usual business, some special approval along these lines may be needed. On the other hand, an operating agreement or other document may obviate the need for special approval. This is far too complex a topic to cover here. If it comes up, consult the City Attorney's office.

540 Signature of contractor. In most cases, the signature portion of the contract should be one of the forms in GBA Appendix E on the City Attorney's CODI page. Select the form depending on the contractor's status -- a corporation, LLC, partnership, proprietorship, etc. Please read the instructions at the top of GBA Appendix E. Prepare the contract with only one signature form for the contractor, rather than several, since the contractor may use the wrong form if given a choice. When preparing the contract for approval – which is well before you send the contract for the contractor to sign – you should *insert the contractor's name* where the form directs that the contractor's name be typed or printed. Do not change the form -- or let the contractor change it -- without asking an attorney.

If it is a *sole proprietorship* (which is old-fashioned individual ownership), use Form 1 or 2. The difference between these Form 1 and Form 2 is: if an individual owns and operates a business under a trade name or a firm name (e.g., Jones Trucking Co. or Smith Grocery), use Form 1; if an individual owns and operates it under his or her own name (e.g., Jennifer Smith) without a trade or firm name, use Form 2.

If it is a *partnership* in which the general partner is an individual – the general partner is a human -- use Form 3. Even if it's a "limited partnership," a general partner will sign for it. If they want any other signature, such as a limited partner's signature or a signature by a non-human, consult our office. Also, note that a "limited partnership" is different from a "limited liability company," which is discussed in section 540.4 (Limited liability companies).

If the contractor is a *corporation*, use Form 4.1 or 4.2, and include the sentence, "Affix corporate seal" as shown in those forms.

If the contractor doesn't seem to fit into any categories in Appendix E, check with our office to see how to prepare the signature form.

540.1 Seal. Observe that "(SEAL)" appears in all the signature forms except for signatures by the county and the schools; as you fill in and adjust the signature block, please keep "(SEAL)" there for as many other parties there are to the contract.

540.2 Keep the format. When you copy and paste a form from the Appendix, make sure that the margins, spacing, fonts, etc. track those of the original.

540.3 IN WITNESS WHEREOF. We generally end the body of a contract with a sentence that begins "IN WITNESS WHEREOF" and which says the parties sign "under seal" – you can see this at the end of Appendix A. Some variations on that sentence may be all right, but ask an attorney for any help you want.

540.4 Limited liability companies.

540.1.1 Recognizing an LLC. A limited liability company's name must contain at least one of the following eight expressions: limited liability company; ltd. liability co.; limited liability co.; ltd. liability company; L.L.C.; LLC; P.L.L.C.; and PLLC. To keep it easy in this document, I'll (usually) call it an LLC.

540.1.2 Who usually signs. The normal rule is that an LLC's contracts are signed by an official called a "manager," not by a "member."

540.1.3 Human signs as manager. If you're lucky, a human will sign as the LLC's manager; in that situation, use GBA Appendix E Form 5.1. It's fairly easy to tell whether someone is human. On whether someone is a manager, keep reading.

540.1.4 When persons besides manager can sign. The LLC's "operating agreement" – a document that governs the LLC's affairs – may say that persons in addition to managers can sign contracts. A person signing as the LLC's "president," "contracting agent," or even Great Lord Chamberlain lacks authority to sign unless the operating agreement says that the president, contracting agent, or Great Lord Chamberlain can sign such contracts. For example, simply naming someone "president" is not enough, since the operating agreement needs to give the president the power to sign contracts before the president has that power. One LLC's president will enjoy different powers compared with the president of another LLC.

540.1.5 Manager by being a member. All "members" are automatically "managers" if the operating agreement does not say otherwise. In other words, the default is that members are managers, though the operating agreement can reject the default. Even so, when a member (using that automatic, default authority) signs a contract, he or she signs in the capacity of manager and should be designated as manager in the signature section.

540.1.6 LLC or corporation signing as manager. Sometimes it is all right if the "person" signing is not a human. For example, ABC, LLC's manager may be XYZ, LLC; in other words, one LLC is the manager of another LLC. Or, ABC, LLC's manager may be MNO, Inc. (a corporation). When you come across this situation, contact an attorney. It may comfort you to know that even in those instances, a human ultimately signs.

In the first example, a human may be the manager of XYZ, LLC; the human signs as manager of XYZ, LLC, and (if the form is prepared correctly) that signature also constitutes XYZ, LLC's signature as manager of ABC, LLC. If you want to get dizzy, imagine chains with four or more companies, so that B signs for C; C signs for D; and D signs for E, with E being the firm that contracts with the City.

To avoid a last-minute problem, see section 550.7 (Contractor's acceptance of forms).

545 Signature of City. I have combined information on how to write the City's signature form, who will sign the City's signature form, and how to get the contract signed by the City. That is gathered in section 900 (Who signs) and section 902 (Getting contracts signed by the contractor and the City).

550 Notarization.

550.1 Acknowledgment. When talking about signing contracts, "acknowledgment" and "notarization" mean the same thing.

550.2 Selecting a form. Once you have picked the contractor's signature form, from GBA Appendix E, you should insert the corresponding notarization form, from GBA Appendix F. Please read the instructions at the top of GBA Appendix F. Unless you discuss it with a City attorney, do not change the forms -

- or let the notary or the contractor change them. If none of these acknowledgment forms seems to fit, please ask our office. If there is a bond, please see section 610.6 (Acknowledgment form).

550.3 Blanks. Let the notary fill in the "State of" and "County of" blanks. Please *insert the contractor's name in the acknowledgment.* In other words, *please insert the contractor's name in the acknowledgment.* Other blank lines will need to be filled in later, and please keep them about as long as they are in the forms, so that there will be enough room. The blanks for an individual's name should be at least 4 inches long. If for some rare, unusual reason you can't insert the contractor's name, make the blank for a company's name at least 6 inches long. A signature line should be at least 3 inches long. (If the contractor asks, the blank lines in front of "Secretary" and "President" are for "Assistant" or "Vice" if those words are needed.)

550.4 Compare with the original form. When you copy and paste a form from the Appendix, make sure that the margins, spacing, etc. track those of the original.

550.5 Notarization format. Don't let a notarization form straddle two pages. It's fine to place two notarization forms on one page.

550.6 One form per contractor. If you are using a performance bond or performance and payment bonds, the contractor's acknowledgment forms in GBA Appendix B or C will be enough, and you should not use additional acknowledgment forms for the contractor.

550.7 Contractor's acceptance of forms. Ask the contractor whether it can sign the signature form and use the acknowledgment form that you have prepared. You don't want to find out at the last minute that there is a misunderstanding about its name or status that prevents it from signing or acknowledging.

If the contractor does not sign and complete the signature (and acknowledgement, if applicable) forms that you have put in the document, and assuming it is all right to change or delete anything from those forms, a revised document needs to be provided to the contractor for its signature (and notarization, if applicable). That is, do not accept a contract signed by the contractor with an incomplete acknowledgement form even if the contract would have been valid with no acknowledgement. The incomplete form could lead to a contention that the contractor had not fully signed the contract (with notarization, if applicable) and did not intend to be bound by it until it had fully signed (with notarization, if applicable). That contention is most likely to be made if the contractor has second thoughts about the deal before it has done much of the work, or if a dispute between the City and the contractor occurs early in the performance of the work stage.

550.8 City acknowledgment. As discussed in section 902.4 (Summary of options for the City's signature), in nearly all contracts, the City signs electronically, rather than with a pen on paper, with its signature not notarized. In the rare instance in which the City will sign with a pen on paper, you can, if appropriate, include an acknowledgment, which calls for Option 2, 2a, 3, or 3a as discussed in section 902.4 (Summary of options for the City's signature).

600 SPECIAL DOCUMENTS.

605 Contracts with other governmental bodies.

If the contract is with any entity in this list, then this section 605 applies:

a county, town, village, other city, or other subdivision, authority, or agency of local government;
a local board of education;
a sanitary district;
an airport authority;
a facility authority created under N.C.G.S. 160A-480.3;
-or-
a special district created by a transportation authority under N.C.G.S 105-508, 105-509, or 105-510

These contracts are sometimes called "interlocal agreements." However, if a contract is between the City of Durham and a subdivision or agency of the state or federal government, the contract is not an interlocal agreement, and this section 605 does not apply.

605.1 Durham County is the other party. We often find that Durham County prepares a proposed interlocal agreement, has it approved by the Board of Commissioners, and then assumes that the City will accept it as-is. It becomes awkward for the City to suggest changes, even changes that County staff agree will improve the agreement, because "the Board of Commissioners has already approved it." When dealing with Durham County, you should intervene before the matter is placed on the Board's agenda. If you fail at that, tell the attorney that the agreement has been approved by the Board.

605.2 Purposes. The contract must state the purposes of the contract. For example,

> Section *. Purpose. The purpose of this contract is to provide for the collection of real and personal property taxes owed to the City of Durham.

605.3 Duration. The contract must state the duration of the contract. For example,

> (*version 1)* Section *. Duration. This contract shall be perpetual, unless terminated earlier by mutual agreement. The governing body of each party hereto has determined that duration to be reasonable. On such termination, all obligations that are still executory on both sides are discharged but any right based on prior breach or performance survives.
>
> *-or-*
>
> *(version 2)* Section *. Duration. This contract shall expire at midnight on (*date*), unless terminated earlier by mutual agreement. The governing body of each party hereto has determined that duration to be reasonable. On such expiration or termination, all obligations that are still executory on both sides are discharged but any right based on prior breach or performance survives.

As a general rule, version 1 is better, as explained in section 270 (Date of contract; term of contract; date of performance) above.

605.4 Personnel. The contract must state the manner of appointing the personnel needed to carry out each party's obligations under the contract. The following statement suffices in an agreement between the City of Durham and a county:

> Section *. Appointment of Personnel. The City Manager shall designate persons to carry out the City's obligations under this contract. The County Manager shall designate persons to carry out the County's obligations under this contract.

605.5 Amending or terminating. The contract must state methods for amending or terminating the agreement. This will usually be:

> Section *. Amendment and Termination. This contract may be amended or terminated by agreement of the parties.

605.6 E-Verify in interlocal agreements. If the other unit asks for an E-Verify clause or affidavit, please see section 425.1.7 (Affidavits).

605.7 Special motion for interlocal agreements.

If the agreement applies the advice in section 605.3 (Duration) above, the motion should be in this form: to resolve that the City Manager be authorized to execute (*insert the agreement's name, and if it does not include the other unit's name, see that the motion specifies the unit's name*).

If the agreement fails to apply the advice in section 605.3, the motion should be in this form: to resolve that the duration of *(insert the agreement's name, and if it does not include the other unit's name, see that the motion specifies the unit's name*) be deemed reasonable and that the City Manager be authorized to execute the agreement.

Note the use of the word "resolve" in both motions.

The advice in this section 605.7 applies to the other party to the agreement, too. It could be worthwhile to inquire how it will comply. There are other ways to comply besides using the motions I've written.

605.8 Preaudit certificate.

605.8.1 What is it and when is it required? When a contract of certain governments in North Carolina (cities, counties, school boards, and some others -- not the state or federal government) requires it to pay money in the fiscal year in which the contract is formed, the contract must include a "preaudit certificate," signed by its finance officer (or similar position). It is called a certificate, though it is only a sentence followed by a signature. It usually appears in the contract's signature pages. For N. C. cities, towns, and counties, the preaudit certificate is

> This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.
>
> _____
> (signature of finance officer

If in doubt about whether a particular contract needs a preaudit certificate, it's best to assume that it does. There's no harm in inserting a preaudit certificate in a contract that does not require one. However, that does not generally mean that you need to insert a preaudit certificate into most contracts.

605.8.2 Preaudit and the electrically signed contract. Nearly all City contracts will be electronically signed by the City of Durham using the Onbase contract module. That electronic method is Option 1 as described in section 902.5.1 (Option 1: The City will sign electronically in CAW) below, where you are told to insert a signature form that it calls "Form 11," which contains this:

> preaudit certificate, if applicable _____

So, if you just do what Option 1 in that memo says, using Form 11, you'll be fine.

605.8.3 Preaudit and the non-electronically signed contract. When the City will not electronically sign using the Onbase contract module, and a preaudit certificate is needed for the City's finance officer to sign, you should insert the preaudit certificate for the City's finance officer to sign. You will not apply Option 1 but will apply Option 2 or higher, under section 902 (Summary of options for the City's signature).

605.8.4 The other party is a governmental unit. Whether or not the City will electronically sign using the Onbase contract module, when (i) another North Carolina city, town, county, school board, or other local unit will sign the contract, and (ii) it's possible that a preaudit certificate is required for that other N. C. unit, then insert a preaudit certificate followed by a signature line identified for the other finance officer. If a preaudit certificate is needed for an entity other than a N. C. city, town, or county, ask the other party for the right words so that you can insert its preaudit certificate. For example, a school board's certificate reads, "This instrument has been preaudited in the manner required by the School Budget and Fiscal Control Act." It's to be followed by a line marked "date" and a line for the school board's finance officer's signature.

610 Performance bonds and payment bonds.

If the City proves that a contractor has breached its contract, a court may order it to pay money to the City. Are we out of luck if the contractor is insolvent? Not if a performance bond is in place. That bond provides a pot of money to pay the contractor's obligations to the City. If the contractor does not pay its suppliers or subcontractors, the payment bond can pay them, again even when the contractor lack assets to pay. Payment bonds are sometimes called labor and materialman's bonds. Both kinds of bonds need to be signed and handled properly, because the companies issuing them will make every objection before paying a nickel. They are different from "bid bonds," discussed in section 756 (Bid bonds and bid deposits). Bond companies have been known to make changes to a bond form that gut the bond's value, so be most careful.

610.1 When required.

610.1.1 Purchasing contracts. On contracts to purchase apparatus, supplies, materials, or equipment, State law does not require a performance bond or payment bond. The City may choose to

require either or both but rarely does. If the City chooses to require only one, it would be a performance bond.

610.1.2 Construction or repair work. When the total amount of construction or repair contracts awarded for a project is estimated to be or is $300,000 or more, a performance bond and a payment bond are required from any contractor or construction manager at risk with a contract of more than $50,000. For example, on a project estimated at $300,000, a contract with the general contractor for $251,000 needs both bonds, but a $49,000 grading contract on the same $300,000 project needs neither bond. (No bond is needed to contract with a construction manager. A construction manager at risk (CMAR) is different from a construction manager.) This bonding requirement can't be waived. On the other hand, the City may choose to require these bonds even when the law does not require them. A bidder's ability to obtain these bonds suggests that the bonding company has investigated and found the company to be (as Elaine Benes might say) "bondworthy" -- solvent and with the resources to complete the contract, but the bond itself gives real protection.

610.2 Deposit instead of bond. Instead of using a performance bond or a payment bond, a contractor may substitute a deposit of cash, cashier's or certified checks (on FDIC-insured banks or trust companies), or government securities, but performance and payment bond are used 99.9+% of the time.

610.4 Which form to select. On the City Attorney's CODI page, Appendix B is a 3-page form that you should use when both bonds are required. It covers both bonds in one nifty form. Appendix C is a 3-page form that you should use when only a performance bond is required. If the bonds are relevant to your project, write one of the following statements in the bid documents. Use *Statement 1* if both bonds are required, and *Statement 2* if only a performance bond is required.

Statement 1: If performance and payment bonds are required, the City requires the use of its performance bond and payment bond form unless, after consulting the City Attorney's office, the project manager finds that different bond forms satisfactorily protect the City. Before bidding, each bidder should show the City bond form to its bonding company to be sure it can promptly issue the bond on that form in the event the contract is awarded to it.

Statement 2: If a performance bond is required, the City requires the use of its performance bond form unless, after consulting the City Attorney's office, the project manager finds that a different bond form satisfactorily protects the City. Before bidding, each bidder should show the City bond form to its bonding company to be sure it can promptly issue the bond on that form in the event the contract is awarded to it.

610.5 Filling in blanks. On page 1 of both Appendixes B and C (on the City Attorney's CODI page), there are places for two dates to be written: "Date of Contract" and "Date of Execution [of the bond(s)]." The "Date of Contract" must be the same date that was used in the "Date of Contract Form" shown in section 250 above (Parties); that's the form that begins "This contract is dated, made, and entered into as of the _____ day of _____, 20_____. . . ." The "Date of Execution [of the bond(s)]" blank can be filled in with either (1) the same date as that on the "Date of Contract" line, or (2) a later date. The notaries must date their acknowledgment forms the same date as the "Date of Execution," or they may use a later date, and one notary's date can be different from another's; a notary's date depends on when the signer appeared before the notary. Before sending the contract and bond forms out, to prevent the surety from putting incorrect dates in the "Date of Contract" line, you may wish to fill in the "Date of Contract" line and the "Date of Execution" line, or tell the contractor what dates to put there. You should fill in the "Contract Name and Number" line with the title of the contract and whatever number that your department or division uses for it. Because virtually all contractors on projects with performance bonds are corporations or limited liability companies (LLCs), these forms are designed for a principal that is one of those kinds of entities. If you have the rare contractor that is neither of those two kinds of entities on a performance or payment bond project, ask us to prepare the signature and acknowledgment forms. Do not let anyone change the form, including the notarizations. Of course, blanks are to be filled in but the typed words should not be changed. If someone changes, or wants to change, ***anything*** in either of those appendixes, consult the City Attorney's office.

610.6 Acknowledgment form. If you use Appendix B or C, do not put an acknowledgment form for the contractor after the contract, because the acknowledgment form in Appendixes B and C already

includes an acknowledgment for the contractor. If that form is not correct for your contractor, please ask us to change it.

610.7 Non-City bond forms.

Skip this section 610.7 when you use Appendix B or C.

610.7.1 If you must use a non-City bond form, add this sentence.

Other bond forms, such as the AIA forms, are available but are not as good for the City as Appendixes B and C. It's better and simpler when the bond is on Appendix B or C; but if for some strong reason the bond is not on Appendix B or C, then see that the following sentence is written onto to the bond before it is signed by anyone: This bond is given pursuant to Article 3 of Chapter 44A of the N. C. General Statutes.

610.7.2 Acknowledgment.

Each bond written on a form other than Appendix B or C should have acknowledgment forms like those in Appendixes B and C. However, if the titles of the bonds are different, you must change those acknowledgment forms to take that in account (simply so that each acknowledgment form refers to the title of the bond that is being used). For instance, if the bond is called "Materialmen's Bond" instead of "Payment Bond," then the acknowledgment should read "Materialmen's Bond" in both the title and in the body of the acknowledgment.

615 Amendments to contracts.

615.1 When to amend.

If an existing contract needs to be changed (changing the date of completion, reducing the scope, eliminating some items being purchased, increasing the scope of services but still staying within the existing contract's purposes, etc.), then use a contract to amend the existing contract.

If you have an existing contract with a firm and want that firm to do a new project or provide an additional service in addition to the project already in the works, then you generally should not amend the existing contract. Instead, you should generally create a new, separate contract for the new project or service.

Even though you may not think of an amendment as itself being a contract, the amendment itself is a contract. The amendment (which you should think of as a contract to amend) needs to go through the same processes as any other contract. So you do not necessarily save many steps by using a contract to amend instead of a separate contract.

615.2 E-Verify and amendments.

For amendments and E-Verify, see section 425.1.4 (Amendments and change orders).

615.3 Council approval.

The contract to amend may need City Council approval. Even if the City Manager approved the existing contract, sometimes only the City Council can authorize a contract to amend it.

615.3.1 Ongoing authority to amend.

Resolution 9673 (Resolution Delegating Authority to the City Manager with Respect to Making and Executing Contracts, Leases and Grant Agreement, adopted October 5, 2009) gives the City Manager considerable power to make contracts to amend without the need to go to City Council. Here's the resolution's structure on this issue:

> Section 1 of the resolution defines "Reasonably Expected Expenditures" as "the dollar amount that the City Manager or the City Manager's designee determines, as of the time of executing the instrument in question, to be the sum of the probable payments the City can reasonably be expected to pay, including for liabilities under an indemnification provision if the relevant instrument contains such a provision."
>
> Section 2 of the resolution addresses three types of contracts separately, depending on what's happening:
>
> > (A) Section 2.01 of the resolution lets the Manager enter into contracts to amend service contracts if the "Reasonably Expected Expenditures" under the amended contracts do not exceed $50,000. "Reasonably Expected Expenditures" is defined in the resolution.
> >
> > (B) Section 2.02 of the resolution lets the Manager enter into amended construction contracts if the Reasonably Expected Expenditures under the amended contracts do not exceed $300,000. If an original construction contract is between $250,000 and $300,000, the Manager may enter into

contracts to amend it as long as the net sum of the Reasonably Expected Expenditures under the amended contracts does not exceed the original contract amount by more than 20%.

(C) Section 2.03 of the resolution lets the Manager enter into purchasing contracts to amend when the Reasonably Expected Expenditures under the amended contracts do not exceed $90,000. That figure for purchasing contracts rises to $300,000 in some circumstances.

615.3.2 Changes neutral or good for the City; amendments.

Resolution 9673 also provides that the City Manager may, before or after a contract is signed, change it from the version approved by City Council. The City Manager may do that if the changes do not increase the Reasonably Expected Expenditures, do not significantly change the contract, and do not make the contract, considered as a whole, less favorable to the City. See section 5 of the resolution for more details. If the contract has not yet been signed, the changes would be to the original (not-yet-signed) contract, so only one contract would be signed. If the contract has been signed, a contract to amend is the way to go. Page 10 of the city's manager's Agenda Manual advises you to routinely add a motion that asks City Council for authority to make modifications, but that manual was last revised August 2006 – before resolution 9673 was adopted in 2009 – so that particular advice is out of date; therefore, you should disregard it. In view of resolution 9673, the motion that the manual advises you to add could actually reduce the City Manager's authority to amend. In some rare situations, the automatic authority to change contracts that is provided by resolution 9673 does not fit your contract, so it's possible that a motion tailored to a specific situation may occasionally be needed.

615.3.3 Authority to amend specific contracts or specific types of contracts.

From time to time the City Council grants the City Manager the authority to enter into specific kinds of contracts to amend. In some construction projects, change orders are to be expected, and the motion for City Council to approve the original contract can anticipate that by authorizing such change orders. See 710.3.4 below on writing that motion. On December 4, 2003 the City Council adopted resolution 9060, which authorizes the City Manager to modify contracts for services necessary to respond to weather-related conditions. If you're thinking of using resolution 9060, read all of resolution 9060 first.

615.4 Form of contract to amend.

The body of an amendment (that is, a contract to amend) needs to say only enough to change the existing contract. For example, if the existing contract has the clause requiring compliance with the SDBE ordinance, the amendment does not need an SDBE clause. If an exhibit to the existing contract is not to be changed, do not attach that exhibit to the amendment. The reader needs to be able to tell both what is changed by the amendment and what remains from the original contract. Since it is a contract, the amendment needs the same other parts as any contract: names of parties, signature forms, etc. For a recommended form, see GBA Appendix D on the City Attorney's CODI page.

Please note how Appendix D gives short names for the existing contract and the amendment. That helps make it clear which contract is being dealt with. In the example in Appendix D, the amendment refers to the existing contract as the "Original Contract." Note that Appendix D quotes the words to be deleted, quotes the words to be inserted, and specifies where new words and sections are to be inserted. It also states section numbers *and their titles*. Adding their titles gives the reader a sense of the meaning of the amendment even when the existing contract is not at hand, and it tends to reduce confusion and mistake.

Here are more guides for the amendment:

615.4.1 If it ain't broke.

Do not delete or otherwise terminate the contractor's obligation to deliver goods and services simply because the contractor has already provided them under the existing contract. Delete goods and services that have not been delivered only if one of the purposes of the amendment is to eliminate them from the scope of work.

Suppose the original contract requires the delivery of lions, tigers, and bears. Suppose the contractor delivers all lions right away. Suppose you no longer need bears. You'd amend the contract to delete bears. The contract as amended would still require the contractor to deliver lions and tigers. The contractor would be able to show that it had complied with the lion requirement. If it turns out that one of the previously delivered lions is actually a poodle, wouldn't you want to be able to make a claim? That claim would be made under the contract as amended.

615.4.2 Already paid. Do not delete the City's obligation to pay for goods or services that the City has already paid for under the existing contract. That's under the concept discussed in section 615.4.1 (If It Ain't Broke). The City will have proof of what it has paid if somehow the contractor seeks payment again.

615.4.3 Date of original contract. Do not change the date of the original contract. For example, suppose the top line of the original contract says, "This contract is dated, made, and entered into as of the 10th day of July, 2013. . . ." In that example, the contract to amend will have its own top line, such as "This contract is dated, made, and entered into as of the 8th day of August, 2014 . . . ." The contract to amend will then recite that it is amending the original contract dated July 10, 2013 but the contract to amend ordinarily should not change that date. Despite that good advice, if you still think you need to change the contract's date because of when you want the work to begin, see section 615.4.4 (Schedule for performance) below.

615.4.4 Schedule for performance. When not defined, "date of performance" is a vague expression. It can mean, for example, when the contractor must begin work, when the contractor must do some specified part of the work, or when the contractor must complete the work. If the date of performance in the existing contract is still correct for some or all of the goods and services named in the existing contract, leave it alone. You may need a new date for the goods and services to be added by the amendment. If you want certain services done by a certain date, you may need a sentence like: "The Contractor shall perform the services listed in Section 2 of this Contract to Amend the Contract to Provide Consulting Services by November 16, 2014." If you simply need all the services completed by one date, try this: "The Contractor shall perform all the services required by this Contract to Amend the Contract to Provide Consulting Services by April 15, 2015." If there's a chance of confusion, you can specify which goods and services are due by which dates.

615.4.5 Referring to sections. When you refer to sections, you must make it clear whether the section is in the original contract or in the amendment. If the contract to amend refers to section 3 and there's a section 3 in the original contract and a different section 3 in the contract to amend, that's not good. One way to eliminate that problem is to use a different set of section numbers in the amendment than in the existing contract. For example, if the section numbers in the existing contract are 1, 2, 3. . . 20, you could number the sections in the contract to amend 101, 102, 103, etc. That's what you see in Appendix D on the City Attorney's CODI page. If you like amending so much that you make a second contract to amend, it could have sections 201, 202, etc.

615.4.6 Name of contract to amend. A useful name is "Contract to Amend (*insert name of existing contract*)." The next amendment could be "Second Contract to Amend (*insert name of existing contract*)."

615.4.7 Reciting the history. In the first contract to amend, you'd write something like this, as you can see in Appendix D:

> The City and the Contractor entered into the Contract for Paperwork Study, dated June 5, 2013 (Original Contract).

615.4.7.1 Amending an amendment. If the existing contract has previously been amended, and you want to amend it again, your contract to amend -- it's now the second (or later) contract to amend -- needs to explain that there are an original contract and one or more previous amendments. It need not say what the previous amendments did or why they were entered into. Their names and dates will be enough. For example:

In the second contract to amend, you'd write:

> The City and the Contractor have entered into the following contracts:
> Contract for Paperwork Study, dated June 5, 2013 (Original Contract); First Contract to Amend Contract for Paperwork Study, dated February 4, 2015 (First Contract to Amend).

In the third contract to amend, you'd write:

> The City and the Contractor have entered into the following contracts:
> Contract for Paperwork Study, dated June 5, 2013 (Original Contract); First Contract to Amend Contract for Paperwork Study, dated February 4, 2015 (First Contract to Amend); Second Contract to Amend Contract for Paperwork Study, dated March 16, 2016 (Second Contract to Amend).

615.4.8 One-sided amendment. Alert our office when your proposed contract to amend benefits only one party: for example, where the only thing the amendment does is to give the contractor more time to complete work; in that example, all benefits from the amendment go to only one party (in this example, to the contractor), not to both parties, and that creates an obscure legal problem. That's in contrast to requiring the contractor to do more work (benefit to City) in exchange for more money (benefit to contractor), which doesn't create that obscurity.

615.5 Citing sections of previous contract. Note that when the contract to amend in Appendix D refers to a section number of the original contract, it also refers to the section's title. That double-referencing (to number and title) helps avoid mistakes. If you still make a mistake with the section number, double-referencing makes the mistake apparent; in case a dispute later arises, the usual rule of law will let you explain which section you intended to refer to, but that rule applies because you double-referenced. If you cite only the wrong section number (that is, you do not also cite the section's title), a contractor who benefits from the mistake may insist on keeping it. While seeing a contractor take that position is unlikely, part of my task is to prevent problems. Someone taking on the project from you may innocently think that it means the specified section, which could lead at best to confusion, and at worst to problems.

615.6 Review by attorney. For us to review an amendment, please see that we have a copy of the existing contract. If the final signed version has been filed away in Onbase, tell us how to find it and/or send us a copy. Some attorneys do better with paper copies and others with electronic copies. If you want to be especially helpful, tell us how to find information on the existing contract, such as the agenda item (date of council meeting, Onbase PR number, etc.) and the Onbase contract number. If the proposed amendment will be a second or later amendment, we may need to see the granddaddy, original contract, and all its descendants.

CHAPTER C – FINDING A CONTRACTOR AND THE PRICE; PROCEDURES TO FOLLOW

700. What category are you contracting for? First, you may need to classify what are you contracting for: Is it goods? Is it construction or repair? Is it architectural services, engineering services, or surveying services? Or some other kind of service?

700.1 To help you select --

700.1.1 Goods. Goods are pretty much ready-made. They do not even need to be tangible, so software that is not made for us is a "good." Other goods include raindrops on roses and whiskers on kittens, bright copper kettles and warm woolen mittens, brown paper packages tied up with strings, cream colored ponies and crisp apple strudels, doorbells and sleigh bells and schnitzel with noodles, wild geese that fly with the moon on their wings. Lions and tigers and bears. On the other hand, if what the City is buying is mostly made to its order, the City is not buying goods. Instead, the contract is for construction or for "other services."

700.1.2 Construction and repair. "Construction" is a broad term that includes constructing a building, a water main, and an athletic field. If land is cleared as part of a building project, or if an existing structure is to be demolished to make way for a building, clearing and demolition are considered construction for our present purpose. On the other hand, clearing a lot is not construction when there are no plans to build on the vacant lot.

The law probably thinks of buying new equipment or other personal property as a purchase of goods, rather than construction, even if the thing is put together to the buyer's specifications. Likewise, buses are put together to the buyer's specs but are probably considered goods to be bought.

"Repair" includes repairing a building, water main, and HVAC equipment.

700.1.3 Services performed by certain license-holders; CMAR. If the service can be done only by a licensed architect, engineer, or surveyor, it's an architectural service, engineering service, or surveying service, respectively. If we want an architect or engineer to do the work but the law does not restrict the work to a licensed architect or engineer, then it's a service but not treated specially for purposes of contracting. For instance, for convenience, the City may engage an engineer to provide engineering services and some related non-engineering services. A construction manager at risk (CMAR) is engaged like an architect or engineer.

700.1.4 Overlapping and multiple categories. Lots of contracts will involve more than one category. A construction project will include buying plenty of ready-made stuff. A piece of already manufactured equipment may still need the vendor's adjustment and installation. Sometimes it doesn't matter which category the project is in. When the category the project fits in matters, the decision is generally based on how predominant the construction or repair side of the contract is compared with the purchasing side. When in doubt, going with the side that carries the greater requirements protects us from a challenge. Of course, you can consult an attorney.

700.2 State law and City requirements. If the contractor is to perform other services – not described above in this section -- State law, in general, imposes no particular procedures or requirements. With respect to this, as well as the other categories, the City Manager has added procedures and requirements. In most instances, State law imposes a floor of procedures and requirements, and the City Manager may add to that floor.

700.3 State procurement law chart.

	what is being contracted for	*threshold*	*State law requires* See note 2. See note 4.	*to get started*
1	construction and repair	$500,000 and above (estimated cost of contract)	formal bids	Formal bidding is addressed especially in sections 744.1 – 744.2 and throughout sections 748 – 768.
2	purchase of goods See note 1.	$90,000 and above (estimated cost of contract)	formal bids	Formal bidding is addressed especially in sections 744.1 – 744.2 and throughout sections 748 – 768.
3	construction and repair	$30,000 but less than $500,000	informal bids, though formal is allowed as an alternative	Informal bidding is addressed especially in sections 744.1 – 744.2.
4	purchase of goods See note 1.	$30,000 but less than $90,000	informal bids, though formal is allowed an alternative	Informal bidding is addressed especially in sections 744.1 – 744.2.
5	architectural, engineering, surveying services,	$0	a selection process initially driven by qualifications rather than	See section 728 (Looking for an architect, engineer,

	and construction manager at risk (CMAR)	See note 3.	price	surveyor, or construction manager at risk?).
6	service other than those in row 5 of this chart See note 5.		no State bid law or solicitation law requirements	See section 700.2.

Note 1. "Goods" means apparatus, supplies, material, and equipment.

Note 2. Whether or not your project has a State bid law or solicitation law requirement, you may have to comply with the City Manager's requirements.

Note 3. This means that column 3 applies regardless of dollar amount. Still, you may be able to arrange an exemption from column 3 if the estimated professional fee is under $50,000, as outlined in section 728.7 (Exemption from qualifications-based selection procedure).

Note 4. Exceptions abound. See section 744.2 (ARRANGEMENT OF EXCEPTIONS).

Note 5. If the work is construction or repair, see rows 1 and 3 in this chart.

702 Should you use a request for proposals (RFP)? To start off, do not use an RFP for these: (1) to solicit bids for construction or repair work or (2) to solicit bids for buying goods. Put another way, RFPs are generally appropriate for either of two purposes:

A To request proposals to provide a service to the City. This is so whether the candidates' qualifications, the dollar amount for which the candidates will do the work, or something else, is key to choosing the contractor.

-or -

B To request proposals to provide a service to the City when you have not set the requirements for how a candidate can satisfy the City's needs but you can say what the needs are. For instance, suppose you want a firm to provide publicity. The RFP can ask candidates how they can meet those needs. In its response to the RFP, each candidate will tell you what it will do, how it will do it, and what the cost will be for that work. The costs may vary greatly, depending upon what is proposed. In the example, maybe one candidate proposes direct mail, a second candidate proposes social media, and a third proposes using someone to stand by the side of the road, dressed in a costume and waving signs. The City can choose the contractor based not only on price but also on how the firm best meets its needs.

704 RFQ and RFQ. In a typical RFP, you may ask about, among other things: firms' qualifications, how they will do the work, and how much they will charge. (If looking for engineering, architectural, or surveying services, or for a construction manager at risk, you'll use an RFP but there are times that you wouldn't ask for price upfront. For more on engaging those four kinds of services, see row 5 of the chart in section 700.3 (State procurement law chart). An RFQ (Request for Qualifications) can be thought of as a type of RFP, so nearly everything in this book about RFPs can apply to RFQs. There's no bright line dividing RFPs and RFQs. An RFQ generally does not ask for prices and fees upfront; instead, it asks for credentials, expertise, etc., so that you can assess the candidates' ability to do the work. Instead of Request for Qualifications some people use RFQ to mean Request for Quotations but that's rare in City of Durham parlance.

706 Candidates and contractors. In this book and in the Model RFP, I use the word "candidates" to talk about firms that may respond to an RFP, and those that do respond to an RFP. Once a candidate signs a contract, I call it the "contractor." For one contract, you may have chosen from several candidates but you have only one contractor.

710 Scope of subchapter.

This subchapter applies to services, but not construction or repair, and not purchase of goods.

712 Finding candidates.

Cost estimate	*Summary of key elements of FP 505-1**
Below $10,000	An RFP is not required. Newspaper advertising is not required. Advertising on the City Purchasing's website is not required. Departments have the discretion to obtain quotes or to use the RFP process. If circumstances permit, obtain multiple price quotes or proposals; if not obtained, the department director should document why not.
More than $10,000 but less than $50,000	RFP is required. Newspaper advertising is not required. Advertising on the City Purchasing's website is not required but is recommended.
$50,000 or more	RFP is required. Newspaper advertising is not required. Advertising on City's Purchasing website is required but can be waived.

*You can find Finance Policies on CODI at

http://codinet/apps/codipolicy/SitePages/Home.aspx

FP 505-1 applies to services other than other than architectural, engineering, surveying, or construction manager at risk. Also, FP 505-1 does not apply to construction or repair.

714 Core of RFP.

The most important part of the RFP is unique to each project. It tells the candidates what your project is about and what services you want. It should explain the goals of your project and what you expect the contractor to do.

716 Model RFP.

When you need to prepare an RFP, don't start with a blank screen. Or a blank stare. On the City Attorney's CODI page, under the CODI title Contracting Guides and Forms, is a link to a Model RFP. Embedded throughout the Model RFP are instructions on completing the RFP. Use and adapt the Model RFP for your project. The Model RFP includes "Exhibit A," which is a proposed contract. Let candidates see the proposed contract, to the extent you can assemble one, while they're preparing their proposals.

718 Electronic versions of proposal.

If you prepare blanks and forms for candidates to fill in, you may want assurance that they do not change the anything they should not change. For example, obviously you do not want them to change your questions. When deciding what computer program to use in preparing forms for candidates to fill in, consider how easy or hard it will be for candidates to accidentally or intentionally make changes without alerting you of the changes when they send you the form.

720 Starting the RFP.

At the beginning of the RFP, it can be helpful to insert the "NOTICE OF RFP," using the advertisement recommended in section 724 (Advertising to solicit proposals for services) below. This briefly summarizes the project and sets out essential deadlines.

722 City's webpage. After you have written the RFP for your project, the Purchasing Division of the Finance Department will help you put your entire RFP on the Purchasing Division's webpage, under Current Bid Opportunities.

724 Advertising to solicit proposals for services.

724.1 Pattern advertisement to solicit services *other than* architectural, engineering, surveying, or construction manager at risk.

NOTICE OF RFP BY CITY OF DURHAM FOR < BRIEFLY DESCRIBE, e.g., FINANCIAL ANALYSIS or TELECOMMUNICATIONS ADVICE >

The City is seeking a firm to (*provide a financial analysis of its budget, or to advise on telecommunications equipment.* [*Perhaps explain the nature of the services being solicited*.]). For information, see the Request for Proposals, which may be obtained at (*City office and department, address, telephone, email, website, etc*.; [*if there's a consultant*:] *consultant's office and department, address, telephone, email, website, etc*.) Proposals are due on (*date*). The City Council of the City of Durham reserves the right to reject any or all proposals. Notice under the Americans with Disabilities Act: A person with a disability may receive an auxiliary aid or service to effectively participate in city government activities by contacting the ADA Coordinator, voice (919) 560-4197, fax 560-4196, TTY (919) 560-1200, or ADA@durhamnc.gov, as soon as possible but no later than 48 hours before the event or deadline date.

724.2 Pattern advertisement to solicit architectural, engineering, surveying, or construction manager at risk services.

NOTICE OF RFP BY CITY OF DURHAM FOR (BRIEFLY DESCRIBE, e.g., ARCHITECTURAL SERVICES FOR DESIGN AND CONSTRUCTION ADMINISTRATION OF CONSTRUCTION OF A FIRE STATION)

The City is seeking a firm to (provide services for the design and construction administration of a fire station.). For information, see the Request for Proposals, which may be obtained at (City office and department, address, telephone, email, website, etc.; URL). After the initial contract is entered into between the City and the (choose which applies: architect, engineer, surveyor, or construction manager at risk), the parties to the agreement may agree on changes to the contract as appropriate to construct the (describe the project, for example: fire station) in a manner that will meet the City's needs. Those changes may include changes in the design, in the services, and in the professional fees and other compensation. Proposals are due on (date). The City Council of the City of Durham reserves the right to reject any or all proposals. Notice under the Americans with Disabilities Act: A person with a disability may receive an auxiliary aid or service to effectively participate in city government activities by contacting the ADA Coordinator, voice (919) 560-4197, fax 560-4196, TTY (919) 560-1200, or ADA@durhamnc.gov, as soon as possible but no later than 48 hours before the event or deadline date.

724.2.1 Avoiding having to re-advertise.

In the pattern ad for soliciting architectural, engineering, surveying, or construction manager services, the two sentences about possible changes can speed the process if changes are needed. Run the ad with those sentences.

724.3 Non-collusion.

See section 450 (Non-collusion affidavit) and section 798.10 (Non-collusion).

724.4 Other sales points.

Add anything else to the web notice to help potential candidates *decide whether to look at* the RFP. It's best to not load it with details that candidates will need to respond to the RFP; those are best kept in the RFP.

724.5 Setting deadline.

While it's the candidates' responsibility to get the proposal to the City in time, you might consider when FedEx and UPS deliveries are likely to be made in choosing the deadline. If they normally deliver around 11:00 AM, you could avoid making the time 10:30 AM.

724.5.1 Soft deadline. My strong recommendation is not to treat the time set to receive proposals as a hard deadline, as shown by the following sections of the Model RFP, which is on the City Attorney's CODI page: section 110 (B) (Discretion of the City) and section 140 (Deadline to Submit Proposals). This subsection 724.5.1 pertains to soliciting proposals for services and contrasts with formal bids, which must have a hard deadline.

724.6 Pre-proposal conference. The Purchasing webpage has a column for pre-bid conferences. If you're going to have a pre-proposal conference, specify the date and time there. If appropriate, you can add: "*Attendance is strongly urged."*

724.7 Keep out of the notice. Don't put these in the notice; for that matter, don't put them *anywhere*, because they can cause trouble:

anything contrary to section 510.6 (Dates and time);

that proposals (or bids) received late will be rejected; and

that the City will award the contract to the lowest responsible or responsive candidate (or bidder).

For other things to omit, see section 798.13 (What to leave out).

726 Additional publicity.

If you have a list of firms that perform the desired services, contacting them by email or other direct means can increase the response to the RFP. The Department of Equal Opportunity/Equity Assurance (EO/EA) asks that you send notices to the certified SDBEs that provide the services you are soliciting. On how to get a list of certified SDBEs, consult EO/EA. Consider also sending notices to firms listed in the Yellow Pages (if you are old enough to know what they are), to firms you find on the Internet, and to other firms that you have somehow heard about. The content of the notices can be what you posted on Purchasing's webpage. You can focus these direct notices on firms in the city or the region. That is not the same as saying that the City will automatically favor local firms when selecting the successful candidate. However, the SLEB program, discussed in section 475 (Small Local Business Enterprises (SLBEs)), favors local firms in some circumstances.

726.1 When is newspaper advertising required? If your project is subject to a grant agreement or specific federal or state regulations, see if they require newspaper advertising. If they require a newspaper ad but they're silent on how and when to run the ad, publish the ad once, sufficiently in advance of the date you need to receive responses so that the candidates have time to see the ad, obtain the materials, and prepare and submit a response. It is probably least expensive if the ad appears in the classified ads under "legals" or "legal notices." Read the ad when it is published to make sure that it is correct. Clip -- or go online and save a copy of -- the ad. Even if you publish a newspaper ad, you should still post the notice on the Purchasing webpage.

726.1.1 Pattern ads for RFPs. In the rare instance of advertising an RFP in a newspaper, start with the advertisement that you wrote under section 724 (Advertising to solicit proposals for services) above.

726.1.1.1 Pre-proposal conference. If there is a pre-proposal conference, I recommend specifying the date and time in the newspaper ad, and, if applicable, that attendance is strongly urged.

726.1.1.2 Omit from the newspaper ad. Please see section 798.13 (What to leave out).

728 Looking for an architect, engineer, surveyor, or construction manager at risk?

728.1 Standard way to engage them. Do you want a contract for architectural services, engineering services, surveying services, or "construction manager at risk" (CMAR) services? I'll call them the "four kinds of services." (A CMAR is a licensed general contractor who guarantees the cost of construction and who handles some construction-management services, such as construction administration. Even though the CMAR is a general contractor, the CMAR does not necessarily construct any of the project at hand.) See section

728.2 (Are the services really architectural, engineering, or surveying?) to decide if you need those kinds of services.

728.1.1 Selection of design-builders and public-private partners.

Selection of design-builders and public-private partners is done through variations on this State law, but I do not deal with them here; instead, go to the sections that addresses them in particular, section 744.4.15 (Design-build – Statewide), section 744.4.17 (Design-build bridging), and section 744.4.29 (Public-private project). On the other hand, section 744.4.13 (Design-build for police buildings and 9-1-1 facility – Durham only) can be followed without having to comply with this State law (that is, without having to comply with the State law on soliciting for the four kinds of services).

728.2 Are the services really architectural, engineering, or surveying?

The law requires an architect, engineer, or surveyor in some instances. If the law considers the services to be architectural, engineering, or surveying, then you must engage an architect, engineer, or surveyor, and you may skip the rest of this subsection 728.2, because it is devoted to when the law does not consider the services to one of those types.

If you are engaging an architect, engineer, or surveyor for services that they do not need to be licensed for, N.C.G.S. 143-64.31 may not apply. For example, if you intend to engage an engineer to do services even though they can lawfully be done by someone without an engineering license, G.S. 143-64.31 does not apply and you may skip this entire section 728.2. However, the law requires engaging an architect or engineer in some situations even though one might not think of the services as architectural or engineering. That's in the next subsection.

728.2.1 Even if one may not consider the services to be architectural or engineering.

Even if one may not consider the services to be architectural or engineering, State law says that the City may still need to engage an architect or engineer. Here's the exercise: Determine whether the contract involves spending that meets any of these four categories: (1) $135,000 for building repair that includes major structural change in framing or foundation support systems, (2) $300,000 for building repair not including major structural change in framing or foundation support systems, (3) $100,000 for building repair affecting life safety systems, or (4) $135,000 for construction of or additions to buildings. If any of those four categories applies, a registered architect or registered engineer must prepare the plans and specifications and place his or her name, address, and N. C. seal on them, unless one of the following four exceptions applies.

Exceptions: (1) Dwellings and outbuildings in connection therewith, such as barns and private garages; (2) Apartment buildings used exclusively as the residence of not more than two families; (3) Temporary buildings or sheds used exclusively for construction purposes, not exceeding 20 feet in any direction, and not used for living quarters; or (4) Pre-engineered garages, sheds, and workshops up to 5,000 square feet used exclusively by city, county, public school, or State employees for purposes related to their employment, if there is a minimum separation of these structures from other buildings or property lines of 30 feet.

728.3 Standard way to engage the four kinds of services, continued.

Anyhow, the State law to select someone to perform the four kinds of services is Article 3D of Chapter 143 of the General Statutes, also referred to as N.C.G.S. 143-64.31 or the Mini Brooks Act. This law says that you must do either (a) or (b):

(a) Get an exemption, discussed in section 728.7 (Exemption from qualifications-based selection procedures);

- or -

(b) Do steps (i), (ii), and (iii). (Do all three steps.):

(i) Go to the website for the N. C. Office of Historically Underutilized Businesses, at

https://www.ips.state.nc.us/IPS/Vendor/searchvendor.aspx?t=

Click <Search for Registered Vendors> so that you can search for the kind of services in question. In your results, look at the "HUB" column (currently the next-to-last column) for "SE," which stands for socially and economically disadvantaged. Make a good faith effort to notify the firms labeled "SE" of the opportunity to submit qualifications. Complying with the City's EBO (SDBE) requirements isn't the same as doing this HUB thing.

(ii) Post an advertisement on the City's Internet site, through the Purchasing Division. See section 722 (City's webpage), above. Write the announcement of requirements (this is the RFP itself, instead of the advertisement) broadly enough to include amendments, so that you can more smoothly stay with the firm when additional work is needed. For instance, if the City will build a parks and recreation building and fields, the RFP should say something to this effect: "After the initial contract is entered into between the City and the (*choose which applies: architect, engineer, surveyor, or construction manager at risk*), the parties to the agreement may agree on changes to the contract as appropriate to construct the (*describe the project, for example: parks and recreation building and fields*) in a manner that will meet the City's needs. Those changes may include changes in the design, in the services, and in the professional fees and other compensation."

At first glance FP 504-1, section C.1 (1 (Selection of Architects, Engineers, Surveyors and Construction Managers at Risk (Professional Services)), revision 1, dated 6-12-2012) seems to require posting the notice on the City's Internet site for 30 days unless EO/EA agrees otherwise; however, when soliciting for an architect, engineer, surveyor, or construction manager at risk is done through an RFP and not a formal bidding process, so I don't read section C.1 as applying to soliciting for an architect, engineer, surveyor, or construction manager at risk. In other words, I do not think that the Finance Department expects anyone to apply C.1 when soliciting for those four services. (Also, the EBPO ordinance has been amended so that it no longer requires advertising for 30 days on formal bids.) As to what EO/EA may ask for in this context, take a look at Section 798.5.1 (SDBE).

(iii) Solicit the services, using A or B:

(A) Contact by email, letter, fax, hand-delivery, or some other method that is aimed directly at four or more firms (you can discuss it with me if you can't find four) that provide the kinds of services that you need. The content of the notices to them can be what you posted on Purchasing's webpage.

- or -

(B) Run a newspaper advertisement. See section 726.1.1 (Pattern ads for RFPs) above.

728.4 Prequalification for professional services.

In the past, the City has used a process it called "prequalification" for some proposals for professional services contracts with an estimated contract amount over $30,000. 2014 amendments to a State statute, G.S. 143-135.8, changed the prequalification landscape. Prequalification as defined by the statute cannot be used on some solicitations and can be used for others only if particular steps are taken. Consult an attorney before using prequalification.

728.5 Qualification-based procedures.

If you do not have an exemption under section 728.7 (Exemption from qualifications-based selection procedures), the City must tentatively choose an architect, engineer, surveyor, or CMAR on the basis of demonstrated competence and qualifications for the type of professional services required without regard to fee other than unit price information. If you have an exemption under section 728.7, you can skip this section 728.5. Lacking an exemption, you have two options:

728.5.1 Option (a): sealed fee information with proposal.

In the RFP, ask for fee information, specifying that candidates are to place it in a separate sealed envelope marked with the candidate's name, the name of the project and other suitable information, and something like this on the outside: "*Fee Information: Not to be Opened Until This Candidate Has Been Selected*." If you go this route, some professionals, especially engineers, will not participate, on the ground that their licensing boards may threaten their licenses if they participate. While the licensing boards may be incorrect in reading the law in that way, engineers and others may still not participate for fear of their boards.

- or -

728.5.2 Option (b): postponed request for fee information. In the RFP, do not ask for fee information until the City has selected a candidate.

728.5.3 Criteria to consider in selecting a firm. Whether using option (a) or option (b), you may want to be aware that the State Construction Office uses these criteria, which may be used or ignored as appropriate for a City project: specialized or appropriate expertise in the type of project; past performance on similar projects; adequate staff and proposed design or consultant team for the project; current workload and state projects awarded (note – the City of Durham may not wish to limit its inquiry to state projects awarded); proposed design approach for the project including design team and consultants; recent experience with project costs and schedules; construction administration capabilities; proximity to and familiarity with the area where the project is located; record of successfully completed projects without major legal or technical problems; and other factors that are appropriate for the project.

728.5.4 Negotiating a fee. Whether using option (a) or option (b), after making your tentative selection, you negotiate a contract with a satisfactory fee with that candidate. If you cannot successfully negotiate a satisfactory contract with a satisfactory fee, you then negotiate with the second-best firm.

728.6 Preference for North Carolina firms. A turnabout-is-fair-play rule applies if you are comparing a N. C. resident firm with a nonresident firm. A "N. C. resident firm" both (i) has paid North Carolina unemployment or income taxes and (ii) has its principal place of business in North Carolina. If a firm fails on one or both of those tests, it is a nonresident firm. Once you have the definitions straight, you need to discover whether the state where the nonresident firm is a resident grants a preference to its resident firms over N. C. resident firms. If it grants no such preference, please skip the rest of this subsection. If the other state grants such a preference, however, the rule says that the City is to grant a preference to the N. C. resident over the firm that is a resident of that other state: The City is to prefer the resident firm "in the same manner, on the same basis, and to the extent that a preference is granted in awarding contracts for these services by the other state to its resident firms" over firms resident in North Carolina. Most obviously, you'd run to our office if you run into this situation. This rule does not apply when you are operating under an exemption, as discussed in section 728.7 (Exemption from qualifications-based selection procedures).

728.7 Exemption from qualifications-based selection procedures.

728.7.1 Effect of exemption. If you get an exemption, State law lets you skip section 728.5 (Qualification-based procedures) and you are allowed to ask for, and consider, fee information when you want. However, you will need to add to the RFP a statement to the following effect: "*The City of Durham has exempted this project from N.C.G.S. 143-64.31 (Article 3D of Chapter 143 of the General Statutes), sometimes known as the Mini Brooks Act*."

728.7.2 How to get an exemption. The law on getting exemptions changed in 2013. As adjusted by the 2013 State law changes, City Council resolution 9673 means this:

(a) Fee is under $50,000. The City Manager or the City Manager's designee is authorized to exempt projects from Article 3D of Chapter 143 of the General Statutes, pursuant to G.S. 143-64.32, as follows:

Smaller projects. Any proposed project requiring the selection of one or more firms to provide architectural, engineering, surveying, or construction management at risk services where an estimated professional fee is less than $30,000.

Larger projects. Any particular project requiring the selection of one or more firms to provide architectural, engineering, surveying, or construction management at risk services where an estimated professional fee is $30,000.00 or more but less than $50,000, provided that the City Manager or the City Manager's designee states in writing the reasons and circumstances for each exemption.

(b) Fee is $50,000 or more. If the proposed contract for architectural, engineering, surveying, or construction management at risk services will be $50,000 or more, no exemption is available. You

will have to comply with section 728.1 (Standard way to engage them) and section 728.5 (Qualification-based procedures) above. A City Council resolution cannot obtain an exemption that the City Manager or designee cannot obtain, so even though the resolution attempts to allow exemptions when the fee is $50,000 or more, that attempt now is defeated because of the 2013 changes in State law.

728.7.2.1 Who are the City Manager's designees under resolution 9673?

Under Finance Policy 111-1 (City Manager's Delegation of Contracting Authority, dated 5-14-2012) a deputy city manager when designated as acting city manager may sign to exempt a project to the same extent as the City Manager could. Under that Finance Policy, a department head may do so only when the "Reasonably Expected Expenditures" do not exceed $10,000. See section 615.3.1 (Ongoing authority to amend) for the definition of "Reasonably Expected Expenditures."

728.7.2.2 Procedures and reporting.

If the City Manager or the City Manager's designee is to grant an exemption, you'll need to get it in writing. Resolution 9673 directs the City Manager to report the projects exempted with a statement of the reasons and circumstances for each exemption. The report is to be made each quarter to the City Council.

An emergency does not let you avoid section 728.5 (Procedures) or section 728.7 (Exemption from qualifications-based selection procedures). Neither the City Manager nor the City Council can use an emergency to bypass those sections.

728.8 Form agreements.

See section 320 (Contracts for construction and for architects and engineers).

SUBCHAPTER C3 – BIDDING (FORMAL AND INFORMAL)

740 Bidding and which words to use.

Generally I use "bid," "bidder," "bidding," etc.) in the context of purchasing goods and soliciting construction and repair work, rather than for services.

The chart in section 700.3 (State procurement law chart) tells you when bidding is normally required by State law, but that is subject to all the exceptions in section 744.2 (ARRANGEMENT OF EXCEPTIONS). In some instances, fitting in an exception means that the City can negotiate with one firm. In other instances, fitting in an exception means that a special selection procedure must be performed.

742 Since the City Manager has authority to approve the contract, I do not need to bid out the contract, right?

Sorry, but that statement is *not* right. The fact that the City Manager may have authority to make and sign a contract does not mean that bidding is not needed. Nor does it mean that bidding is needed. Put another way, the rules for when bidding is required are different and separate from the rules for when the City Council needs to approve a particular contract. Put yet a third way, whether the City Council has delegated approval power to the City Manager has no bearing on whether State bid law applies. Simply because the City Manager or designee can approve a contract does not relieve anybody from having to comply with State bid laws and State law bond requirements. The step that Resolution 9673 (and perhaps every resolution or motion delegating power to the City Manager to contract) allows to be skipped is obtaining City Council *approval* of the particular contract and contractor. For example, as discussed in section 800.1.3 (Contracts for which City Council approval is not needed), by Resolution 9673 the City Council has authorized the City Manager or designee to sign contracts to buy goods (apparatus, supplies, materials, or equipment) for a total of $90,000 or less, and up to $300,000 if certain conditions are met. Therefore, a contract to buy $35,000 worth of uniforms or paper towels need not be approved by City Council, so no agenda item is needed. The contract would still have to be bid because informal or formal bids are needed for contracts of $30,000 or more, as shown in section 700.3 (State procurement law chart).

744 EXCEPTIONS TO STATE BIDDING LAW

State law doesn't require informal or formal bidding in a number of situations. Fitting into an exception doesn't excuse you from complying with the City's policies. The chief exceptions are gathered here.

744.1 WHEN DOES STATE LAW REQUIRE BIDDING?

Please see the chart in section 700.3 (State procurement law chart).

Bidding is normally required by State law when a city purchases goods or solicits construction and repair work, unless the cost will be under $30,000. The bidding process sometimes requires giving notice to potential bidders, a certain number of bids, sealed bids, bonds, etc. When I say something about the "law," I am speaking about State law and rarely federal law, not requirements directed by the powers-that-be in the City of Durham, such as the City Manager and Finance Policies.

744.1.1 Services and the word "bidding".

State law requires certain procedures when engaging an architect, engineer, surveyor, or construction manager at risk, and for a few other services. Maybe because we usually keep the word "bidding" for when a potential contractor names a dollar amount in offering to do work or provide goods, we generally avoid the word "bidding" with respect to soliciting for any of those services. The dollar amount in their offers may be a unit price or a series of individual prices, but the point is that construction and repair contractors and sellers of goods offer in terms of dollars, and we call their offers "bids." On the other hand, a city generally seeks the best qualified architect, engineer, and so forth, and then negotiates a price or fee.

744.2 ARRANGEMENT OF EXCEPTIONS

The rest of this section is divided into section 744.3 (PURCHASING EXCEPTIONS TO STATE LAW) and section 744.4 (CONSTRUCTION AND REPAIR - INCLUDES SOME PURCHASING). There's some overlap between purchasing and construction, so if your project involves purchasing, you may need to look through both section 744.3 and section 744.4.

An exception to State law does not exempt from a Finance Policy or other City requirement.

744.3 PURCHASING EXCEPTIONS TO STATE LAW.

The word "purchasing" is used when the City is buying goods (apparatus, supplies, material, or equipment). If you are looking for a purchasing exception and it is not in this group, look also in the "CONSTRUCTION AND REPAIR - INCLUDES SOME PURCHASING" group, below.

744.3.1 Gas, fuel, and oil.

If the purchase involves spending $30,000 or more, it may be bid informally without violating State law. That's so even if the purchase goes above the formal bid level. (G.S. 143-129(e)(5))

744.3.3 Other governmental units.

State law requires no bidding for cities to buy goods from other cities and towns, counties, school boards, the State, federal agencies, and other units of government, including those located in other States. See section 605 (Contracts with other governmental bodies) for when an interlocal agreement is needed and how to prepare one. (G.S. 143-129(e)(1); G.S. 160A-274)

744.3.5 Piggyback.

If you are buying goods in an amount subject to the formal bid procedure (as you can see from the chart above, that's $90,000 or more), State law does not require bidding to contract with a firm that was awarded a contract for such goods after it went through a formal bid process. This exception can be used even if the original bid did not contemplate that other governmental units might buy from the vendor. This exception applies only when all four of these conditions (a, b, c, & d) apply:

(a) The previous contract was to sell to a governmental unit. As used in the piggyback statute, a "governmental unit" is the United States or any federal agency; the state of North Carolina or any of its agencies; any city, county, or other political subdivision of North Carolina; or any of the 50 states, or any agency or political subdivision of any of the 50 states. This condition is probably satisfied even if the governmental unit with the previous contract is the City of Durham itself.

(b) The previous contract was signed within 12 months of the new contract that you propose to make. It's not completely clear, but the two contracts probably must be signed within 12 months of each other; thus, mere City Council approval within the 12 month window may not suffice.

(c) The vendor is willing to sell to the City on the same or better prices, terms, and conditions.

(d) The goods are the same as those purchased under the contract listed in condition (a). You're allowed only a slight leeway from condition (a). Consult an attorney if there's any doubt on where the leeway ends.

744.3.5.1 Procedure to use piggybacking. The City Council must approve purchases made under this exception at a regular meeting (the normal Thursday Work Sessions are okay for this); the City Manager has no authority to authorize use of the piggyback exception. The motion should state that the City Council finds that waiving bidding for this purchase is in the City's best interest. At least 10 days before the meeting, a notice that a waiver of the bid procedure will be considered in order to contract with a qualified supplier must be published in a newspaper or posted on the City's website. (Resolution 9640 authorizes use of the website or newspaper for this purpose.) A sample notice:

> The City Council of the City of Durham will consider waiving competitive bidding under G. S. 143-129(g) at its meeting on (*date of City Council meeting*), to purchase (*only a brief and general description of goods is needed*) from (*name of vendor*), which has agreed to extend to Durham the same or better prices and terms in its contract with (*name of buyer under existing contract*). For information, contact (*name of City employee, with contact information*).

The law does not require the last sentence of that notice, but it helps in case a competitor with a better deal to offer wants to contact someone with the City before the meeting. (G.S. 143-129(g))

744.3.7 Refurbished office equipment. The law requires the State Chief Information Officer and the State Department of Administration to offer cities the option to buy computer equipment, including printers, scanners, and fax machines, that have been refurbished to like-new condition. The purchase would be from firms that the original equipment manufacturer certifies as able to do this work. The city must report savings quarterly to the State Chief Information Officer. (SL 2013-128)

744.3.9 Specialized equipment. State law specifies that the City of Durham may contract to purchase parts, etc. needed "to properly maintain and keep in repair specialized equipment" after obtaining informal bids regardless of how high the dollar amount is. When there is only one known manufacturer or supplier of such equipment or only one known party who can repair such equipment, then a single informal bid from such supplier, manufacturer, or party is sufficient. A record of all of the bids obtained under this procedure must be kept. The records must be available for public inspection after the contract is awarded. As to whether those records must be confidential or publicly available before the award, consult an attorney. As with all these exceptions to State bid law, the City Manager may have his or her procedures and policies that still need to be complied with. If you use this exception, you do not need to comply with the "single source or sole source exception," and vice versa. (Charter 85)

744.3.11 Single source or sole source.

744.3.11.1 Summary. State law allows cities to disregard State bid law for purchasing goods (not for construction or repair) under any of these three situations: (i) when performance or price competition for a product is not available, (ii) when a needed product is available from only one source of supply, or (iii) when standardization or compatibility is the overriding consideration. When a product is made by only one firm, does this single-source exception apply? Not necessarily. Many products are made by one firm but sold through more than one retailer: Microsoft software, Ford automobiles, and Hershey's chocolate, think of all the name-brand items out there. Store brands are sold by more than one retailer – every Apple store sells iPods, and every McDonald's outlet sells Big Macs, probably except in India. If you can establish that all the outlets sell at the same price and terms, you can fit under the "no price competition" provision, but you need to establish that first.

744.3.11.2 Procedure. To use single or sole source exception, City Council approval is required; the City Manager has no authority to authorize use of the exception. The agenda memo should explain that this exception is being used. The motion will be:

> to authorize the City Manager to enter into a contract with (*name of vendor*) to purchase (*nature of the goods to be purchased*), without competitive bidding, as authorized by G.S. 143-129(e)(6) on

the ground that (*here, you'd insert the ground from (i), (ii), or (iii) above, such as, if it's (ii), the product is available from only one source of supply*), in the amount of $____.

The administration's practice is to add ", in the amount of $____" at the end of the motion, so I added it.

If you're in the informal range, it's easier and quicker to follow the informal bid process than to use the single-source/sole-source exception. (G.S. 143-129(e)(6))

744.3.13 State and federal contracts. State law imposes no bidding requirements on a city when it buys goods from contracts that have been entered into by the State or any State agency, or by the United States or any federal agency. Under this exception, the prices, terms, and conditions voluntarily offered to the city have to be as good as or better than those under the State, federal, or agency contract. You may contact the vendor to see if it is willing to sell to the City. The City enters into a contract with the vendor as usual, and as with the other bidding exceptions, City of Durham requirements still apply. While in theory State law allows this exception (with respect to State and State agency -- not federal – vendors) to apply to construction and repair, it is normally used for purchases of goods. (G.S. 143-129(e)(9) – (9a))

744.3.15 Used items. State law imposes no bidding requirements on the purchase of used goods. Remanufactured, refabricated, and demo items do not fit under this exception. A demo item is used for demonstration and sold at a discount. (G.S. 143-129(e)(10))

744.3.17 Group purchasing program. State law imposes no bidding requirements on the purchase of goods through a competitive bidding group purchasing program. Such as program is a formally organized program that offers competitively obtained purchasing services at discount prices to two or more public agencies. The strictures are: The program must be formally organized when it solicits bids for the goods that the City wants to buy. The "formal" part of the organization can be done via contract or possibly other means. The program must solicit the bids competitively. At least two public agencies must be able to buy through the program. Some proof must be found that the prices offered to the City are discount prices. If you want to use this exception, you need to gather information verifying that all the strictures are met. On the other hand, if the strictures are met, the exception broadens out: The program need not be run in North Carolina; for instance, it can be set up and operate in another State. The City can buy goods (that were competitively solicited through the program) even if no other unit has bought those goods through the program. The City need not be a member of the program or joined to it by contract; for instance, if Los Angeles and Chicago formally organize a program, the City of Durham does not need to sign a contract with those cities. The program need not apply all the laws of competitive bidding that apply to a North Carolina city, as long as one can fairly conclude that the program obtained, through a competitive process, the bids for the goods that the City wants. (G.S. 143-129(e)(3))

744.3.19 Cost is below $30,000. If less than $30,000 of public money is to be spent for the purchase of goods, the State bid laws do not apply.

744.4 CONSTRUCTION AND REPAIR - INCLUDES SOME PURCHASING

744.4.1 Additional capacity to streets, sidewalks, and utilities. When a developer or other person or entity plans to build and dedicate to public use a street, sidewalk, water system, sanitary sewage collection and disposal system, or storm sewer and drainage system, the City may negotiate a contract with that someone to add to the work's size, capacity, or quality without following State bid law procedures. (Charter 84.2)

744.4.3 Blind and severely disabled. Goods, as well as construction and repair work, may be contracted for directly from a "nonprofit center for the blind and severely disabled" (defined by statute) without following State bid law procedures. (G.S. 143-129.5)

744.4.5 Building or other structure to be purchased or leased by city, conditioned on seller's or landlord's duties to improve or supply goods. If the City intends to buy a building or other structure, or to become a tenant in a building or other

structure, and the seller or landlord will reconstruct, repair, or renovate; make improvements; or buy goods, it is possible that competitive bidding is not required to make such an arrangement. (Charter 84.3)

744.4.7 Change orders. State law imposes no competitive bidding requirement on a city's entering into construction and repair contracts when work is underway under a construction or repair contract that was awarded under the formal bid process or under an exception to that process. The change order, which is a contract to amend the original construction or repair contract, must be within the scope of the original project as envisioned by the original contract. (G.S. 143-129(e)(4))

744.4.9 Construction manager at risk. The construction manager at risk (CMAR) system – not to be confused with construction management services -- is a form of contracting under which the city has one contract for construction or repair services. That contract is with the CMAR, which must be a licensed general contractor. The city solicits and selects the CMAR using the procedure for soliciting and selecting architects and engineers. That procedure is addressed in the "how to RFP" memo in CODI under Contracting Guides and Forms. In general, the CMAR itself is not allowed to perform construction work on the city project. Instead, the CMAR, not the city, uses the formal bid process to bid out the construction work. Additional rules apply. The city must report to the State when it uses this method, as explained in section 796 (Reporting to State on contracting under non-traditional methods) below. (G.S. 143-129(e)(11) and G.S. 143-64.31)

744.4.11 Design and construction of infrastructure on CIP. A city may make an agreement with a private developer or property owner for the design and construction of infrastructure that will serve the developer or property owner, if the infrastructure is on the city's capital improvement plan. The city is exempt from State bid laws but the developer or property owner must solicit bids in the same way the city would have. The City Council must adopt an ordinance to make this work. (G.S. 160A-499)

744.4.13 Design-build for police buildings and 9-1-1 facility – Durham only. The City may use the design-build process and variants of design-build for the design and construction of a police headquarters and annex facility, two police service centers, and a 9-1-1 facility. The "best qualified" design-build team is to be selected, instead of the usual lowest responsible bidder. Consult an attorney for details. (Charter 85.1; section 4 of SL 2013-386)

744.4.15 Design-build – statewide.

744.4.15.1 Summary. The design-build method lets a city start a project sooner than under the traditional competitive bidding processes. An advantage is that this method can avoid the question of whether it's the designer or builder who is responsible for a problem. Under the design-build method that applies throughout the state -- as contrasted with the Design-build for Police Buildings and 9-1-1 Facility – Durham only -- the city selects and contracts with a design-builder based on the design-builder's qualifications to design and construct the project. A design-builder is one or more firms holding the relevant licenses that are required for the particular project (general contracting and either architectural or engineering). For instance, if the design services can be done by an architect, then an architect could be the design-builder that signs the contract with the city, and the architect would subcontract with a licensed general contractor for the construction work. A disadvantage of this method is the loss of the relationship between the architect and the owner (the city).

744.4.15.2 Procedure. To select the design-builder, the city does not prepare detailed specifications first as in traditional competitive bidding for a construction firm. Instead, the city establishes detailed criteria for the project. Among other things, the criteria must include a cost-benefit analysis of using design-build instead of separate-prime, single-prime, and CMAR. The city publishes notice of a request for qualifications in the same way it solicits architects and engineers, and continues with the process used in selecting an architect or engineer. (See section 728 (Looking for an architect, engineer, surveyor, or construction manager at risk?).) In using that process, I recommend at least a 10-day notice, which may be placed on the city's webpage. The city needs to receive at least three responses or it must publish a second time; regardless of the number of responses, the law does not require a third

publication. As with selecting architects, engineers, etc., the city cannot solicit project cost estimates in the RFQ, and it can negotiate contract price only after ranking based on qualifications. The city ranks the three most qualified respondents. If negotiations with the highest-ranked respondent are not successful, the city may negotiate with the second-highest ranked, and so on, until the city rejects all proposals or selects a design-builder to contract with. As with selecting of architects, engineers, etc., an exemption is available when the fee is under $50,000, though it is unlikely to be practical in the design-build context because it's not likely that $50,000 would be enough to buy the needed design services and the construction work. It is possible, however, that the exemption is available if the non-construction services are under $50,000 and that the cost of the construction doesn't matter in obtaining an exemption, but I am unsure.

744.4.15.2.1 Procedure, continued. Each design-builder must certify that all members of its design-build team who are licensed design professionals, including subconsultants, were selected as required under the Mini-Brooks Act. The design-builder selected by the city must provide performance and payment bonds. The bonds must be for 100% of the contract amount for each contract more than $50,000 on projects costing over $300,000. Once under contract, the design-builder works with the city to design the project, usually by preparing a preliminary design followed by detailed specifications after the city's approval of the preliminary design. The design work can be done in phases, allowing construction to begin while design work continues, or the design work can be finalized before construction starts. After contract award, the design-builder may substitute key personnel (the team of licensed contractors, licensed subcontractors, and licensed design professionals identified in the design-builder's response to the RFQ) but only after obtaining the city's written approval. This requirement to obtain the city's approval does not apply if the design-builder selects the contractors and subcontractors under the competitive bidding requirements of Article 8 of N. C. General Statutes Chapter 143. (G.S. 143-128.1A; G.S. 143-64.31)

744.4.15.2.2 Reporting. The city must report to the State when it uses this method, as explained in section 796 (Reporting to State on contracting under non-traditional methods).

744.4.17 Design-build bridging.

744.4.17.1 Summary. Instead of using the formal name, the design-build bridging construction method, for convenience I'll call it the "bridging method." The city writes a report containing information required by the bridging statute, including on whether the city can effectively use the bridging method for the particular project that it has in mind and why it wants to use the method. The city selects or names a design professional, who will remain on-duty for the duration of the project. The design professional prepares limited drawings and specifications, to the point that they are sufficient to allow a design-builder to bid on them. (Those are for 35% of the project.) The city issues an RFP containing those drawings and specs and other information, seeking bids from design-builders. The design professional already selected or named cannot bid. Design-builders submit bids with their prices to provide remaining design and design services as well as to construct the project. It may do some or all of the construction work with its own employees, but if it engages subcontractors for construction work, it must use a competitive bid process in order to select them. The bridging method gives up some of the speed that the Design-build – Statewide method is supposed to offer, while the bridging method preserves some of the relationship between the architect and the owner (the city) that is lost in the Design-build – Statewide method. That's the big picture.

The bridging method differs from the "Design-build – Statewide" method (discussed in section 744.4.15) in two significant ways. First, in the bridging method, the city contracts separately with an architect or engineer to design 35% of the project and then solicits proposals from design-build firms based on the 35% design. The city then contracts with a design-builder to complete the design and perform construction. The 35% design documents, called "design criteria" in the new bridging method statute, act like a bridge between the initial project concept and the design-build phase. The bridging documents provide enough project requirements in preliminary drawings and specifications to enable design-build firms to submit bids. Second, unlike "Design-build - Statewide," the RFP for design-build services solicits the dollar amount of the fees, and the city awards the contract based on the lowest responsive, responsible bidder standard.

744.4.17.2 Procedure. To start using the bridging method, the city establishes criteria for the project. Among other things, the criteria must include a cost-benefit analysis of using the bridging method instead of separate-prime, single-prime, and CMAR. Next, the city has an architect or engineer design 35% (apparently it's no more and no less than 35%) of the project. The designer may be a city employee; if not, the designer is selected and placed under contract in the way an architect or engineer is normally selected and placed under contract. (See section 728 (Looking for an architect, engineer, surveyor, or construction manager at risk?).) In using the bridging method, I am unsure whether a city can exempt a project from that statutory selection process, because it is unclear whether the $50,000 exemption amount counts construction services. If construction services are counted, as a practical matter the construction cost will always exceed $50,000 so no exemption would be available. On the other hand, if only non-construction services are counted, the non-construction services could come in under $50,000 and make the exemption available. The 35% design, which is called the "design criteria," or the "bridging" documents, must contain nine items specified in the statute.

744.4.17.2.1 Procedure: RFP; selection of design-builder. Using the design criteria, the city issues an RFP for the completion of the design and for the construction of the project. The law specifies minimum information that must be in the RFP. Among other things, it must require each bidder to state the amounts of their fees in a sealed envelope with the rest of its response. Design-builders will respond to the RFP. The city's designer (whether a city employee or a separate firm) may neither submit a response to the RFP nor provide design input to a response to the RFP. Once the city receives the proposals, a hybrid process is done, which winnows the field based on qualifications without regard to fee, and which finally selects based on the lowest responsive, responsible bidder standard. If we assume that the construction work counts towards the $50,000 exemption, as a practical matter an exemption will not be available because the construction cost will always exceed $50,000, but if only the designer's services count, it can be available. If that exemption is used, I'd recommend at least a 10-day notice, which can be placed on the City's webpage, and State law does not require further publication.

744.4.17.2.2 Procedure, three responses. The city needs to receive at least three responses or it must publish a second time. Regardless of the number of responses, the law does not require a third publication.

744.4.17.2.3 Procedure, certification by bidders. Each bidder must certify that all members of its design-build team who are licensed design professionals, including subconsultants, were selected as required under the Mini-Brooks Act. To increase the likelihood that they will use the correct selection process, ask that the certification be included in the firm's proposal rather than submitted later.

744.4.17.2.4 Procedure, selection of first-tier subcontractors. In engaging its first-tier subcontractors, the selected design-builder (the one that the city contracts with) must apply competitive bidding requirements, pretty much as if it were a city. I think that means, for instance, if the first-tier subcontractor's construction or repair work is in the informal range, they must use informal or formal bidding, and if it's in the formal range, they must use formal bidding. To keep things simple (it's too late for that!), design professionals are not considered first-tier subcontractors for purposes of this requirement.

744.4.17.2.5 Procedure; bonds. The selected design-builder must provide performance and payment bonds. The bonds must be for 100% of the contract amount for each contract more than $50,000 on projects costing over $300,000.

744.4.17.2.6 Procedure; substitution of personnel. After contract award, the selected design-builder may substitute key personnel (the team of licensed contractors and licensed design professionals identified in the design-builder's response to the RFP) only after obtaining the city's written approval. (G.S. 143-128.1B; G.S. 143-64.31)

744.4.17.2.7 Reporting. See section 796 (Reporting to State on contracting under non-traditional methods).

744.4.19 Emergencies.

744.4.19.1 What Is an emergency? In the case of an emergency "involving the health and safety of the people or their property," cities are exempt from the State law requirement to competitively bid out purchases or construction or repair. This hardly ever applies. To count, the emergency must exist, not a potential emergency. If the condition can be foreseen in time to prevent harm, or if there's time to avoid using this exception, there's no emergency. When using this exception, the City Council should adopt a resolution, or the City Manager should write a memo to file, finding an emergency and stating the facts that support that finding. Consult an attorney if there's any doubt whatsoever in any shape or fashion. Or just consult us anyway.

744.4.19.2 It's rarely worth it. The intent behind this exception is to let a city enter into contracts quickly when there's a pressing need to act. There's not necessarily a real gain to using the exception even when there is a true emergency. For example, a lease, which doesn't require bidding, may get use of equipment in a hurry. If you're in the informal range for purchasing, construction, or repair, you can probably get informal bids from several vendors without having to decide whether you have a true emergency. For purchases in the formal range, the only big thing this exception gives you is the ability to avoid waiting seven days after posting the ad on the website. For construction and repair in the formal range, this exception lets you avoid waiting that seven days as well avoid the requirements for bonds (G.S. bid, performance, and payment) and the 3-bid rule; you'd also be exempt from the separate specifications requirement for buildings over $300,000, but that's not likely to apply. You also do not speed anything up by the fact that the emergency exception also exempts the City from the remaining requirements under State bid law, such as sealed bids and public bid openings. If the City Council has not delegated authority to the City Manager to approve a contract, even a true emergency will not escape the need for City Council approval. If the City may look for reimbursement, for example from FEMA for hurricane or ice storm damage, it may have to go through a competitive bid process even if State law wouldn't require it. (G.S. 143-129(e)(2))

744.4.21 Guaranteed energy savings contracts. These are contracts "for the evaluation, recommendation, or implementation of energy conservation measures, including the design and installation of equipment or the repair or replacement of existing equipment or meters, in which all payments, except obligations on termination of the contract before its expiration, are to be made over time, and in which energy savings are guaranteed to exceed costs." Particular rules and procedures apply. IMHO these contracts cost more, in money and in aggravation, than run-of-the mill contracts for these goods and services. In 2013 the law was changed to make these deals awful instead of terrible. It includes a requirement that the State Energy Office review the proposal of the contractor chosen by the city before the award is announced. You may be able to read more about these contracts on the web page of the North Carolina chapter of the Energy Services Coalition, though I cannot vouch for the quality of its information. (G.S. 143-64.17 et seq.; G.S. 143-129(e)(8); G.S. 143-129.4)

744.4.23 Intersection or roadway improvements ancillary to private project. A city may contract with a developer or property owner, or with a private party under contract with the developer or property owner, for public intersection or roadway improvements that are adjacent or ancillary to a private land development project. The city may enter into its contract without following State law regarding selection of a designer or for bidding the construction work if the public cost will be $250,000 or less and the city determines that: (i) the public cost will not exceed the estimated cost of providing for those public improvements through either city employees or as if the city had contracted with the designer and the construction firm after following the usual procedures under State law; or (ii) it would be impracticable to coordinate the city's improvements with the private land development improvements, if separately constructed. (G.S. 160A-309)

744.4.25 Labor by city employees. Without following State bid law procedures, construction and repair work may be done by permanent city employees if the project (including labor and goods) cost does not exceed $125,000 or if the labor cost does not exceed $50,000. The law may mean that the authority to approve this work must be given by City Council and cannot be delegated to the City Manager. (G.S. 143-135)

744.4.27 Public enterprise improvements.

A city may contract with a developer or property owner, or with a private party under contract with the developer or property owner, for "public enterprise" (explained below) improvements that are adjacent or ancillary to a private land development project. The public enterprise improvements may be constructed on private property or the city's property. The city's contract must allow the city to reimburse the private party for costs associated with the design and construction of improvements that are in addition to those required by the city's land development regulations. The city may enter into its contract without following State law regarding selection of a designer or for bidding the construction work if the public cost will be $250,000 or less, and the city finds either (i) or (ii): (i) the public cost will not exceed the estimated cost of providing for the improvements through either city employees or as if the city had contracted with the designer and the construction firm after following the usual procedures under State law; or (ii) the coordination of separately constructed improvements would be impracticable.

Public enterprise improvements includes stormwater management programs and these systems: water; wastewater collection, treatment, and disposal; gas production, storage, transmission, and distribution; public transportation; solid waste collection and disposal; off-street parking; and structural and natural stormwater and drainage. (G.S. 160A-320)

744.4.29 Public-private project.

If a city determines in writing that it has a "critical need" for a capital improvement project, the city may acquire, construct, own, lease as lessor or lessee, and operate or participate in the acquisition, construction, ownership, leasing, and operation of a "public-private project," or of specific facilities within such a project, including the making of loans and grants from funds available to the city for these purposes. A "public-private project" is a capital improvement project undertaken for the benefit of a city and a private developer pursuant to a development contract that includes construction of a public facility or other improvements, including paving, grading, utilities, infrastructure, reconstruction, or repair, and may include both public and private facilities.

744.4.29.1 Some prerequisites.

From reading the whereas clauses in the statute, I conclude that the words "critical need" probably mean a "public need that cannot otherwise be met." For this method to apply, the private developer must provide at least 50% of the financing for the total cost of the project. Local Government Commission approval is needed if the contract is a capital or operating lease.

744.4.29.2 Advertising and selection.

After advertising – this advertising must be in a newspaper -- to solicit private developers, the city selects one or more developers with which to negotiate the contract, and it may contract with the private developer the city determines is best qualified.

There is a statute (the Mini-Brooks Act, in this paragraph "the Act") that establishes the procedure described in section 728 (Looking for an architect, engineer, surveyor, or construction manager at risk?). A clause of the Act says that the Act applies to public-private partnership construction services. For that clause to work smoothly or understandably, the public-private partnership construction contracts statute (G.S. 143-128.1C) should explain how to use G.S. 143-128.1C with the Act. The parallel statutes that are parallel with the public-private partnership construction contracts statute, such as G.S. 143-128.1A (the Design-build – Statewide statute), explicitly explain how to use their provisions in conjunction with the Act. However, the public-private partnership construction contracts statute does not explain how to use its provisions in conjunction with the Act. Maybe with another reading of G.S. 143-128.1C, all will become clear to me.

744.4.29.3 Parties' duties.

The development contract may require the developer to be responsible for some or all of the construction, purchase of materials and equipment, and compliance with HUB participation requirements. It may require the developer and the city to use the same contractors; if it does so, then provisions to assure work is done and purchases are made at a reasonable price must be included. Except in special circumstances, the private developer cannot perform design or construction work on the project.

744.4.29.4 Design-build option.

The project may use the design-build construction delivery method.

744.4.29.5 Reporting. The city must report to the State when it uses this method, as explained in section 796 (Reporting to State on contracting under non-traditional methods). (G.S. 143-128.1C; G.S. 143-64.31)

744.4.31 Solid waste management and sludge management facilities.

There's an alternative procedure that can be used instead of the bid laws for construction of solid waste management facilities and sludge management facilities. The alternative procedure is not available for construction of ancillary facilities, such as water and sewer lines to the solid waste management facilities or to the sludge management facilities. (G.S. 143-129.2)

744.4.33 Technology. Well. This is complicated. If you plan to pay a vendor to design custom software, that can be done as a services contract. Hardware is commonly leased, and a true lease is not subject to State bid laws. A true lease is in contrast with a document called a "lease-purchase" but which is really just a way to pay installments towards the purchase. For more on lease-purchases, please see section 330 (Lease-purchase contracts). If the City will spend less than $30,000, no State law requirements apply, though City of Durham requirements may apply, as discussed in section 700.2 (State law and City requirements). If the City will spend $30,000 or more to buy hardware, or a software program that's not customized, or a combination of hardware and software, you may consider competitive bidding and exceptions to competitive bidding. The exceptions to competitive bidding most likely to be useful are piggybacking, specialized equipment, single source, State and federal contracts, group purchasing program (all of which are discussed in section 744.3 (PURCHASING EXCEPTIONS TO STATE LAW)), and the two special options (Best value and ITS) presented below:

744.4.33.1 Best value. You can use this exception to State bid laws if the contract will buy what the statute refers to as "information technology," which it defines as "electronic data processing goods and services, telecommunications goods and services, security goods and services, microprocessors, software, information processing, office systems, any services related to the foregoing, and consulting or other services for design or redesign of information technology supporting business processes."

744.4.33.1.1 RFP, award, and negotiations. Under the Best Value procedure, you prepare an RFP that identifies the factors to be considered in awarding the contract. You give notice as if this were a formal bid, State law requiring that you give at least seven days' notice in a website or newspaper, largely as if it were a formal bid. (Consult an attorney as to how much of the formal bid procedure must be followed.) The award must go to the proposer that submits the best overall proposal, considering the factors identified in the RFP. That's instead of the lowest responsible bidder standard for formal and informal bids. You may negotiate with any proposer in order to obtain a final contract that best meets the City's needs. Negotiations cannot alter the contract beyond the scope of the original RFP in a manner that (i) deprives the proposers or potential proposers of a fair opportunity to compete for the contract; and (ii) would have resulted in the award of the contract to a different proposer if the alterations had been included in the RFP.

744.4.33.1.2 RFP factors. The factors identified in that RFP can be created by you or taken from this list: cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives (here, you'd have to write out the objectives) and maintains industry standards compliance.

744.4.33.1.3 Confidentiality. The City must keep proposals confidential until the contract is awarded. In addition, if a proposal identifies material that it claims should be kept confidential (by calling it a trade secret or proprietary information, or the like), it may be necessary to keep that confidential after the contract award; consult an attorney on confidentiality issues. (G.S. 143-129.8)

744.4.33.2 ITS contract. If the State's Office of Information Technology Services has entered into a contract for "information technology" (as defined in section 744.4.33.1 (Best value)), the City can

buy from the contract. This is like buying off a State or federal contract, described in section 744.3.13 (State and federal contracts) above. (G.S. 143-129(e)(7))

744.4.35 Urban development. The City may negotiate a contract to provide for building of a public improvement (building, utility, etc.) with a developer that is building private improvements, when the two components are part of an urban project. Under this exception it's typical to use one general contractor to building the public and private improvements. A classic example is construction of the North Parking Deck in conjunction with the privately-owned American Tobacco project. We also used this exception to re-build streets in West Village. You'll need an attorney to work through all the rules. (G.S. 160A-458.3 or Charter 108.1)

744.4.37 Cost is below $30,000. If public money less than $30,000 is to be spent for construction or repair, the State bid laws do not apply.

744.4.39 End of exceptions. We may be at the end of the list. If you think I left out an exception, let me know. I left gaps in numbering subsections to leave room for more exceptions.

746 Transfer of city property; trade-ins. The law places limits on how a city may transfer or sell assets or other property to a private company, even if the deal is great for the city or in the context of a purchase or a construction or repair project.

When a city is purchasing goods, the bid documents may propose a trade-in; the documents would invite bidders to name a dollar amount as an offer to buy specified personal property owned by the city, and the city may take the amount offered into consideration when awarding the purchase contract.

If the idea is to transfer property in a way that does not match that trade-in scenario, consult an attorney.

748 Summary of formal bidding. When "formal bidding" is required, the City must advertise in the newspaper or on the City's web site (see section 798 (Soliciting bids, including advertising)). Sealed bids are required, which means that faxes and emails do not count as bids. Bidders must submit bids by the deadline. If construction or repair work is in play, bid bonds or deposits are required (see section 756 (Bid bonds and bid deposits)), and performance and payment bonds may be required (see section 902.2.4 (Performance bond and payment bond)). In part because the terms of the contract can affect the price that a bidder will submit, the contract needs to be ready to be shown to potential bidders when you start the bidding process. That is usually done by including the contract as part of the bid package. The bid process involves preparing the contract, specifications, plans, etc. in advance, so that firms can bid on the same terms. That can allow price and the bidders' experience and ability to be the only factors setting one bidder apart from another.

750 Bids to remain valid for fixed period. When you formally bid, specify that bids cannot be withdrawn for a specified period, such as 60 days, except to the extent otherwise required by law. This will allow a bid to wend its way through more than one City Council cycle, and it will accommodate the 3-bid rule, discussed in Section 762 (Three-Bid Rule). To keep the bids open long enough, add this sentence to the bid documents or the bid form: "Except to the extent allowed by statute, bids shall not be withdrawn and bids shall remain subject to acceptance by the City for a period of (*insert number*) days after the bid opening."

752 Alternates. When alternates can be bid, make your bid forms clear so that anyone can tell what alternates may be awarded. For instance, can the City award a base bid, or a base bid plus exactly one alternate, or a base bid plus either alternate A or alternate B plus either alternate C or alternate D, or a base bid or alternate A or alternate B? Second, make clear which items must be bid in order for a bid to be considered. If a bidder writes "no bid" for alternate C, do you need to reject the bid as nonresponsive? Don't make anyone guess. Write it so that an ordinary person can understand. Otherwise, you may have to reject needlessly.

754 Safety record. When you intend to solicit for construction or repair work by informal or formal bidding, see Bidder Safety Record Review (Finance Policy 603-1, revision 1, issued 4-12-2012).

756 Bid bonds and bid deposits. For construction and repair contracts required to be bid formally, State law stipulates that the bid be accompanied by a deposit of cash, a cashier's check, a certified check, or a bond, of at least 5% of the bid. This requirement does not apply to purchases of goods. A bid bond is in CODI,

as GBA Appendix L. Other bid bond forms may be acceptable, but Appendix L can be counted on, so bid packages should tell bidders that use of that form is recommended, and that other forms may be rejected if they are not equivalent. Bid bonds are different from payment bonds and performance bonds. Bid bonds and bid deposits protect the City when the City awards the contract but the successful bidder fails to sign the contract.

758 Withdrawing bid. If a formal bidder wants to withdraw its bid, contact our office immediately. Certain steps must be taken. Don't wing it.

760 Informal bidding records. Under informal bidding, the City must keep a record of all bids submitted, and the bids must be kept confidential until the contract has been awarded.

762 Three-bid rule. When State law requires formal bidding for construction or repair, the contract cannot be awarded on the first round unless three bids are received. The 3-bid rule has wrinkles, especially when multi-prime bidding is involved, so consult us as needed. When you know you cannot award (for example, you received only one or two bids after the first advertisement), it is best not to open the bids that you received. What if you receive three bids in the initial round and you *think* one of them may be deficient but you're not sure it's deficient? When it is not clear whether to open the bid, as a general rule you should open it. I say that because, if you fail to open any of the bids at bid-opening time, you may have to reject all bids and rebid. Even if you think you cannot or will not award, the law does not prohibit opening bids when bid-opening time has arrived. Some (but not all) defective, nonresponsive bids, even from nonresponsible bidders, count as bids for purposes of the 3-bid rule; so even though you would not award to them, they sometimes can let you award to another bidder without the need to solicit a second round of bids.

The only reason not to open is that bidders dislike having their bids exposed needlessly, and it is fine to accommodate their shyness if doing so does not interfere with your project. Not opening a bid may be no problem if you do not mind having to rebid. (That's not too many negatives, is it? Or is it not?) Consult an attorney as needed.

764 Prequalification for construction. The City has used a process it called "prequalification" for some construction projects. Times change. 2014 amendments to a State statute, G.S. 143-135.8, changed the prequalification landscape. Prequalification as defined by the statute cannot be used on some solicitations and can be used for others only if particular steps are taken. Unless those steps are taken, do not use prequalification, whether it is the process set up by the EO/EA Department or otherwise. Consult an attorney before using prequalification.

766 Buildings. If the contract will be for the "erection, construction, alteration, or repair of a building" (that's a quote from State law), calculate the cost of the work under section 766.1. Depending on dollar amounts that you come up with, various parts of this section 766 may apply.

766.1 Dollar amount: what to count. In calculating the relevant dollar amount for purposes of this section 766, exclude costs of purchasing and erecting prefabricated or relocatable buildings or portions of buildings, but include the portion of the work that must be performed at the construction site.

766.2 Choice of contracting method. A city may use one of the following contracting methods: (a) multi-prime bidding, also known as separate-prime bidding; (b) single-prime bidding; (c) dual bidding; (d) construction management at risk contracting; (e) a method authorized by the SBC, which is discussed in section 766.3.4 (Exceptions); (f) design-build for police buildings and 9-1-1 facility – Durham only; (g) design-build – statewide; (h) design-build bridging; and (i) Public-private Project. The methods named in f – i are discussed in section 744.4 (CONSTRUCTION AND REPAIR - INCLUDES SOME PURCHASING).

766.3 Buildings over $300,000. If the entire cost (not the estimate before bidding) of the work will exceed $300,000, separate specifications must be prepared for *each* of the following four enumerated branches *regardless of how much the work under the branch is estimated to cost*. I think, but do not know, that costs for other work and services, such as architect's fees, do not count toward the $300,000.

(1) Heating, ventilating, air conditioning and accessories (separately or combined into one conductive system), refrigeration for cold storage (where the cold storage cooling load is 15 tons or more of refrigeration), and all related work.

(2) Plumbing and gas fittings and accessories, and all related work.

(3) Electrical wiring and installations, and all related work.

(4) General work not included in the above three branches relating to the erection, construction, alteration, or repair of any building.

That's the law, even when you're seeking only single-prime bids. You may add other branches if you like. If you seek only single-prime bids, your specs will not allow separate bids under any of the branches, but State law says that separate specification for the four branches are still needed. Thus, the solicitation for bids may be (1) multi-prime (MP), or (2) single-prime (SP), or (3) dual bidding (DB), which is MP *and/or* SP.

766.3.1 Multi-prime, single-prime, or dual bidding. When a city solicits bids for individual branches of work, it is using multi-prime (MP) bidding. It is soliciting for separate contracts between the city and contractors. In single-prime (SP) bidding, each bidder proposes to be responsible for all of the work. Dual bidding (DB) gives bidders the option of bidding for the separate specification work or the single-prime work, or both. The advertisement should specify which branches (HVAC, plumbing, electrical, general, or – if you like -- others) can be bid separately and which method is being used (multi-prime bidding, single-prime bidding, or dual bidding). The bid forms must clearly indicate which branch the bid is for; do not assume the bidders will do that for you unless you make it obvious both that they need to do so and how to indicate which branch they're bidding on. A firm may submit a bid for one branch or for more than one branches. In SP, if the City estimates that a branch's estimated cost will be less than $25,000, it may be included in another branch's contract; still, that doesn't absolve the City from the need to have separate specifications even for the under-$25,000 branch. When dual bidding is used, it is common for a firm to submit two bids, one for single-prime and one for the general contracting branch. Each contract must also clearly specify which branch the particular contractor will perform.

766.3.2 Identification of subcontractors. Single-prime bids solicited under section 766.3 must identify in the bid the subcontractors selected for all the branches, except for branches for which there is no work at all. If the City awards the contract, the single-prime contractor cannot substitute a different subcontractor unless (a) the single-prime contractor gives the City a good reason and the City permits the substitution, (b) the original proposed subcontractor's bid is nonresponsible or nonresponsive, or (c) the original proposed subcontractor refuses to sign the subcontract.

766.3.3 Dual bidding award factors. If dual bidding is used, the City may consider the cost of construction oversight, time for completion, and other factors it considers appropriate. For instance, a reasonable amount may be added in as an estimate of staff cost to administer multi-prime contracting in order to fairly compare that method with single-prime contracting. The reason is that, in single-prime contracting, the single-prime contractor does administrative duties that fall on the City when multi-prime contracting is used.

766.3.4 Exceptions. If a project may not be able to be completed by following the rules in this section 766, it is possible but not easy to be granted dispensation from them. Relief involves appeal to the State Building Commission. The SBC cannot grant relief from the need to competitively bid. For instance, if State law requires formal bidding, the SBC cannot avoid that requirement. Some of the options available under section 766.2 (Choice of contracting method) provide exemptions from formal bidding, and if they are used, an appeal to the SBC will not be needed.

768 Protests. The City's formal protest procedure applies to contracts in which the City sought bids, proposals, or qualifications from more than one person (which includes companies and other firms), if the contract goes to the City Council with a recommendation of award. The Finance Policy that declares the procedure requires the responsible City staff person to post a notice of intent to make a recommendation to City Council. That policy tells disgruntled bidders to protest promptly or lose the right to protest. The policy is designed to take care of protests early and may prevent later complaints that can disrupt and delay. The policy is FP 113-1 and is called "Administrative Review of Recommendations for Contract Award." It is on the Finance Department's CODI site.

790 SDBE. The Equal Business Opportunity Program (EBOP) ordinance, which appears in the City Code as Article III of Chapter 18 (beginning with Section 18-50), replaced the M/WBE (Minority and Women Business

Enterprises) ordinance, which until 2008 was Chapter 26 of the City Code. The EBOP applies to all bids and contracts for the purchase of goods (apparatus, supplies, materials, or equipment), construction, repair, and services.

790.1 Goals. To implement the EBOP, sometimes called the SDBE ordinance, the Department of Equal Opportunity/Equity Assurance (EO/EA) Department sets project-specific percentage goals for participation by small disadvantaged business enterprises (SDBEs), broken down into Minority SDBEs and Women SDBEs. The EBOP ordinance directs bidders to supply certain information, but it does not direct the successful bidder to meet the percentage goal or to be closer to the goal than other bidders. However, bidders failing to meet established participation goals are required to demonstrate good faith efforts to meet the participation goals. The time needed for that demonstration can add time to the process for the selection of the winning bidder.

790.2 Pre-bid conference. Ask EO/EA about sending a staff member to explain the EBOP requirements at pre-bid conferences.

790.3 Advertisement, SDBE forms, and SDBE notice. It is typical for EO/EA to ask you to insert a sentence to this effect in your newspaper or web advertisement: "Small Disadvantaged Business Enterprise (SDBE) participation goals are Minority SDBE (*insert percentage*) and Women SDBE (*insert percentage*)." While the contract should not include SDBE data sheets, questionnaires, or forms, the bid documents may need to include them. If the contract is covered by the EBOP ordinance, the contract should include the following paragraph, which can be copied and pasted from either of the pattern contracts in GBA Appendixes A and M.

> SDBE. The Contractor shall comply with all applicable provisions of Article III of Chapter 18 of the Durham City Code (Equal Business Opportunities Ordinance), as amended from time to time. The failure of the Contractor to comply with that article shall be a material breach of contract which may result in the rescission or termination of this contract and/or other appropriate remedies in accordance with the provisions of that article, this contract, and State law. The Participation Plan submitted in accordance with that article is binding on the Contractor. Section 18-59(f) of that article provides, in part, "If the city manager determines that the Contractor has failed to comply with the provisions of the Contract, the city manager shall notify the Contractor in writing of the deficiencies. The Contractor shall have 14 days, or such time as specified in the Contract, to cure the deficiencies or establish that there are no deficiencies." It is stipulated and agreed that those two quoted sentences apply only to the Contractor's alleged violations of its obligations under Article III of Chapter 18 and not to the Contractor's alleged violations of other obligations.

790.4 Communicating with EO/EA. When you communicate on a project to the EO/EA Department, you should address it to the Director until you are told that correspondence on that project should go to a member of the EO/EA staff. If you like, you may also send a copy to an EO/EA staffperson.

790.5 Planning. To avoid surprise or delay, consult the EO/EA Department to estimate how much time will be needed to comply with SDBE requirements.

790.6 Minority business participation. In case you are interested, this subsection tells you why the EBOP ordinance lets you disregard a state statute and a City resolution. Two State statutes (N.C.G.S. 143-128 and 143-128.2) impose various minority business requirements on building projects, but the City's EBOP ordinance implements them, so you need not be concerned about those State statutes. By the same token, the City Council, on January 2, 1990, adopted "Resolution to Establish a Verifiable Percentage Goal for Participation by Minority Business in the Awarding of Building Construction Contracts Awarded Pursuant to N.C.G.S. 143-128." The EBOP ordinance is considered to have, in effect, replaced that 1990 resolution, so you need not be concerned about the resolution, either.

796 Reporting to State on contracting under non-traditional methods.

When a city contracts with a construction manager at risk, a design-builder (including under the design-build bridging method), or a private developer under a public-private partnership as provided by G.S. 143-64.31, the city must report to the N. C. Department of Administration (DOA) within 12 months after the city starts to occupy the project. DOA regulations will be issued to specify what needs to be in the report.

798 Soliciting bids, including advertising.

798.1 Formal bidding. When formally bidding, State law requires that an advertisement of the bid appear at least once in a newspaper having general circulation in the city or (if the City Council has authorized it) that the advertisement appear on the Internet. By Resolution 9640, adopted April 6, 2009, the City Council approved placing advertisements on the Internet instead of in a newspaper when the administration determines that use of the Internet can save money. See section 722 (City's webpage), above, on the mechanics of Internet advertising. If you ever somehow find it necessary to run a newspaper advertisement, see section 798.14 (Newspaper rather than Internet advertisement).

798.2 Informal bidding. State law does not require advertising (newspaper or Internet) to solicit informal bids.

798.3 Federal or State requirements. If a contract is subject to a grant agreement, or to federal or state regulations, see if the grant agreement or the regulations specifically require a newspaper advertisement as contrasted with only that notice be given in accordance with applicable State law. If those documents are silent on the what, when, and how, but they require a newspaper advertisement, publish the advertisement once under the 7-day rule in section 798.5 (How far before bid opening must the advertisement appear?), or longer if SDBE considerations call for more time. If they simply require compliance with State law, Internet advertising satisfies the advertising component of State law.

You pretty much have to comply with whatever the grant agreement says unless it is contrary to law.

798.4 City requirements. The previous sections speak of State law. The City Manager, however, requires Internet advertising in some instances not required by State law. That is the City Manager's prerogative, since there can be times when State law does not go far enough.

798.5 How far before bid opening must the advertisement appear? State law requires seven days – that's seven full days -- to lapse before the time specified for the opening of the bids. For example, if the advertisement appears on a Tuesday, regardless of the time of day, the bid opening cannot be on Tuesday of the next week. It can be on Wednesday or later. Read the advertisement when it is posted to make sure that it is correct and keep a copy for your file. If you cut it close by running the advertisement the minimum number of days before bid opening and discover an error, you may have to run a corrected advertisement and reschedule the bid opening. However, please read:

798.5.1 SDBE. Years ago, the City's M/WBE ordinance generally required advertisements to appear at least 30 days before bid opening. That ordinance has been repealed. Its successor, the current EBOP ordinance, contains no such provision. Finance Policies 501-1, 502-1, 504-1, and 505-1 say: "In accordance with the Equal Business Opportunity Program (EBOP) ordinance, advertising on formal bids should be for at least 30 days. If there are no certified Small or Disadvantaged Businesses available to bid on a particular contract, or if circumstances necessitate a shorter period, the 30-day requirement can be shortened by the Equal Opportunity/Equity Assurance Director to a period of no less than seven full days."

The EO/EA Department advises that, on every project in which SDBE goals have been set, it expects all formal bids to be solicited with an Internet advertisement appearing at least at least 30 days before bid opening. Upon request, EO/EA will consider reducing that period to two weeks before bid opening; requests for a shorter period are referred to the City Manager's office. In the case of formal or informal bidding without SDBE goals, EO/EA does not expect a newspaper advertisement.

My personal interpretation of those two quoted sentences from those Finance Policies is that they are attempting only to tell staff how to comply with EO/EA advertising requirements, and that the EO/EA Department's statements on advertising will supersede those two quoted sentences. But the Finance Department interprets its own policies, and they can require more than the law requires. The policies must not conflict with the law, but even if the policies require more days of advertising than the law requires, that would not conflict with the law.

See section 790.3 (Advertisement, SDBE forms, and SDBE notice) for an SDBE-related sentence to place in advertisements.

798.6 Posting a second advertisement. After your Internet advertisement appears but before the bid opening date, things can change. You may need to change the Internet advertisement in order to postpone the bid opening date, to correct a mistake, or because of changes in the work. If you publish a changed advertisement, you generally need to think of the changed advertisement as if it is to be read by potential bidders who have not already heard of the project; that is, by potential bidders who did not see the first advertisement. If it is too late for such potential bidders to do things that bidders would need to do, you probably need to make some changes; one of those is to set the bid opening date at least seven full days from the date the changed advertisement appears. You also need to think of the effect on the bidders that have already seen the first advertisement and have tried to comply with its requirements. For instance, if the first advertisement said that a pre-bid conference is mandatory, and that conference was held before the changed advertisement appears, the changed advertisement should state that the pre-bid conference is optional or it should give a time for another mandatory pre-bid conference after the posting of the changed advertisement.

798.7 Pattern advertisements. Here are three pattern advertisements for most cases. The first advertisement is for the purchase of goods. The second and third are for construction or repair. If you're formally bidding, the law requires most of what's in those three advertisements but does not require more unless something, such as section 798.3 (Federal or State requirements), section 798.9 (Setting the time of bid opening), or section 798.10 (Non-collusion), tells you that you may need something added to an advertisement.

Think of the advertisement as a commercial; an effective commercial is short, as a way to alert potential bidders to the essentials. Add to the legal minimum only what's needed to help firms decide whether to read the bid package. If the advertisement is long, they may get lost in the details before deciding whether they're interested in the project. If the advertisement interests them in the project, they will look at the bid package. Advertisements for services are addressed in section 724 (Advertising to solicit proposals for services).

798.7.1 Pattern advertisement to purchase apparatus, supplies, materials, or equipment.

INVITATION FOR BIDS BY CITY OF DURHAM FOR (*BRIEFLY NAME THE PROJECT, e.g., TRUCK TIRE AND TUBE PURCHASE*)

The City of Durham will open sealed bids at *(time)* on *(date)* in *(location of bid opening),* Durham, NC, for the following project: *(e.g., purchase of a fire truck; purchase of 18 police cars).* A complete description of the items to be purchased may be obtained at *(state the time and place, e.g., Smith and Jones, Engineers, 1212 W. Powell Blvd., Raleigh, NC 28200 or Public Works Dept., City of Durham, 101 City Hall Plaza, Durham, NC 27701-3329)* on *(insert the time, for instance, weekdays, except holidays, from 8:00 a.m. to 4:30 p.m.).* The City Council of the City of Durham reserves the right to reject any or all proposals. Notice under the Americans with Disabilities Act: A person with a disability may receive an auxiliary aid or service to effectively participate in city government activities by contacting the ADA Coordinator, voice (919) 560-4197, fax 560-4196, TTY (919) 560-1200, or ADA@durhamnc.gov, as soon as possible but no later than 48 hours before the event or deadline date.

798.7.2 Pattern advertisement for construction or repair for single-prime and multi-prime, but not for dual bidding construction projects.

If you are not sure what dual bidding is, please see section 766.3.1 (Multi-prime, single-prime, or dual bidding), above.

INVITATION FOR BIDS BY CITY OF DURHAM FOR (*BRIEFLY NAME THE PROJECT, e.g., CONSTRUCTION OF POLICE STATION*)

The City of Durham will open sealed bids at *(time)* on *(date)* in *(location of bid opening),* Durham, NC, for the following project: *(e.g., construction of a police station; removal of asbestos ceiling tile; construction of a wastewater treatment plant and associated facilities; construction of renovations and additions to City Hall).* Plans and specifications may be (*indicate: obtained and/or viewed*) at *(state the time and place, e.g., Smith and Jones, Engineers, 1212 W. Powell Blvd., Raleigh, NC 28200 or General Services Dept., City of Durham, 2011 Fay St., Durham, NC 27704-5012; the "place" can be a URL)* on *(insert the time, for instance, weekdays, except holidays, from 8:00 a.m. to 4:30 p.m.; obviously, the time*

limits do not apply to the URL). (If State law definitely requires, or if you choose to require, that the successful bidder have a contractor's license, add: Each bidder must show evidence that it is licensed under Chapter 87 of the N.C. General Statutes.*) (If the preceding sentence does not apply but State law may possibly require that the successful bidder have a contractor's license, or if you're just not sure, add: Each bidder must show evidence that it is licensed under Chapter 87 of the N.C. General Statutes when a license is required for the work.) (If SDBE provisions are needed in the ad, insert them.)* The City Council of the City of Durham reserves the right to reject any or all proposals. Notice under the Americans with Disabilities Act: A person with a disability may receive an auxiliary aid or service to effectively participate in city government activities by contacting the ADA Coordinator, voice (919) 560-4197, fax 560-4196, TTY (919) 560-1200, or ADA@durhamnc.gov, as soon as possible but no later than 48 hours before the event or deadline date.

798.7.3 Pattern advertisement for dual bidding construction projects.

Note: Dual bidding defined in section 766.3.1 (Multi-prime, single-prime, or dual bidding).

INVITATION FOR BIDS BY CITY OF DURHAM FOR (*BRIEFLY NAME THE PROJECT, e.g., CONSTRUCTION OF POLICE STATION*)

The City of Durham will open sealed bids at *(time)* on *(date)* in *(location of bid opening)*, Durham, NC, for the following project: *(e.g., construction of a police station; removal of asbestos ceiling tile; construction of a wastewater treatment plant and associated facilities; construction of renovations and additions to City Hall)*. The City will accept bids under both the single-prime and multi-prime contracting systems. Multi-prime bids must be received, but not opened, at least one hour before the time named above for opening bids. Plans and specifications may be *(specify whether they can be obtained, viewed, or both)* at *(state the time and place, e.g., Smith and Jones, Engineers, 1212 W. Powell Blvd., Raleigh, NC 28200 or Water Management Dept., City of Durham, 1600 Mist Lake Dr., Durham, NC 27704-4764; the "place" can be a URL)* on *(insert the time, for instance, weekdays, except holidays, from 8:00 a.m. to 4:30 p.m.; obviously, the time limits do not apply to the URL). (If State law definitely requires, or if you choose to require, that the successful bidder have a contractor's license, add: Each bidder must show evidence that it is licensed under Chapter 87 of the N.C. General Statutes.) (If the preceding sentence does not apply but State law may possibly require that the successful bidder have a contractor's license, or if you're just not sure, add:* Each bidder must show evidence that it is licensed under Chapter 87 of the N.C. General Statutes when a license is required for the work. *(If SDBE provisions are needed in the ad, insert them.)* The City Council of the City of Durham reserves the right to reject any or all proposals. Notice Under the Americans with Disabilities Act: A person with a disability may receive an auxiliary aid or service to effectively participate in city government activities by contacting the ADA Coordinator, voice (919) 560-4197, fax 560-4196, TTY (919) 560-1200, or ADA@durhamnc.gov, as soon as possible but no later than 48 hours before the event or deadline date.

798.8 Copies of plans and specifications. If you have decided on the contract form in advance, which is needed in informal and formal bidding as discussed in section 748 (Summary of formal bidding), put it in the bid package, so that bidders will know what they are getting into. If there's a fee to get copies of the specifications, briefly explain how that works. Here are three examples:

Contract documents may be purchased for $35 by a check payable to Hazen & Sawyer. For mailing, add $15. They may be accessed at *(URL)*.

-or-

Contract documents may be obtained for a deposit of $50 by a check payable to Hazen & Sawyer, of which $40 is refundable upon return of the items. For mailing, add $15.

-or-

For information on how to obtain copies of the contract documents, contact *(name and telephone number or email address)* or open *(URL)*.

798.9 Setting the time of bid opening. While it's a bidder's responsibility to get its bid to the City in time, you may consider when FedEx and UPS deliveries are likely to be made in choosing the

deadline. For example, if they normally deliver around 11:00 AM, you can facilitate bidding by setting the deadline at 11:30 AM or later.

798.10 Non-collusion. See section 450 (Non-collusion affidavit). If a non-collusion affidavit is required, the advertisement must read, "All bids must include a non-collusion affidavit."

798.11 ADA. The City's ADA Coordinator has approved the following:

> **External Correspondence – ADA Disclaimer** (page 22 of existing manual)
>
> The Americans with Disabilities Act (ADA) notice has been revised and should be inserted into all printed materials for public dissemination. However, when the City publishes a newspaper advertisement soliciting bidders or vendors, the ADA notice may be omitted.
>
> **Notice Under the Americans with Disabilities Act**
>
> A person with a disability may receive an auxiliary aid or service to effectively participate in city government activities by contacting the ADA Coordinator, voice (919) 560-4197, fax 560-4196, TTY (919) 560-1200, or ADA@durhamnc.gov, as soon as possible but no later than 48 hours before the event or deadline date.
>
> Aviso bajo el Acto de Americanos Discapacitados – Una persona con una discapacidad puede recibir asistencia o servicio auxiliar para participar efectivamente en actividades del gobierno de la ciudad con ponerse en contacto con el Coordinador de ADA, buzón de voz (919) 560-4197, fax (919) 560-4196, TTY (919) 560-1200, o ADA@durhamnc.gov, lo más antes posible pero no menos de 48 horas antes del evento o fecha indicada.
>
> The purpose of this revision is to improve the clarity of communication for residents who need auxiliary aids or services and to provide updated contact numbers. This notice shall immediately replace all previous disclaimers and a legible font size must be used. If you have any questions, contact Stacey Poston.

The above appears in the "Update to City of Durham Graphic Standards Manual and Style Guide." You should disregard the ADA information on the bottom half of page 22 of the original "Graphic Standards Manual & Style Guide," and instead observe the update quoted above. The original and the update can be found on the Public Affairs CODI page.

798.12 Pre-bid conference, phone numbers, repeating locations, and other matters. I recommend including the date and time of a pre-bid conference, if there is one. For example, when a pre-bid conference will be held, the advertisement should contain a sentence like one of these: *"All bidders must attend a pre-bid conference on September 3, 2015 at 2:00 p.m. at the General Services Dept."* or "*A pre-bid conference will be held on September 3, 2015 at 2:00 p.m. at the General Services Dept."* Pre-bid conferences may be needed because of SDBE (see section 790 (SDBE)) or simply for efficient contract administration. Think before requiring attendance at a pre-bid conference, since it generally means a bid should be rejected from a bidder who did not attend.

Giving a phone number, email address, or website for questions about getting the description or plans and specifications may be appropriate. In my example, the advertisement should state the address of General Services. If you describe an office's location once in the advertisement and mention the location again, you need not give the full address the second time in the same advertisement. It's appropriate to add anything else that is needed to help potential bidders decide whether to look at the bid documents.

798.13 What to leave out. Ninety-nine percent of the time, omit from the advertisement what is in column A of this chart. However, as column B says, some of what's listed in column A should go into the bid package.

ADVERTISEMENT-SHOULD-NOT-CONTAIN CHART

Column A - what to omit from the web or newspaper advertisement	*Column B - remarks*

ABOUT THE CITY OR THE ADVERTISEMENT ITSELF	
.1 that the bidding process is formal or informal, or that the process is under G.S. 143-129 or Article 8 of Chapter 143	Specifying formal or informal, or citing those statutes, is harmless if it is correct but a problem if it is wrong. Even if it is correct, there's hardly ever any gain from saying it. All of that applies to saying these things in the bid package, too.
ABOUT THE PROJECT, PROPOSAL, BID, ETC.	
.2 details on the project	A general description will suffice. You just need to get candidates interested in reading the bid package, which is where you will write the details.
.3 anything about a surety, a performance bond, a payment bond, any other bonds, or that cash or checks may be used instead of those bonds	If applicable, this should be in the instructions or other documents.
.4 anything about insurance	This should be in the instructions or other documents.
.5 that local, state, and federal laws, regulations, ordinances, and codes must be followed	The contract should contain text to this effect.
.6 how much time the contractor will have in order to complete the work	This can be worth placing in the advertisement, if you want such a quick completion that many firms will lose interest when they learn the completion date.
.7 that the City or anyone else is not responsible for documents not obtained from them	Not needed
.8 that the City will not pay for candidates' bids or proposals	Not needed
.9 that the goods to be delivered or the work to be done must be "in accordance with plans and specifications" or "as described in the bid package"	Not needed
.10 that the proposed construction or repair work includes furnishing all materials, labor, equipment tools, etc.	Not needed.
.11 a reference to "An Act to Regulate the Practice of General Contracting"	Writing it that way is obscure and inaccurate. Please use the statement in the pattern ad about holding a license under Chapter 87.
.12 every location where plans and specifications can be found	Use your judgment. You have to tell readers where they can "have" plans and specs but the law is satisfied if that's one place. If plans and specs are available at lots of places, you could list as many as you want. If you include a long list, consider formatting it in a way that lets the reader skim it and easily find the key information.
ABOUT THE FORMAT OF THE BID, PROPOSAL, OR ENVELOPE	
.13 the address to mail or deliver bids or proposals	This should be in the instructions. For formal bids, the advertisement must contain the location of the bid opening, but the instructions can explain how to deliver bids and proposals.
.14 anything about the format of bids or proposals, or the envelope that the bid or proposals should be in	This should be in the instructions. If applicable, the requirement that bids be sealed is already in the pattern advertisement.
.15 what words or numbers must appear on the bid or proposal envelope	This should be in the instructions.
ABOUT OPENING BIDS AND PROPOSALS	
.16 that the time of opening will be standard,	See section 510.6 (Dates and time). "Standard Time," "Daylight

daylight, or local	Saving Time," and "local time," as well as their abbreviations, ordinarily should not be written anywhere in the advertisement or the bid package.
.17 12:00 PM or 12:00 AM	Instead, write noon or midnight. If you want, you can write "12:00 noon," or "12:00 midnight" but omit "AM" and "PM" for those times. A lot of people do not know whether 12:00 AM is noon or midnight.
.18 days of the week	That is, omit Monday, Tuesday, etc. Instead, state the date. It's best to use a word (instead of a number) for the month. Thus: Dec. 11, 2015 or 11 Dec. 2015.
.19 that anyone, such as interested parties, may attend the opening of bids or proposals	Not needed.
.20 that the opening of bids or proposals will be public	Not needed.
.21 that bids or proposals will be read	Not needed.
.22 that late bids or proposals will not be read or considered	I recommend against saying this. For formal bids, this is the law. You don't need to say it for it to be the law. When it's not a formal bid, you actually may want to be able to open late submissions. Omitting this kind of statement does not obligate you to open late submissions. Including this kind of statement can only hurt, especially if you add it when it is not the law. If you have a formal bid and you're itching to add this statement to the advertisement or the instructions to bidders, go ahead, knock yourself out.
ABOUT WHAT HAPPENS AFTER THE OPENING	
.23 that candidates cannot withdraw their bids or proposals for a certain number of days or that bids or proposals will be held a certain number of days	If you want a clause to this effect, definitely add it to the instructions or other documents.
.24 that the City may waive informalities	The formal bid pattern advertisement says what the law wants said about this for formal bids. No more is needed.
.25 that the City will award to the lowest responsible or responsive bidder or candidate	Can cause problems. Trying to state this information in the advertisement will not help and it can hurt. The actual standard of award is more complex than you can write in an advertisement. If you say it wrong, there can be times it would cause you to reject all bids or proposals and start the process over.

798.14 Newspaper rather than Internet advertisement.

In nearly all cases, you will seek bids with an Internet advertisement on the City's web page, not a newspaper advertisement. Read this section, however, if you run a newspaper advertisement. This section still assumes that you post an Internet advertisement that satisfies the normal legal requirements and that the newspaper advertisement is not needed to satisfy legal requirements but only for additional publicity.

798.14.1 Which newspaper.

If advertising in the *N&O*, ask for the discount the City gets under a 2007 contract with that paper. If you're running an ad, EO/EA encourages you to use the *Carolina Times*.

798.14.2 Content.

To write a newspaper advertisement, you can start with section 798.7 (Pattern advertisements), and delete its sentence about the ADA. Newspaper advertisements soliciting bidders or vendors do not need an ADA notice. ADA is addressed in section 798.11 (ADA).

CHAPTER D - GETTING THE CONTRACT APPROVED

800 This book has brought us to the point of receiving proposals. Now we'll address getting approval of the contract by the City Manager (or from City Council, if needed).

802 Council approval and agenda.

800.1 Is City Council approval needed? In a sense, City Council approval of a contract is always needed before a contract can be signed. That does not mean that every contract actually needs to go to City Council. In fact, few contracts need to go to City Council. The reason is that City Council "approval" can be granted in at least two ways: (i) The City Council itself can approve the particular contract and contractor, or (ii) The City Council can give the administration authority to select the contractor and approve the contract. The City Council may have done option "ii" long before your particular project arose, for example in October 2009 when it adopted Resolution 9673, discussed in section 800.1.4 (Contracts for which City Council approval is not needed). When you work under option "ii" you will not need to prepare an agenda item or ask City Council for approval of your particular contractor or contract.

This rest of this section 800.1 can be slow going. Read it at your own risk!

800.1.1 Who approves versus who signs. There's a distinction between who approves a contract versus who signs a contract. It's logical that approval to sign should be given before a contract is signed. As discussed in the first paragraph of this section, the City Council is the font of approving power but it has shared some of that approving power with the City Manager. The City Manager has shared some of his approving power with some subordinates, whom we often refer to as designees.

800.1.2 Contracts that can be approved by the City Manager or designee. If the contract can be approved by the City Manager or a designee of the City Manager, you do not need to ask the City Council to approve the contract. When you place the contract in the Onbase Contract Approval Workflow (CAW) module, the contract will be approved in that module by the City Manager or a designee before it is signed by the City Manager or a designee.

800.1.2.1 Who are the City Manager's designees? What contracts may they sign? By Finance Policy 111-1 (City Manager's Delegation of Contracting Authority, dated 5-14-2012), the City Manager has delegated some of his approval and signing power. That policy is on the Finance Department's CODI site. Before using FP 111-1, you need to read the policy, but if you want a rough summary (with exceptions you will see when you read the policy) –

Type of contract	Who may sign	Maximum contract amount, considering reasonably expected expenditures
Service	DCMs and department directors	$10,000
Non-City agency service, after appropriation by City Council	Director of Budget and Management	$50,000 *
Construction and repair	DCMs and directors of Community Development, Fire, General Services, Parks and Recreation, Police, Public Works, Solid Waste, Transportation, and Water Management	$25,000
Purchase, based on a competitive bid; buying through a coop; or buying from State contract	Finance Officer	$300,000

Purchase, when the preceding row does not apply	Finance Officer	$90,000
Electric Utilities	DCMs and directors of General Services, Parks and Recreation, Public Works, Transportation, and Water Management	$50,000

*The policy does not specify a dollar limit. I presume it intends to authorize up to the limit allowed by resolution 9673, which is $50,000.

The Finance Department says that when the policy allows a department director to approve or sign, interim department directors may do so, but acting department directors may not.

800.1.2.1.1 Designee for approval and signing of amendments. Finance Policy 111-1 provides:

> All Deputy City Managers and all Department Directors are designated to act on behalf of the City Manager to negotiate, make, approve and execute any change orders and contracts to amend (including time extensions) for any original contract executed by such Deputy City Manager or Department Director, provided that the reasonably expected expenditures of the change order(s) or contract(s) to amend plus the original contract do not exceed the contracting authority delegated to Deputy City Managers and Department Directors within this policy.

800.1.3 Contracts to amend. If you are dealing with a contract to amend, see section 615 (Amendments to contracts).

800.1.4 Contracts for which City Council approval is not needed. There's quite a list of types of contracts that already have City Council approval, so that the City Manager (and possibly a designee) may sign them without taking them to City Council. The principal list is in Resolution 9673, adopted October 5, 2009, named "Resolution to Enter into Contracts, Leases and Grant Instruments; to Delegate Contracting Authority to City Employees; to Take Actions on Bid, Proposals, and Bonds." It's on the City Attorney's CODI site as "resolution authorizing City Manager." All contracts signed under Resolution 9673 are to be reported to City Council quarterly. The attorney's office may know of a resolution that grants approval authority to the City Manager for the kind of contract you are concerned with, in addition to Resolution 9673.

800.1.4.1 Some contracts covered by Resolution 9673 are

(1) Service contracts. Service contracts, in which another party to the contract will provide services, including contracts to amend such contracts, provided the Reasonably Expected Expenditures under the original or amended contract do not exceed $50,000.
(2) Construction or repair contracts. Construction or repair contracts, in which another party to the contract will perform construction or repair, including change orders and contracts to amend such contracts, provided the Reasonably Expected Expenditures under the original contract (that is, the contract to be amended) or the contract as modified by amendments and change orders do not exceed $300,000.
(3) Some amendments to construction or repair contracts.
(4) Some options and alternates under construction or repair contracts.
(5) Purchasing contracts. Contracts to purchase apparatus, supplies, materials and equipment, including contracts to amend such contracts, provided the Reasonably Expected Expenditures under the original or amended contract do not exceed
(a) $300,000 when (i), (ii), or (iii) applies:
(i) Lowest bidder. The award is to the lowest responsive and responsible bidder;

(ii) Buying through a coop. The purchase is made through a competitive bidding group purchasing program, which is a formally organized program that offers competitively obtained purchasing services at discount prices to two or more public agencies; or

(iii) Buying from State contract. The purchase is made from a contract established by the State or any agency of the State, if the contractor is willing to extend to the City the same or more favorable prices, terms, and conditions as established in the State contract.

- or -

(b) $90,000 when subsection (a) does not apply.

(6) Grants. Some grant applications and grant agreements.

(7) Electric utilities. Contracts for electric service, including for installation, maintenance, and repair of street lights and for electricity, provided that the Reasonably Expected Expenditures for any individual year do not exceed $100,000.

The resolution defines "Reasonably Expected Expenditures" to mean "the dollar amount that the City Manager or the City Manager's designee determines, as of the time of executing the instrument in question, to be the sum of the probable payments the City can reasonably be expected to pay, including for liabilities under an indemnification provision if the relevant instrument contains such a provision."

800.1.5 Change orders. On construction projects, if change orders may arise, look at Resolution 9673's section 2.02, which authorizes the City Manager or designee to make and sign --

"[c]onstruction or repair contracts, in which another party to the contract will perform construction or repair, including change orders and contracts to amend such contracts, provided the Reasonably Expected Expenditures under the original contract [that is, the contract to be amended - RW] or the contract as modified by amendments and change orders do not exceed $300,000. Subsection (a) of 2.02 says:

"Amendment or change order when original contract is between $250,000 -$300,000. When the contract amount of an original contract is between $250,000 - $300,000, inclusive, the City Manager or the City Manager's designee is authorized to make, approve, award, and execute change orders and contracts to amend as long as the net sum of the Reasonably Expected Expenditures under all change orders and contracts to amend executed pursuant to this subsection (a) does not increase the original contract amount by more than 20%."

If the authority given by Resolution 9673's section 2.02 is enough, do not add a motion to get authority to repeat that authority. If section 2.02 is too little, consider adding a second motion along the lines of: "to authorize the City Manager to execute change orders on the (*name of project*) construction contract, provided that the total project cost does not exceed the amount budgeted for the construction phase plus the project contingency." If that motion gives too much, you can limit it by using this instead: "to authorize the City Manager to execute change orders on the (*name of project*) construction contract, provided that the cost of each change order does not exceed (*insert a dollar amount*) and that the total project cost does not exceed the amount budgeted for the construction phase plus the project contingency."

800.2 Okay, I have decided I need to go to City Council. If City Council approval is needed, you get to prepare an agenda item!

800.2.1 Agenda manual. On how to prepare an agenda item, see the City Manager's Agenda Manual. It is on the City Manager's CODI page, under City Manager Resources; click on the square photo labeled Agenda Manual.

800.2.2 Agenda deadline. The City Manager's deadline to place the item in the Onbase Agenda Approval Workflow module falls on 11:59 PM Tuesday four to five weeks before the City Council meeting. The deadlines can be found in the City Council Schedule, which is posted on the City Manager's CODI page, under City Manager Resources – click on the square photo labeled City Council Schedule.

800.2.3 Motion. In Onbase, there's a blank labeled "Motion To: Statement of presentation you wish to make and statement of action you wish Council to take." Despite that instruction, do not insert a statement of presentation there. Save that for the agenda memo. Instead, do what section 800.2.3.1 (Form and content of motion) below says.

800.2.3.1 Form and content of motion. Page 10 of the City Manager's Agenda Manual, revised August 2006 says: "Generally, motions should be brief and concise, but they should provide enough information such that the citizen may obtain a general idea about the item without reading the memorandum and backup materials. For example, 'To authorize the City Manager to execute a contract with [legal name of vendor] in the amount of [dollar amount of contract] for [brief summary of work to be performed].' " The motion is not the place to write an argument to justify or explain anything; instead, the agenda memo is the place for arguments and explanations.

800.2.3.1.1 The dollar amount can't be pinned down. Sometimes it can be hard to insert a single dollar amount in the motion without being misleading because the project has too many moving parts. If stating a dollar amount presents a problem for a particular motion, you may want to see if the city manager's office will relax that requirement.

800.2.3.2 Amendments. Please see section 615.3.2 (Changes neutral or good for the city; amendments) for advice to disregard a motion described on page 10 of the Agenda Manual.

800.2.3.3 Motion for interlocal agreements. Please see section 605.7 (Special motion for interlocal agreements).

800.2.3.4 Motion or agenda memo text for competitive bidding exceptions. If you are relying on an exception to the competitive bid law, be aware that to use some of the exceptions, the motion or the agenda memo may need to contain particular text. This book's discussion of an exception, likely to be in section 744 (EXCEPTIONS TO STATE BIDDING LAW), may set out the recommended text. If the discussion of an exception says that you should consult an attorney, the attorney should be able to tell you any recommended text.

800.2.3.5 Installment financing agreements involving real property; economic development incentive agreements; annexation agreements; and development agreements pursuant to G.S. 160A-400.24. State law requires that extra procedures be performed with respect to certain kinds of contracts. They are installment financing agreements involving real property; economic development incentive agreements; annexation agreements; and development agreements pursuant to G.S. 160A-400.24. For details on these four kinds of agreements and what special requirements apply, such as conducting public hearings, see "Public Hearing Chart" on the City Attorney's CODI page.

800.2.4 Agenda memo.

800.2.4.1 In general. In general, the usual practices for writing agenda memos apply. See the City Manager's Agenda Manual. To locate it, see section 800.2.1 (Agenda manual).

800.2.4.2 To award to other than lowest bidder. When formal or informal bidding was used, if the recommendation is to award to a bidder that was not the lowest bidder, ordinarily the agenda memo needs to explain why that is the plan. For example, if the lowest bidder omitted a required bid bond or has performed badly on other work, say that in the memo. Doing so will make it easier to defend the decision if the losing bidder sues the City.

800.2.4.3 Motion to authorize negotiating. The word "negotiate" can be ambiguous. If "negotiate a contract" means to discuss and agree in a non-binding way on the terms of a contract with the proposed contractor and bring the proposed contract to the City Council for approval, the City Manager already has that authority and does not need a motion to exercise it. What is limited is the power to sign a contract, which we often call to execute a contract. Sometimes the administration wants to know if the City Council is inclined to approve a contract before the details have been worked out, in order to save the administration from spending time on something that will be DOA; in that instance, the administration typically asks the City Council to approve non-binding deal points that the administration and the proposed contractor have previously explicitly agreed are not binding at this point. To avoid doubt I recommend against a motion that authorizes negotiations unless the motion says more.

Therefore, if you want to use the word "negotiate" in a motion, you can avoid ambiguity if you do this: If you want the proposed contract brought to City Council for approval, please include "and bring any recommended contract to the City Council for its approval" in the motion. If you want the City Manager to have authority to sign the contract without the need to return to City Council, then the motion should specify authority to execute the contract.

800.2.4.4 Attachments in onbase. If you put an attachment in Onbase, please see that it, including all handwriting on it, is dark enough to be read.

800.2.4.5 Contract to be revised later. What if the contract is not quite ready but the agenda deadline draws nigh?

800.2.4.5.1 Maybe authority already exists. Because of Resolution 9673, you may not need to ask for authority for you to finish writing and revising the contract after the item has gone to City Council in its unfinished form. That resolution, adopted October 5, 2009, is "Resolution to Enter into Contracts, Leases and Grant Instruments; to Delegate Contracting Authority to City Employees; to Take Actions on Bid, Proposals, and Bonds." It is on the City Attorney's CODI site as "resolution authorizing City Manager." Section 5.01 of the resolution says:

> The City Manager or the City Manager's designee may make changes before or after execution to a contract or lease approved or authorized by Council if all of the following three conditions are met:
>
> (a) The changes do not increase the Reasonably Expected Expenditures.
>
> (b) The contract or lease is not significantly changed.
>
> (c) The changes do not make the contract or lease as a whole less favorable to the City.

In applying subsections (b) and (c), the changes will be assessed in light of the information and documents presented to City Council.

If Section 5.01 of the resolution gives you the power to make changes of the sort that you want without having to return to the City Council for more authority, stop there and do not write another motion to let you make changes. See section 615.3.2 (Changes neutral or good for the city; amendments) for more.

800.2.4.5.2 The contract is an agenda attachment; you want authority to change it. If, however, Section 5.01 of Resolution 9673 is insufficient, you can write an additional motion to give the City Manager the authority that you want:

> "To authorize the City Manager to make changes to the contract before executing it if the changes (*insert appropriate limits*)."

That is in addition to the motion to authorize the City Manager to execute the contract that is in the agenda material.

800.2.4.5.3 The contract is not an agenda attachment; you want authority to change it. If you lack a good draft of the contract to put before City Council, you should describe the contract in the memo in detail, including the scope, cost, etc. The motion usually is:

> "to authorize the City Manager to write and execute a contract with (*legal name of vendor*) in the amount of (*dollar amount of contract*) for (*brief summary of work to be performed*)."

Of course, you take the risk that the City Manager or the City Council will reject the entire agenda item until the contract is ready, so do not count on this method to always get you to City Council. Using this motion could imply that someone didn't do his or her work. If our office doesn't see the draft far enough before the deadline, we may not sign off on in Onbase whether or not the motion in this subsection is used. On the subject of our office's scheduling requirements, please see section 800.2.6.3.2 (Attorney timing).

800.2.5 Revisions in onbase; don't ban this box. If you make changes to an item in the Onbase Agenda Workflow module, a box will pop up for you to fill in with a few lines of information about your revisions. When you write something in that box, you're helping others have a quick idea of what changes you made. It's the nice thing to do. If altruism is not enough for you, writing something in the box can also help you if someone asks you about it.

800.2.6 City attorney review of agenda item.

800.2.6.1 In general. An attorney's review may call for discussing the contract's terms with you, doing legal research, and working with you to rewrite portions of the contract. If our office lacks enough time to review the contract, it may be necessary to push the agenda item into a later agenda cycle. For details on having legal issues of agenda items handled, see pages 22-28 of the Agenda Manual on the City Manager's CODI page. To find the manual, see section 800.21 (Agenda manual). Review by the attorneys is further addressed in the City Attorney's "Guidelines" memo. It's on our CODI page, under the title Agenda Item.

800.2.6.2 What to tell the attorney. When thinking of asking an attorney about a proposed contract that will need City Council approval – maybe you want advice in writing the contract or in getting it approved in Onbase – it's a great help to the attorney when you send a draft of your Onbase agenda memo early in your conversations with the attorney. Writing the memo focuses your mind on what the deal is about, how much money is involved, whether the City Council has previously made relevant decisions, and so on. The memo gives the attorney the kind of background and details needed to grasp your needs and goals. A rough draft will be appreciated. If you have time to write only the executive summary, even that will be appreciated. We're an appreciative bunch.

800.2.6.2.1 Emails easier to follow. When you communicate with attorneys about an item after it has been placed in the Onbase agenda module, try to include the Onbase PR number. Also, if you keep the email string as part of your response, it is easier for us to know what was already written about the matter; that's better than starting a new email.

800.2.6.3 Avoid unnecessary delay.

800.2.6.3.1 Route to the right attorney. When you put the item in the Onbase agenda module, the Attorney's office support staff person responsible for routing agenda items to the attorneys will not know which attorney you have been working with. So the item may go to the wrong attorney, causing him or her unnecessary involvement and work and causing delay in getting an attorney sign-off. Therefore, once the item is in the Onbase queue, you should tell the attorney you have worked what its Onbase PR number is, or send the PR number to the Attorney's office's support staff along with the name of the attorney you have worked with.

800.2.6.3.2 Attorney timing. Please send the agenda item out sufficiently ahead of the City Manager's deadline so that our office, as well as other departments, can review it before the deadline. Sometimes we see that the originating department has dealt with a complicated proposed contract for a considerable time but the first the attorney hears about it is when it goes into the Onbase Agenda Workflow module. Not so good. Without sufficient time, the attorney may need to send the item back. If there are no legal issues, the proposed item should be in the Attorney's Office by Friday morning before the City Manager's 11:59 PM Tuesday deadline. If the item is routine but has some legal issues, the item should be in the Attorney's Office by the morning of Tuesday of the prior week. If holidays intervene, add days accordingly. If it's not routine, more time may be needed. This is discussed on the City Attorney's "Time Periods" memo. It's on our CODI page, under the title Agenda Items or the title Agenda Item Review. Alert the attorney to the date of the Tuesday 11:59 PM Onbase Agenda Workflow module deadline you hope to meet.

800.2.6.3.2.1 Late items. The City Attorney's Time Periods memo also states: "All late agenda items submitted to the City Attorney's office must bear the signature of the City Manager or an Assistant City Manager, indicating that it is a priority for the item to be reviewed

despite having missing the agenda item review deadline." Read that to say that our office needs a communication (email, etc.) from the City Manager, an assistant city manager, or a DCM, along those lines.

800.2.6.3.3 Keep your item out of agenda limbo. Onbase does not notify us when an item has been modified. When you want an attorney to look at the revised version, tell the attorney that you've revised it. Otherwise, it can sit quietly in Onbase, unread and forlorn, and we won't know that it's ready for further review. Things are speedier if you follow 800.2.6.2.1 (Emails Easier to Follow).

CHAPTER E -- GETTING THE CONTRACT SIGNED

900 Who signs. As to signing – The City Council itself doesn't sign contracts. Ninety-nine-plus percent of contracts that are approved by the City Council may be signed, after that City Council approval, by the City Manager. (The reason it is not 100% is that a tiny fraction are signed by the Mayor.) As I say, the City Manager may sign those 99+% of contracts, but the City Manager allows some of them to be signed by a designee (even though the City Manager may still sign them if he wants).

902 Getting contracts signed by the contractor and the City.

902.1 Contents of section 902.

CONTENTS OF SECTION 902	Section of GBA
Getting it signed by the contractor	902.2
Getting it signed by the City	902.3
Summary of options for the City's signature	902.4
Detailed instructions for using the five options	902.5
Option 1: The City will sign electronically in CAW	902.5.1
Option 2. The City Manager –not a designee -- will sign with pen on paper	902.5.2
Option 2a. The City Manager –not a designee -- will sign with pen on paper; tracking allowed	902.5.3
Option 3. The City Manager's designee will sign with pen on paper	902.5.4
Option 3a. The City Manager's designee will sign with pen on paper; tracking allowed	902.5.5
Note on signing by a City Manager's designee or signing by a deputy city manager	902.6

902.2 Getting It Signed by the Contractor.

902.2.1 Have the contractor sign first. The contractor (the other party to the contract) should sign first. If you have a reason for the City to sign first, please ask an attorney whether that creates problems for your contract. (However, the order of signing does not matter when the contractor is a local government located in North Carolina; an agency of a local government located in North Carolina; the State of North Carolina or any of its agencies; or the United States or any of its agencies. In those instances, you need not ask an attorney.) If for some good reason the City signs first, then when you want to place the contract in the Contract Approval Workflow module in Onbase, on filling in the Contract Cover Sheet you will need to answer "yes" to whether "City Signed First Contract or Wet/Ink Signature Req."

902.2.2 The contractor will sign with pen on paper. Usually, the City has the contractor sign two originals.

902.2.3 No changes by contractor. Examine the signature and the notarization (if there's a notarization) to see that they were properly completed without changes. Shouldn't this go without saying? From unfortunate experience, it needs saying. Before sending you the signed contract, the contractor may fill in blanks and sign where needed, but the contractor ought not change the contract's text or the signature and notarization forms.

902.2.4 Performance bond and payment bond. If either bond is required for your project, read this subsection. Otherwise, skip it!

Satisfy yourself that the bond forms are proper; to do that, review section 610.4 (Which form to select).

902.2.4.1 Surety's qualifications.

The surety (the company that issues the bonds) must be licensed under N.C. law to execute such bonds. When you see the signed bonds, look up the surety on the N. C. Department of Insurance at this URL:

https://sbs-nc.naic.org/Lion-Web/jsp/sbsreports/CompanySearchLookup.jsp

You can also reach that URL by these steps:

Open: ncdoi.com

Click: INSURANCE DIVISIONS

Click: Consumer Services (Auto, Homeowners, Life and Other Insurance)

Click: CHECK THE LICENSE STATUS OF A COMPANY (This is in the left column.)

Once there, type the name of the company and search. Don't fill in other boxes or select any other limits. After what seems like 10 minutes, you will get the page for the company. Make sure the company's name matches that on the bond and that the state of incorporation -- Delaware, Pennsylvania, and Connecticut are common -- matches the state shown on the bond. (The state of incorporation may differ from the surety's business address.) Verify that it says "Status: active." See that after "NAIC #" there's a number. Click LINE OF BUSINESS, and verify that it says 16-16 - Fidelity & Surety Insurance. For help, you can call the Department of Insurance at 800-546-5664 or 919-807-6750; at the prompts, press 1, then 0.

The United States Treasury Department provides this directory, with information to verify some information: **http://www.fms.treas.gov/c570/c570_a-z.html**

Many sureties are listed in the bottom half of that page.

902.2.4.2 Claims against surety.

If any State agency or any N. C. local government unit has an unsettled claim against a surety, the City may be able to reject a bond from that surety; if you run across that situation, consult our office.

902.2.4.3 Signed bonds.

There are lots of things to examine in the power of attorney, and I can't list everything here.

Look for original documents, not photocopies. Check the dates. If anything looks off, ask the City Attorney's office. Feel free to ask us even if everything looks great.

The "attorney in fact" is the individual who signs the bonds for the surety. Was the attorney in fact properly authorized to sign a bond of the type and in the dollar amount? The "power of attorney" is the document attached to the bonds that says that the attorney in fact was authorized to sign a bond of the type you have and the dollar amount. Even if the power of attorney appears sufficient, however, it is prudent to go further, by contacting the surety. To do that, have the executed bond and power of attorney in front of you for a phone call, or send the surety a copy of the entire bond and power of attorney. Here's contact information for many sureties:

http://c.ymcdn.com/sites/www.surety.org/resource/resmgr/pubs-public/bondobligeeguide.pdf

902.3 Getting it signed by the City.

902.3.1 Contract Approval Workflow module in Onbase.

To be signed by the City, contracts go through the Onbase module called Contract Approval Workflow (CAW). While CAW is the module to use when a contract is to be approved by the City Manager or designee and then signed by the City Manager or designee, CAW is also the module to use even when the contract has been approved by the City Council and all you need is for the contract to be signed. The basic idea of CAW is that you will import the contractor-signed contract into the module and link it with a Contract Cover Sheet. You then submit the contract for signature by appropriate City people. All the detail on CAW you could ever want is available from Technology Solutions. To find some of that detail in CODI, click Resource/Information Center; then click the Onbase square. Also, Technology Solutions provides training.

902.3.2 The City is the City.

The vendor or other contractor makes a contract with the "City of Durham," not with a City department – even when a department director signs as the City Manager's designee.

902.3.3. Forms not to split.

A signature form and an acknowledgment form may be on one page or on separate pages, but unless otherwise stated, don't let a page break split either of those forms in two.

902.4 Summary of options for the City's signature.

Your possibilities for the City's signature are options 1, 2, 2a, 3, and 3a. **For any individual contract, you will select one of those five options.** This section guides you in selecting the one that fits.

Option 1: The City will sign electronically, whether by the City Manager himself or herself or by a designee of the City Manager. Nearly all contracts are signed under option 1. If the City's signature needs to be acknowledged (notarized), or if for some reason the City's signature needs to be done by pen on paper, choose one of the other options.

Options 2, 2a, 3, and 3a: The City will sign with pen on paper. The City rarely signs with pen on paper.

Option 2. The City Manager will sign for the City.

Option 2a. Same as Option 2 but if you use option 2a, it will be possible to track the contract through CAW before the City individuals have signed with pen on paper.

Option 3. A designee of the City Manager will sign for the City.

Option 3a. Same as Option 3 but if you use option 3a, it will be possible to track the contract through CAW before the City individuals have signed with pen on paper.

902.5 Detailed Instructions for Using the Five Options.

902.5.1 Option 1: The City will sign electronically in CAW.

Copy and paste City signature Form 11 into the contract. A copy of Form 11 is in "Appendix P to GBA (Signature and Notarization Forms for the City)" on the City Attorney's CODI site under the CODI title Contracting Guides and Forms. Form 11 in Appendix P should be used regardless of whether the City Manager or the City Manager's designee (a deputy city manager or a department director) signs for the City. When you paste Form 11 into a contract, maintain the 1.25 inch vertical space between CITY OF DURHAM and the signature line; it is all right, but not necessary, to increase that vertical space. Place the words "ATTEST" and "CITY OF DURHAM" on the same page of your contract as the lines for the City Clerk's and City Manager's signatures.

You should not type a preaudit certificate. With the words "preaudit certificate," this form already identifies a location for the finance officer to insert an electronic preaudit certificate, which will happen in CAW without your having to do anything else. The space for the preaudit certificate does not have to be on the same page as the City's signature. Wherever the preaudit certificate is, see that there is a 1.25-inch

vertical space for the electronic preaudit certificate to be inserted. It is all right, but not necessary, to increase that vertical space.

For the contractor's signature and acknowledgment (notarization), open the CODI link to "Appendixes to GBA," and go to Appendixes E and F.

Form 11

(*To use with option 1. If you keep the font at 10, the layout is more likely to work.*)

ATTEST: CITY OF DURHAM

_____ By:_____

preaudit certificate, if applicable _____

902.5.2 Option 2. The City Manager –not a designee -- will sign with pen on paper.

This option is rarely used.

1. Copy and paste City signature Form 12 into the contract. Form 12 is among those in "Appendix P to GBA (Signature and Notarization Forms for the City)" on the City Attorney's CODI site.
2. The preaudit certificate can be typed into the contract. If one is not there but it's needed, the Finance Department will add it, and the finance officer will sign it, too.
3. Sometimes the other party to the contract will insist on acknowledgment of the City's signature. In most instances, it is not needed to make the contract valid. To use it in your contract, insert the acknowledgment form that comes with Form 12. If you insert the acknowledgment form, fill in its first two blanks.
4. On the hard copies, put Post-it Notes where the signatures are needed, to make it easier for the signers to find them.
5. Send the contract to the City Manager for signature.
6. After the City Manager (or acting city manager) has signed, check that his or her name and title are legibly written under the signature.
7. Send the contract to the City Clerk for her to attest and otherwise do her part.

8. If a deputy city manager will sign as acting city manager, please see the Note near the end of this article.

902.5.3 Option 2a. The City Manager –not a designee -- will sign with pen on paper; tracking allowed.

This option is rarely used. The difference between this option and Option 2 is that this option provides the ability to track the contract through CAW before the City individuals have signed with pen on paper.

1. Copy and paste City signature Form 12 into the contract. Form 12 is among those in "Appendix P to GBA (Signature and Notarization Forms for the City)" on the City Attorney's CODI site.
2. Sometimes the other party to the contract will insist on acknowledgment of the City's signature. In most instances, it is not needed to make the contract valid. To use it in your contract, insert the acknowledgment form that comes with Form 12. If you insert the acknowledgment form, fill in its first two blanks.
3. Insert Form 14 *at the end* of the contract in CAW. Form 14 is in Appendix P to GBA.
4. Have the contract approved in CAW. That includes having the electronic signatures of the City affixed on Form 14. Those are the signatures of the finance officer (if there's a preaudit certificate), the City Manager (or the DCM if the DCM signs as acting city manager per the Note near the end of this article), and the City Clerk. Indicate for those persons that their electronic signatures should be placed on the last page instead of where their pen-on-paper signatures will go. On the hard copies, put Post-it Notes where the signatures are needed, to make it easier for the signers to find them. Create a short memo to act as a cover sheet to route the hard copies of the contract, along with a printout of the Onbase contract cover sheet. The printout of the Onbase contract sheet will reflect that the contract has already been approved by the appropriate individuals, which should make comfortable the individuals who are to sign with pen on paper.
5. Circulate at least two original hard-copy contracts for pen-on-paper signatures by the City, starting with the City Manager. If a deputy city manager will sign as acting city manager, please see the Note near the end of this article.
6. After the City Manager (or acting city manager) has signed, check that his or her name and title are legibly written under the signature.
7. Send the contract to the City Clerk for her to attest and otherwise do her part.
8. Make a PDF of the entire, signed paper contract. Replace the contract that is in the Onbase CAW module with the signed PDF version, a step you accomplish by importing the PDF into the module, linking it to the Contract Cover Sheet, and clicking <Submit the Contract for Approval>. The status becomes "Signed Contract Received." The signed hard copy contract is routed in the Onbase CAW module to the City Clerk, who locks the contract down in CAW and changes the status to "Approved Contract Cert Applied."

902.5.4 Option 3. The City Manager's designee will sign with pen on paper.

The designee will be a deputy city manager or a department director. This option is rarely used.

1. Copy and paste City signature Form 13 into the contract. Form 13 is among those in "Appendix P to GBA (Signature and Notarization Forms for the City)" on the City Attorney's CODI site.

2 – 7. Follow steps 2 – 7 from Option 2.

8. For information on designees, please see the Note near the end of this article.

902.5.5 Option 3a. The City Manager's designee will sign with pen on paper; tracking allowed.

The difference between this option and option 3 is that that this option 3a provides the ability to track the contract through CAW before the City individuals have signed with pen on paper. This option is rarely used.

1. Copy and paste City signature Form 13 into the contract. Form 13 is among those in "Appendix P to GBA (Signature and Notarization Forms for the City)" on the City Attorney's CODI site.
2. Sometimes the other party to the contract will insist on acknowledgment of the City's signature. In most instances, it is not needed to make the contract valid. To use it in your contract, insert

the acknowledgment form that comes with Form 13. If you insert the acknowledgment form, fill in its first two blanks.

3. Insert Form 14 *at the end* of the contract in CAW. Form 14 is in Appendix P to GBA.
4. Have the contract fully approved in CAW. That includes having the electronic signatures of the City affixed. Those are the signatures of the finance officer (if there's a preaudit certificate), the City Manager's designee, and the City Clerk affixed in CAW. Indicate for those persons that their electronic signatures should be placed on the last page instead of where their pen-on-paper signatures will go.
5. On the hard copies, put Post-it Notes where the signatures are needed, to make it easier for the signers to find them. Circulate at least two original hard-copy contracts for pen-on-paper signatures by the City, starting with the City Manager's designee.
6. After the City Manager's designee has signed, check that his or her name and title are legibly written under the signature.
7. Send the contract to the City Clerk for her to attest and otherwise do her part.
8. For information on designees, please see the Note near the end of this article. How about that, you're already there!

902.6 Note on signing by a City Manager's designee or signing by a deputy city manager.

902.6.1 Signing by others for City Manager.

If a deputy city manager (DCM) will sign as a City Manager's designee under Finance Policy 111-1 and Resolution 9673, use option 3 or 3a.

When a department director turns on the Onbase out-of-office feature, contracts that the department director would have signed are re-directed for signature to a DCM.

If the City Manager is temporarily absent or disabled, one – not all -- of the DCMs will have the authority to sign all contracts that the City Manager himself or herself could sign. In that situation, the specified DCM signs as acting city manager, rather than as the city's manager's designee, and option 2 or 2a should be used; when that is done, see that the name of the acting city manager, rather than the City Manager, is written under the signature, with the title "acting City Manager." Even when he or she is the *acting city manager*, it's probably all right if he or she signs as City Manager's *designee* under FP 111-1.

902.6.2 Finance Policy 111-1 and Resolution 9673. Finance Policy 111-1 is the City Manager's Delegation of Contracting Authority. It is limited by Resolution 9673 (Resolution Delegating Authority to the City Manager with Respect to Making and Executing Contracts, Leases, and Grant Instruments).

902.7 Reporting. Resolution 9673 directs the City Manager to report each quarter to the City Council the contracts (including contracts to amend) signed under authority of the resolution.

THE END

Rev. 6/1/15.

International Municipal Lawyers Association

Advancing Excellence in the practice of Local Government Law

Institute for Local Government Lawyers

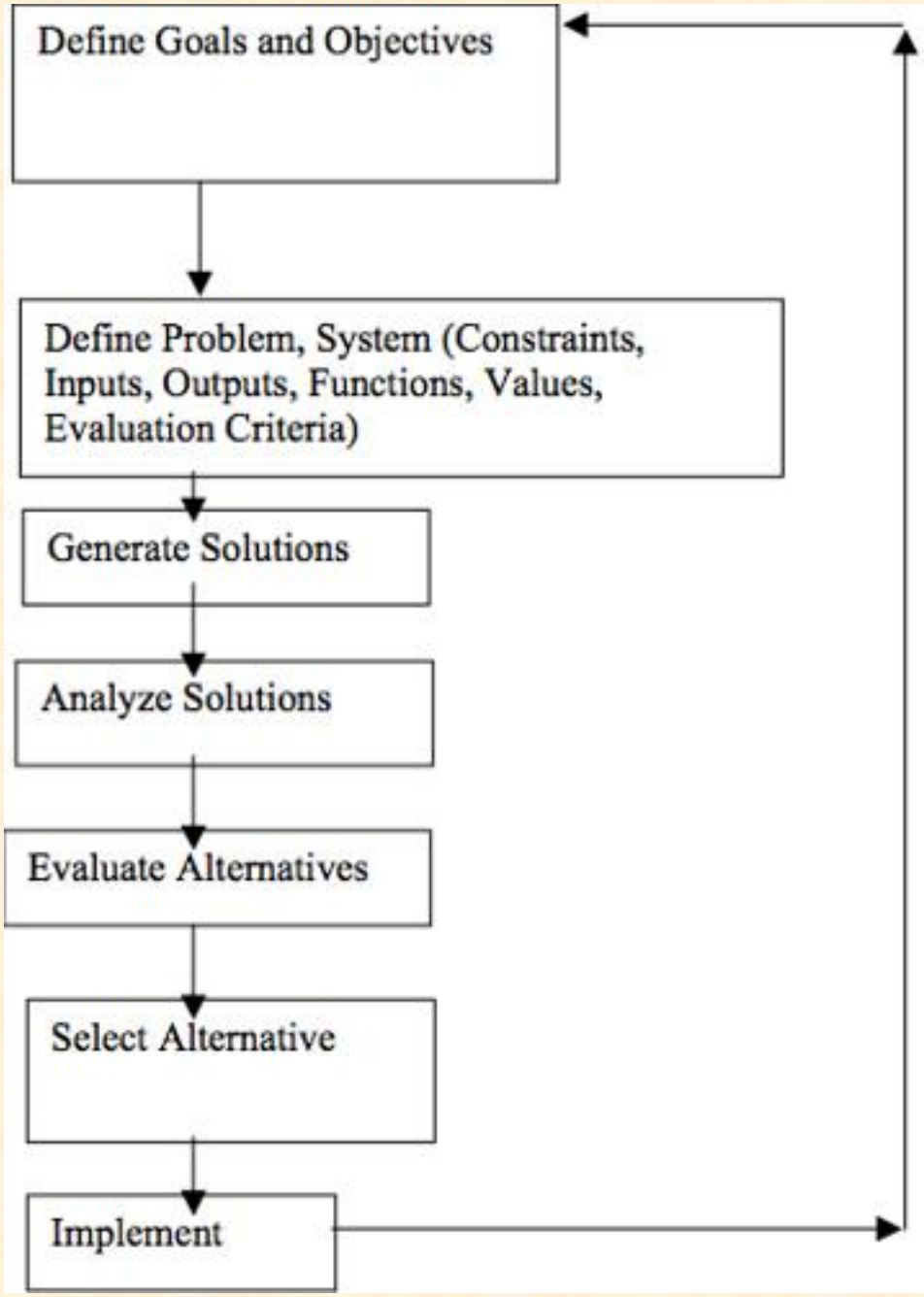
Saturday, October 3, 2015
Las Vegas

Land Use Law 101

Dwight Merriam, FAICP, CRE

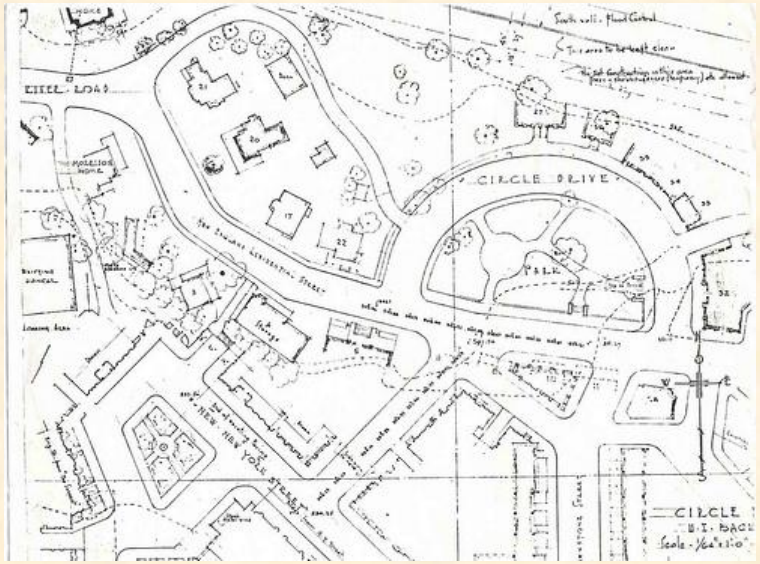
Robinson & Cole LLP

The Planning Process


Define Goals and Objectives
Define Problem, System (Constraints, Inputs, Outputs, Functions, Values, Evaluation Criteria)
Generate Solutions
Analyze Solutions
Evaluate Alternatives
Select Alternative
Implement

Before Local Planning

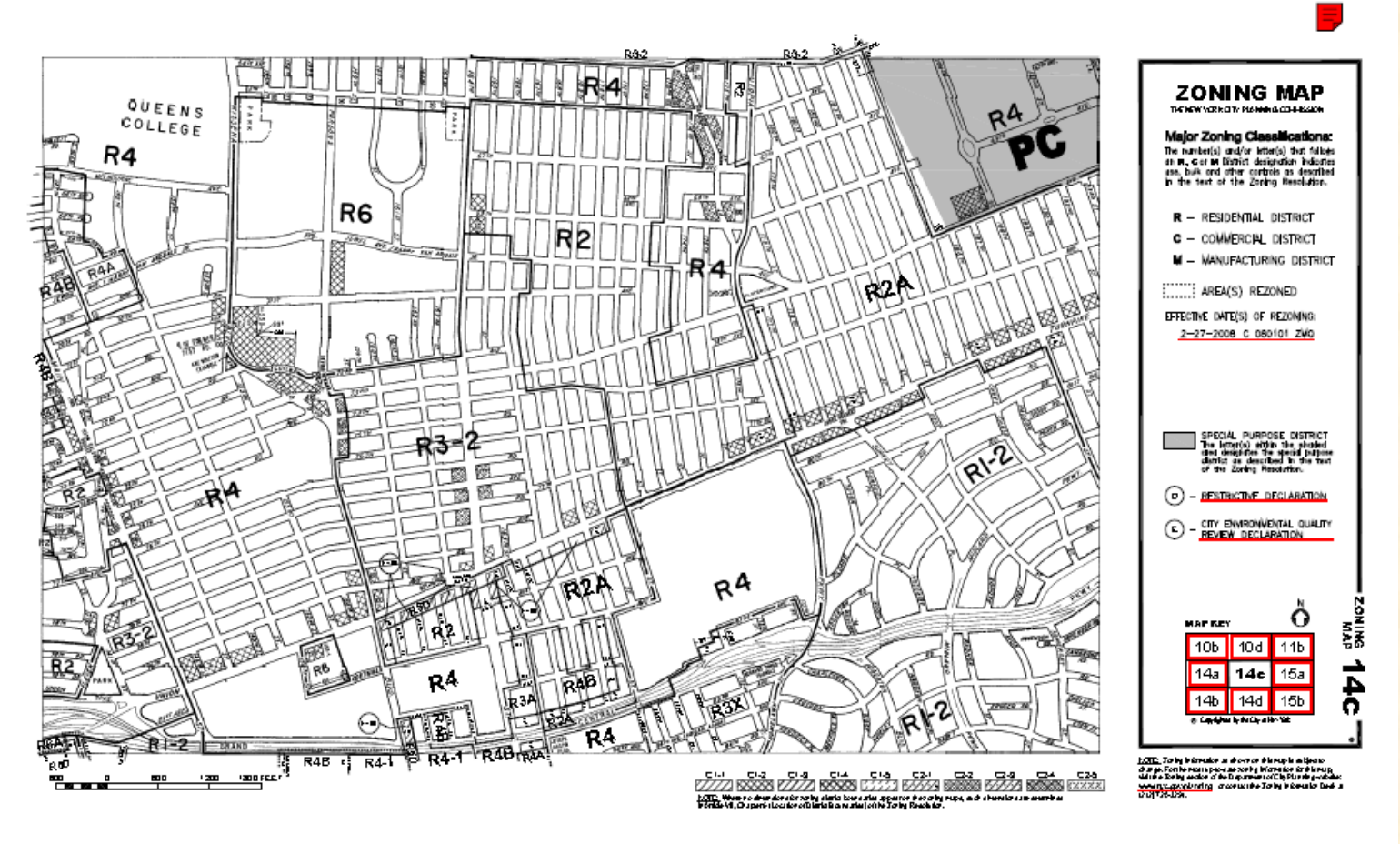
- Colonial times
- Sanitary reform movement
- City Beautiful
- Planning commission



Legal Status of the Plan

- Mandatory planning doctrine
- Consistency doctrine

Zoning

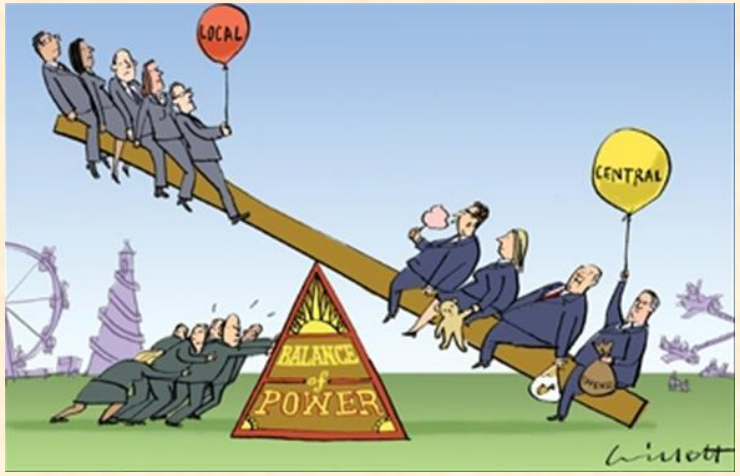

QUEENS COLLEGE
R4
R6
R2
R4
R4
PC
R2A
R4B
R4A
R3-2
R4
R2
R3-2
R2
R4
R2A
R4
R4B
R3A
R3X
R1-2
R1-2
R4B
R4-1
R4-1
R4B
R4A
R4
ZONING MAP
Major Zoning Classifications:
R – RESIDENTIAL DISTRICT
C – COMMERCIAL DISTRICT
M – MANUFACTURING DISTRICT
AREA(S) REZONED
EFFECTIVE DATE(S) OF REZONING:
2-27-2008 C 080101 ZMQ
SPECIAL PURPOSE DISTRICT
D – RESTRICTIVE DECLARATION
E – CITY ENVIRONMENTAL QUALITY REVIEW DECLARATION
MAP KEY
10b 10d 11b
14a 14c 15a
14b 14d 15b
ZONING MAP 14c

A Brief History

- Before zoning
- *Euclid v. Ambler*

The Power to Zone

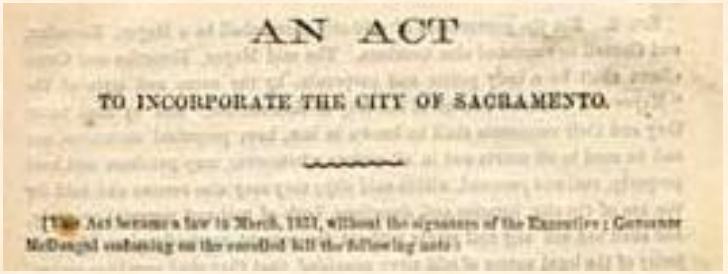
The police power…



- **To preserve, promote, protect…the public health, safety and general welfare…**

The Power to Zone

- Standard Zoning Enabling Act
- Inherent and implied powers
- Charter
- Home rule
  - Initiative and referendum
  - Extraterritorial zoning
  - Annexation and prezoning


AN ACT

TO INCORPORATE THE CITY OF SACRAMENTO.

Purposes of Zoning

- Preserve property value
- Preserve character
- Traffic safety
- Regulation of competition
- Fiscal zoning
- Growth management
  - Rate and sequence

Private Regulation

- Covenants and easements
- Common interest communities
- “The right to dry” issue
- Dog amortization

GAC 20020166605 24 pgs

016-71-1566

DECLARATION OF COVENANTS,
CONDITIONS AND RESTRICTIONS FOR
THE LAKE AT SAN JOAQUIN, SECTION ONE

THIS DECLARATION made as of the date hereinafter set forth by D. R. HORTON-TEXAS, LTD., a Texas Limited Partnership (hereinafter referred to as "Declarant"):

WITNESSETH:

Other Powerful Controls

- The market
- Infrastructure
- Taxes
- Government spending

Zoning

- Use
- Bulk, density, dimension
- Cumulative v. exclusive use

Common Issues in Zoning

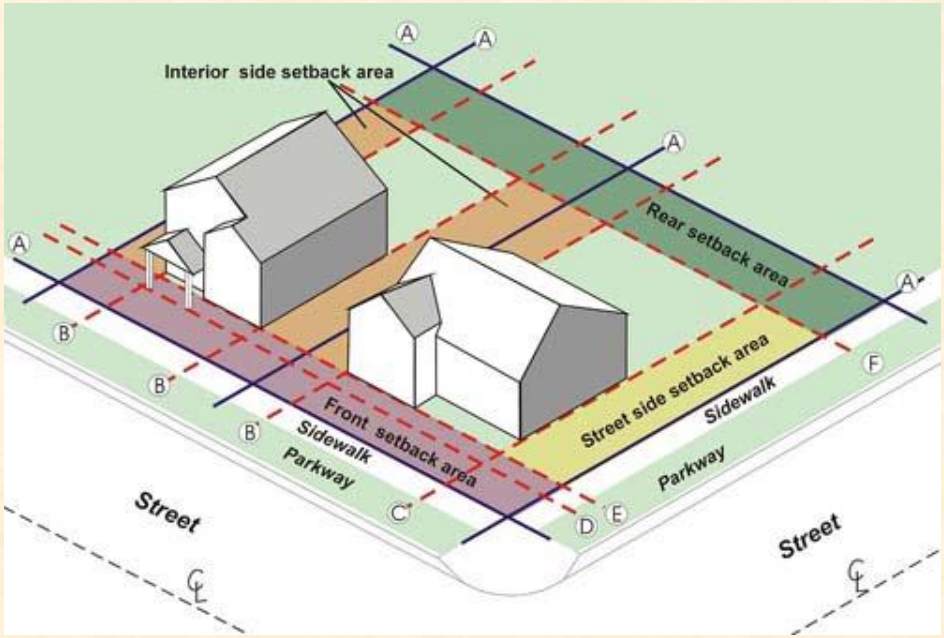
- Accessory uses
- Home occupations
- Definition of family
- Group homes
- Agricultural uses

And Not-So-Common Issues in Zoning

- Medical and recreational cannabis
- Hookah lounges
- Nudist camps
- Gun clubs
- Doggy day care

Height, Bulk, Setback Controls

- Setbacks, sideyards
- Frontage
- Height
- Lot coverage
- Floor area ratios
- Open space ratios



Toolbox of Techniques

- The basics
  - Legislative
  - Administrative
  - Quasi-judicial
- Increasing due process

Increasing Flexibility

- As-of-right
- Site plan
- Conditional use
- Overlay zone
- Floating zone
- Planned Unit Development
- Special Development District

…and more…

- Incentive zoning
- Performance zoning
- Interim and holding zones

…and more…

- Affordability
- New urbanism
- Traditional neighborhood design
- Transit oriented development
- Form-based codes

Constitutional Issues

- Procedural due process
- Substantive due Process
- Equal protection
- First Amendment
  - signs, religion
- Fifth Amendment
  - takings

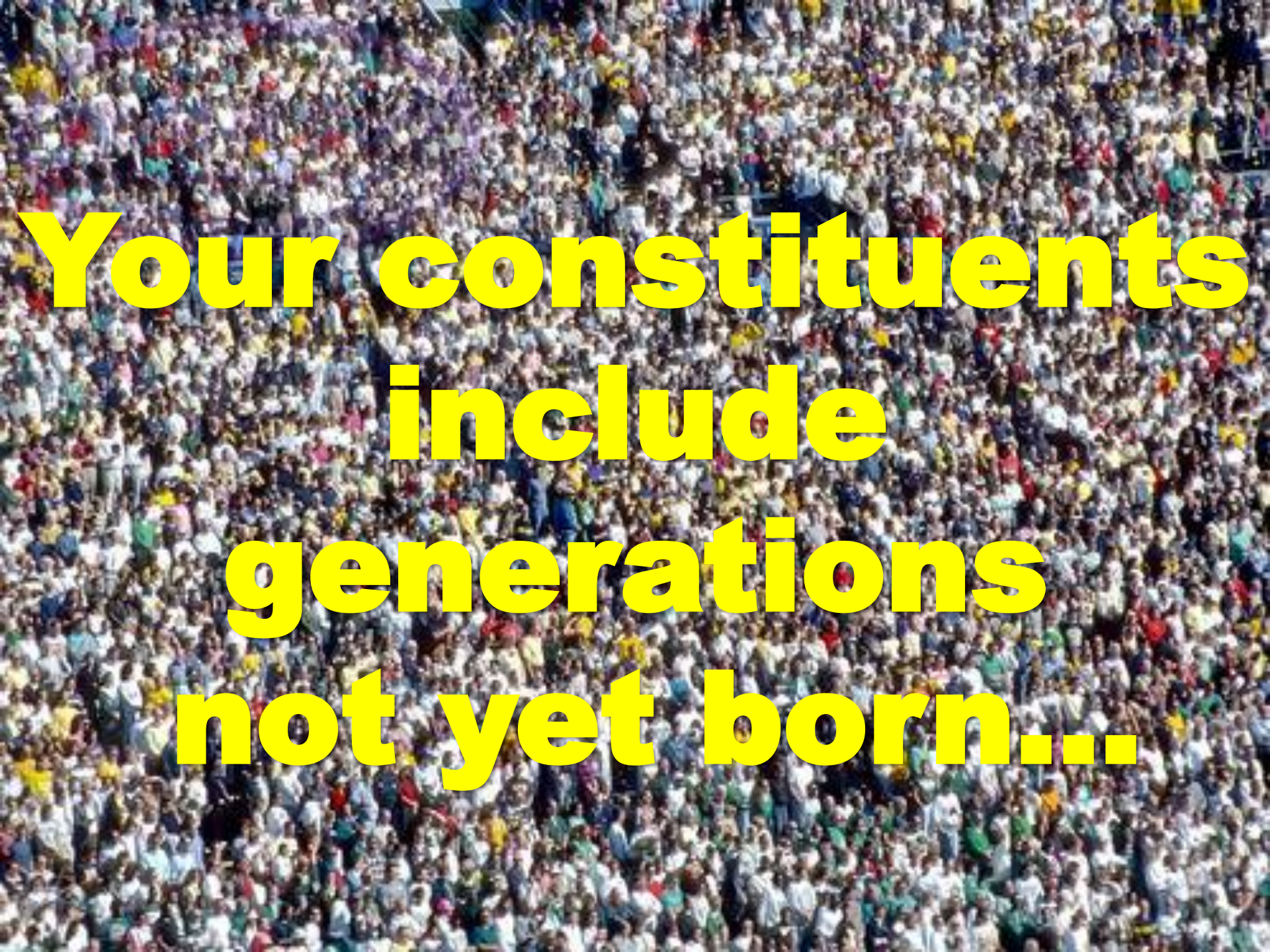
Subdivision

- To make orderly land sales and descriptions
- Assure adequate infrastructure

Federal Overlay

- Fair Housing Act
- Religious Land Use and Institutionalized Persons Act
- Clean Water Act
- Americans with Disabilities Act

We think this is the best, most interesting, and always challenging part of being a local government lawyer.


Your constituents
include
generations
not yet born...

INSTITUTE FOR LOCAL GOVERNMENT LAWYERS
Saturday October 3, 2015

Resource Materials for Land Use

U.S. Supreme Court Cases

Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc. (US 2015).
http://www.supremecourt.gov/opinions/14pdf/13-1371_8m58.pdf

Reed v. Town of Gilbert (US 2015)
http://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf

Tarrant Regional Water District v. Herrmann (US 2013)
http://www.supremecourt.gov/opinions/12pdf/11-889_5ie6.pdf

Arkansas Game & Fish Commission v. U.S. (US 2012)
http://www.supremecourt.gov/opinions/12pdf/11-597_i426.pdf

Horne v. Department of Agriculture (US 2015)
http://www.supremecourt.gov/opinions/14pdf/14-275_c0n2.pdf

Horne v. Department of Agriculture (US 2013)
http://www.supremecourt.gov/opinions/12pdf/12-123_c07d.pdf

Koontz v. St. Johns Water Management District (US 2013)
http://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf

Arlington v. FCC (US 2013)
http://www.supremecourt.gov/opinions/12pdf/11-1545_1b7d.pdf

Marvin M. Brandt Revocable Trust v. U.S. (US 2014)
http://www.supremecourt.gov/opinions/13pdf/12-1173_nlio.pdf

Koontz Fallout

California BIA v. City of San Jose (Cal. Sup. Ct.) (endorsing inclusionary housing ordinances by ruling that they are legally permissible as long as it can be shown the ordinance is reasonably related to the public welfare).
http://www.courts.ca.gov/opinions/documents/S212072.PDF

http://www.courts.ca.gov/opinions/revpub/H038563.PDF
http://scholar.google.com/scholar_case?case=17931150985265517687&q=California+Building+Industry+Association+v.+City+of+San+Jos%C3%A9,+&hl=en&as_sdt=2,5

Commentary on ***Koontz*** (thanks to Rob Thomas at www.inversecondemnation.com for the list) [control and click to follow the link or go to www.inversecondemnation.com and search "Koontz"]:

> ***Supreme Court Rules for Property Owner in Koontz v. St. Johns River Water Management District*** - lawprof Richard Frank, *Legal Planet*.
>
> ***Supreme Court's Koontz Decision May Help Landowners Fighting Mitigation Payments*** - from the *Massachusetts Land Use Monitor*.
>
> ***Does* Koontz *also blow holes in* Williamson County*?*** - J. David Breemer, *PLF Liberty Blog*.
>
> **Koontz v. St. Johns River Water Management District*: Of Issues Resolved - and Shoved under the Table*** - lawprof Richard Epstein, *Point of Law*.
>
> ***Supreme Court ruling bolsters private property rights*** - from the *LA Times*.
>
> ***Opinion recap: Broadening property owners' right to sue*** - from *SCOTUSblog*.
>
> ***Koontz Decision: No Big Deal or Blow to Sustainable Develoment?*** - Jonathan Nettler, *Planetizen*.

Late to the Game: Koontz and whether you can have a takings claim without an actual takings - lawprof Jessie Owley, *Land Use Prof Blog*.

CAC Reacts to Supreme Court Decision in Koontz Takings Case - *Constitutional Accountabllity Center.*

Land Owners Complete a Clean Sweep at the U.S. Supreme Court - Brad Kuhn, C*alifornia Eminent Domain Report*.

A Few More Thoughts About Koontz - lawprof Eduardo Penalver, *PrawfsBlawg*.

Koontz' Unintelligible Takings rule: Can Remedial Equivocation save the Court from a Doctrinal Quagmire? - lawprof Rick Hills, *PrawfsBlawg*.

Koontz and Exactions: Don't Worry, Be Happy - lawprof Jonathan Zasloff, *Legal Planet*.

No Permit for You! - How Denying a Permit Could be a Taking - Jesse Souki, *Hawaii Land Use Law and Policy*.

Surprise! Environmental Lawprof Dislikes Koontz – Robert Thomas Inversecondemnation.com

And these:

Koontz Decision: No Big Deal or Blow to Sustainable Development? - Planetizen

http://www.planetizen.com/node/63926

A Legal Blow to Sustainable Development - Prof. Echeverria, Vermont Law School
http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?_r=1&

A Legal Blow to Cities That Want to Take Your Property - Cato Institute
http://www.cato.org/blog/legal-blow-cities-want-take-property

First decision post-*Koontz*:

Town of Ponce Inlet v. Pacetta, Ct. App. Fl. (July 5, 2013)
http://www.5dca.org/Opinions/Opin2013/070113/5D12-1982.op.pdf

Pending case:

California Building Industry Association v. City of San Jose
Appeal pending, review granted – a case to watch in California Supreme Court
http://www.courts.ca.gov/opinions/documents/H038563.PDF
http://www.inversecondemnation.com/files/final-pet-for-review.pdf

Background cases:

Nollan v. California Coastal Commission
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0483_0825_ZS.html

Dolan v. Tigard
http://www.law.cornell.edu/supct/html/93-518.ZS.html

Lingle v. Chevron
http://www.law.cornell.edu/supct/html/04-163.ZS.html

Eastern Enterprises v. Apfel
http://www.law.cornell.edu/supct/html/97-42.ZO.html

Commentary:

John Baker and Katherine Swenson, ***Koontz v. St. Johns River Water Management District: Trudging Through a Florida Wetland with Nine U.S. Supreme Court Justices*** (May 2013)
http://www.greeneespel.com/files/pdf/ReprintZPLR052013.pdf

Ilya Somin, ***Two Steps Forward for the 'Poor Relation' of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause***
Cato Supreme Court Review, pp. 215-243, 2012-2013 (Symposium on the 2012-13 Supreme Court Term), George Mason Law & Economics Research Paper No. 13-48
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325529

John D. Echeverria, ***Koontz: The Very Worst Takings Decision Ever?***
Vermont Law School Research Paper No. 28-13
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316406

Justin R. Pidot, ***Fees, Expenditures, and the Takings Clause***
University of Denver Sturm College of Law
Date posted: July 26, 2013

Last revised: August 15, 2013
Working Paper Series
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298307

John Ryskamp, ***Koontz Pulls the 'Trigger' on the Affordable Care Act***
Independent
Date posted: July 1, 2013
Working Paper Series
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287280

Takings

Solida v. United States, 778 F.3d 1351 (Fed. Cir. 2015) (When a church that owned a camp sued the government for an alleged taking of property without compensation in both federal district court and in federal claims court, based upon a water diversion project by the Fish and Wildlife Service as part of its wildlife management mandate, the government moved to dismiss the federal claims court action for lack of subject matter jurisdiction (pursuant to the Supreme Court's holding in *United States v. Tohono* under which the United States Court of Federal Claims does not have jurisdiction over any claim against the United States when the plaintiff has a previously filed a case against the United States in another court in respect to the same claim(s) asserted in the Court of Federal Claims). The Federal Circuit Court of Appeals upheld the Federal Court of Claims's dismissal, emphasizing the binding precedent set forth in Tohono. In a concurring opinion, Judge Taranto points to potential holes in the Tohono rule, stating that "if restorative relief is incomplete, as by leaving a temporary taking uncompensated, questions would arise about whether tolling of the statute of limitations might be recognized to avoid unconstitutionality or whether the combination of remedy-depriving statutes is unconstitutional as applied").
http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/14-5058.Opinion.2-24-2015.1.PDF

Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319 (Mo. 2015) (finding statute limiting damages for agricultural nuisances does not authorize an unconstitutional private taking nor violate equal protection).
http://law.justia.com/cases/missouri/supreme-court/2015/sc93816.html

Kirby v. N.C. Dep't of Transp., 769 S.E.2d 218 (N.C. Ct. App. 2015) (The Map Act, a state statute which gives the North Carolina Department of Transportation the ability to designate hundreds of parcels for future highway use and prevent their development in the meantime for the avowed purpose of keeping the future acquisition price low, was held to effect a taking and property owners are entitled to compensation for such a designation).

https://scholar.google.com/scholar_case?case=17706063766671105645&q=Kirby+v.+N.C.+Dept+of+Transp&hl=en&as_sdt=8006

Irwin v. City of Minot, 860 N.W.2d 849, 2015 ND 60 (N.D. 2015) (The Court held that an issue of fact remains as to whether removing clay from the plaintiffs' property during a flood to build dikes, but without compensating the plaintiffs, occurred during an emergency that presented an "imminent danger" giving rise to an "actual necessity" to take the clay and precluding compensation for the taking).
http://www.ndcourts.gov/court/opinions/20140217.htm

Koontz v. St. Johns River Water Management District
http://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf

Powell v. County of Humboldt, 166 Cal. Rptr. 3d 747, 757 (Cal. Ct. App. 2014)
http://www.californialandusedevelopmentlaw.com/files/2014/03/Powell-v.-County-of-Humboldt.pdf

Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528 (2005)
http://supreme.justia.com/cases/federal/us/544/04-163/

Lost Tree Vill. Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015) (holding that the denial of a wetland fill permit constituted per se regulatory taking).
http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/14-5093.Opinion.5-28-2015.1.PDF

Lost Tree Village Corp. v. United States, (Fed. Cir. 2013)
http://www.cafc.uscourts.gov/images/stories/opinions-orders/12-5008.pdf

Gregory M. Stein, David. L. Callies, Brian Rider, *Stealing Your Property or Paying You for Obeying the Law? Takings Exactions after* Koontz v. St. Johns River Water Management District 21 (American College of Real Estate Lawyers, March 2014).
http://files.ali-cle.org/thumbs/datastorage/skoob/articles/BKAC1403%20TAB09%20Stein_Callies_Rider_Koontz_thumb.pdf

Home Builders Ass'n of Central Arizona v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (*Dolan* does not apply to a "generally applicable *legislative* decision by the city) (emphasis in original)
http://www.leagle.com/decision/1997666187Ariz479_1595.xml/HOME%20BUILDERS%20ASS'N%20v.%20CITY%20OF%20SCOTTSDALE

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (zoning-imposed landscaping requirement not subject to *Dolan* scrutiny);

Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695-96 (Colo. 2001) (rejecting *Dolan* for legislatively-enacted impact fee).
Courts applying *Dolan* to legislative enactments include *Sparks v. Douglas County*, 904 P.2d 738 (Wash. 1995) (en banc) (road dedication requirement);

Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995) (land dedication requirement);

Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App.1994) (street-widening right-of-way dedication requirement).

Lemire v. State Dept. of Ecology, 309 P.3d 395, 409 (Wash. 2013)
http://www.courts.wa.gov/opinions/pdf/877033.pdf

Merscorp v. Malloy (Conn. Super. Ct., 2013)
http://www.ctlawtribune.com/pdfwrapper.jsp?sel=/pdf/merscorp_malloy.pdf

Cerajeski v. Zoeller, 735 F.3d 577, 580 (7th Cir. 2013)
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D10-31/C:12-3766:J:Posner:aut:T:fnOp:N:1232851:S:0

Canel v. Topinka, 212 Ill.2d 311, 288 Ill.Dec. 623, 818 N.E.2d 311, 324–25 (2004)
https://www.courtlistener.com/ill/bTpL/canel-v-topinka/

Cedar River Water & Sewer Dist., v. King Cnty., 315 P. 3d 1065, 1089 (Wash. 2013)
https://www.courts.wa.gov/opinions/pdf/862931.pdf

Marvin A. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014)
http://www.supremecourt.gov/opinions/13pdf/12-1173_nlio.pdf

Hotze v. Sebellius , --- F.Supp. 2d ---, 2014 WL 109407
http://www.larryjoseph.com/_Dockets/Hotze-v-Sebelius/13-01318-SDTx-Decision.pdf

Climate Change

Jennifer Peltz, Levees, Removable Walls Proposed To Protect NYC
Jun. 11 8:06 PM EDT
http://bigstory.ap.org/article/mayor-discuss-prepping-nyc-warming-world

Severance v. Patterson (Texas 2012 and 5th Cir. 2012)
https://www.supreme.courts.state.tx.us/historical/2012/mar/090387.pdf
http://www.ca5.uscourts.gov/opinions/pub/07/07-20409-CV1.wpd.pdf

Borough of Harvey Cedars v. Karan (New Jersey App. 2012; NJ Supreme Court 2013)
http://njlaw.rutgers.edu/collections/courts/appellate/a4555-10.opn.html
http://njlaw.rutgers.edu/collections/courts/supreme/a-120-11.opn.html

Stop the Beach Renourishment, Inc. v. Florida Dept. of Env. Protection, 560 U.S. 702 (2010)

Jordan v. St. Johns County (Fla. App.Ct. 2011, review denied)

Equal Protection

Warden v. City of Grove, Okla., 604 Fed.Appx. 755 (Mem) (10th Cir. 2015) (held that due process and equal protection claims brought by the developer of a mobile home park were not ripe for judicial review because the developer had "not even applied for a permit for his development, as [he] has not sought the approval of the Planning Commission, a prerequisite to applying for a permit[,] nor were there any 'evidentiary materials suggesting that [he] has sought a variance [from the Board]."
http://www.ca10.uscourts.gov/opinions/14/14-5114.pdf

Miller v. City of Monona, 784 F.3d 1113 (7th Cir. 2015) (holding that the approved condominium project was not suitable comparator for purposes of owners' class-of-one equal protection claim and the denial of owners' project was rationally related to persistent asbestos and building code problems on the property).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D05-01/C:13-2575:J:Tinder:aut:T:fnOp:N:1544912:S:0

David Hill Development LLC v City of Forest Grove (D. Or. 2013)

00251339.PDF

http://tinyurl.com/lstvd42

Comprehnesive Plans

Apple Grp., Ltd. v. Granger Twp. Bd. of Zoning Appeals, --- N.E.3d ----, 2015 WL 3774084 (Ohio 2015) (holding that Township's comprehensive plan met all required factors and may be included within its zoning resolution instead of a separate and distinct document).
http://supremecourt.ohio.gov/ROD/docs/pdf/0/2015/2015-Ohio-2343.pdf

Concrete Nor'west v. W. Wash. Growth Mgmt. Hearings Bd., 185 Wash.App. 745, 341 P.3d 351 (2015) (The county council did not have a duty to amend its comprehensive plan and zoning map and designate plaintiff's property as mineral resource land).
http://www.courts.wa.gov/opinions/pdf/D2%2045563-3-II%20Published%20Opinion.pdf

RDNT, LLC v. City of Bloomington, 861 N.W.2d 71 (Minn. 2015) (The state supreme court held that the city acted within its discretion in denying a nursing home's application for a conditional use permit to expand its existing assisted living services by adding a third building to its campus because the proposed mitigation conditions were insufficient. In a concurring opinion, Justice Anderson wrote that while he agrees with the majority's ultimate holding, he is "particularly struck by the willingness of the City to ignore the longstanding use of property by RDNT, a use the predates the arrival of the neighbors now complaining about traffic." He wrote separately "to address an alarming argument advanced by the City that the majority… [did] not reach in affirming the court of appeals. That argument is that the City may properly deny a conditional use permit when the proposed use is in conflict with its comprehensive plan. [His] concurring opinion [was] prompted by significant uncertainty in [the] statutory framework and confusion in [the] case law concerning the role of comprehensive plans… There are constitutional implications lurking behind that insistence of the City that a conditional use permit may be denied for any comprehensive plan violation").
http://caselaw.findlaw.com/mn-supreme-court/1694937.html

City of Portland, OR, Bureau of Planning and Sustainability:
http://www.portlandoregon.gov/bps/article/465826

Oregon's statewide planning program:
http://www.oregon.gov/LCD/docs/goals/compilation_of_statewide_planning_goals.pdf

Involving the public in the planning process via an app:
http://www.portlandbps.com/gis/cpmapp/

Growing Smart Legislative Guidebook (American Planning Association)
http://www.planning.org/growingsmart/

Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 2001) (zoning inconsistent with plan, building constructed pursuant to zoning ordered torn down.)
http://scholar.google.com/scholar_case?case=9344086111461559402&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Griswold v. City of Homer, 186 P.3d 558 (Alaska 2008): Zoning passed by initiative inconsistent with plan, so invalidated.
http://scholar.google.com/scholar_case?case=4473075930033677947&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Haines v. City of Phoenix, 727 P. 2d 339 (Ariz. 1986): Plan had height limit of 250 feet, but court found 500 foot high building consistent.

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STATE OF CALIFORNIA GENERAL PLAN GUIDELINES
GOVERNOR'S OFFICE OF PLANNING AND RESEARCH:

http://opr.ca.gov/docs/General_Plan_Guidelines_2003.pdf

http://opr.ca.gov/docs/Update_GP_Guidelines_Complete_Streets.pdf

http://opr.ca.gov/docs/specific_plans.pdf

http://ceres.ca.gov/planning/plan_comm/

http://ceres.ca.gov/planning/open_space/open_space.html

http://opr.ca.gov/docs/SB244_Technical_Advisory.pdf

Robert L. Liberty, Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States, 22 ELR 10367 (1992)
http://elr.info/store/download/25879/6111

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http://www.sccourts.org/opinions/HTMLFiles/SC/27065.pdf

Religious Land Use and Institutionalized Persons Act

Bernstein v. Vill. of Wesley Hills, Nos. 08-CV-156 (KMK), 12-CV-8856, 2015 WL 1399993 (S.D.N.Y. 2015) (Village did not impose or implement a land use regulation, within the meaning of the Religious Land Use and Institutionalized Persons Act, when they filed an action alleging that the town board's approval of the development of a religious corporation's property violated state environmental review laws, where the village had no capacity to impose or implement environmental review).

Candlehouse, Inc. v. Town of Vestal, New York (USDC ND NY 2013)
http://rluipa-defense.com/docs/Candlehouse%20v.%20Town%20of%20Vestal.pdf

Wetlands

Final Compensatory Mitigation Rule
http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003_05_30_wetlands_CMitigation.pdf

Adult Uses

Showtime Entm't, LLC v. Town of Mendon, 472 Mass. 102, 32 N.E.3d 1259 (2015) (held that pre-enactment studies and other evidence, e,g. of secondary effects, used by the town in developing regulations prohibiting the sale of alcohol at adult establishments demonstrated a "countervailing State interest" sufficient to justify the ban on the sale of alcohol at such businesses, but even though the ban was justified it was not adequately tailored because it not only banned the sale of alcohol in adult entertainment establishments but also banned it in any legitimate theater that happened to be in the adult entertainment overlay district and wanted to show a mainstream performance like the rock musical "Hair" or "Equus", neither of which is adult or sexually oriented and presumably would not be the source of the secondary effects that come from serving alcohol in places that do provide adult entertainment).
http://masscases.com/cases/sjc/472/472mass102.html

35 Bar and Grille v. San Antonio, (USDC WD Tx 2013)

139072525-Judge-s-Entertaining-Order-in

Housing – Inclusionary Zoning

42 USC § 3601 http://www.justice.gov/crt/about/hce/title8.php

Metropolitan Housing Development Corporation v. Arlington Heights, 616 F2d 1006 (7th Cir. 1980).

Mt. Holly Gardens Citizens in Action v. Township of Mount Holly, 658 F3d 375 (3rd Cir. 2010)
http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1507.htm

Magner v. Gallagher, 619 F.3d 823 (8th Cir. 2010)
http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1032.htm

Executive Order 12892 -
http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/EXO12892

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Hills Development Company v. Township of Bernards, 103 N.J. 1 (1986). (Mt. Laurel III)(sustained the NJ Fair Housing Act as an alternative to Judicial Relief)

Holmdel Builders' Association v. Holmdel Township, 121 N.J. 550 (1990). (housing fees)

Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151 (1975) (Mount Laurel I)

Southern Burlington County NAACP v. Township of Mount Laurel II, 92 N.J. 158 (1983) (Mount Laurel II).

Toll Brothers, Inc., v. Township of West Windsor, 173 N.J. 502 (2002).(builder remedy still viable for non-COAH towns)

N.J.S.A 52:27D-301, et seq. (N.J. Fair Housing Act, setting up COAH)

Holmes, Robert C., *Southern Burlington County NAACP v. Township of Mt. Laurel, (1975), Establishing a Right to Affordable Housing Throughout the State by Confronting the Inequality Demon*, Chapter 3, in Courting Justice, 10 New Jersey Cases That Shook the Nation, Paul Trachtenberg Ed., (2013)

Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, Connecticut Public Interest Law Journal,
Vol. 12 No. 2 2013.

Robert C. Holmes, *A Black Perspective on Mount Laurel II: Toward a Black Fair Share*, Seton Hall L. Rev. Vol. 14 No. 4 1984.

http://njlaw.rutgers.edu/collections/courts/supreme/a-127-11.opn.html (July 2013 N.J. Supreme Court opinion reversing Governor Christie's abolition of COAH)

http://njlaw.rutgers.edu/collections/courts/supreme/a-90-10.opn.html (Sept. 2013 N.J. Supreme Court opinion voiding growth share rules and setting deadline for new rules; the deadline has been extended to May, 2014)

http://www.state.nj.us/dca/services/lps/hss/transinfo/reports/units.pdf (link to site which says the Mt. Laurel/COAH programs had created about 60,000 new units and rehabilitated about 15, 000 units as of March, 2011).

Douglas S. Massey, "*Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb,"* Princeton University Press (2013)

Housing – Distressed Properties

62-64 Main St. LLC v. Mayor & Council of Hackensack, 221 N.J. 129, 110 A.3d 877 (N.J. 2015) (Property owners challenged city's classification of their lots as blighted. The state supreme court reversed the state appellate court's holding that the houses were not blighted. The supreme court found that the properties were in various states of ruins, constituting blight, and a landowner's desire to develop property does not militate against a blight declaration in New Jersey law).

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- The section on problem property owners is: http://www.communityprogress.net/problem-property-owners-pages-201.php
- The section on reusing vacant properties is: http://www.communityprogress.net/reusing-vacant-properties-pages-202.php

Alan Mallach, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS (2nd ed. 2010)

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"Vacants to Value" - vacantstovalue.org – the signature program of the Mayor Stephanie Rawlings-Blake of Baltimore dealing with vacant properties; contains many materials.

Julie A. Tappendorf & Brent O' Denzin, *Turning Vacant Properties into Community Assets Through Land Banking*, 43 The Urban Lawyer 3 (Summer 2011).

Timothy A. Davis, *A Comparative Analysis of State and Local Government Vacant Property Registration Statutes*, 44 The Urban Lawyer 2 (Spring 2012).

Stephen Whitaker and Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent and Foreclosed Property on Sales Prices of Neighboring Homes*, Federal Reserve Bank of Cleveland (Oct. 2011).

Frank S. Alexander & Leslie A. Powell, *Neighborhood Stabilization Strategies for Vacant and Abandoned Properties*, 34 Zoning & Planning Law Report 1 (2011)

Jessica A. Bacher, *Addressing Distressed Properties: Legal Tools*, 39 R.E.L.J. 207 (2010);

Dwight H. Merriam, *Helping Development in a Down Economy*, 50 Municipal Lawyer 14 (2009).

Sorell E. Negro, *A New Tool for Vacant Properties: Land-Banking*, Municipal Lawyer (March/April 2012).

Sorell E. Negro, *You Can Take It to the Bank: The Role of Land Banking in Dealing with Distressed Properties*, 35 Zoning & Planning Law Report 9 (September 2012).

Medical Marijuana

City of Riverside v. Inland Empire Patients Health & Wellness Center, 300 P.3d 494 (Cal. 2013)

The Michigan Medical Marihuana Act (MMMA), MCL 333.26421 et seq.

Riverside v Inland Empire Patients Health & Wellness Ctr, Inc, 56 Cal 4th 729; 156 Cal Rptr 3d 409; 300 P3d 494 (2013),

Signs

Reed v. Town of Gilbert, 2015 WL 2473374, 576 U.S.__ (U.S. 2015) (holding that the provisions of a municipality's sign code that made content-based distinctions between "Temporary Directional Signs, Ideological Signs, and Political Signs" unconstitutionally discriminate against a particular kind of content) (text commentary based on blog postings 6/22/15 and 6/30/15 at www.RLUIPA-Defense.com authored by K. Chaffee, E. Seeman, and B. Connolly, with permission).
http://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf

Courts will view content neutrality differently given the U.S. Supreme Court's 2015 decision in *Reed v. Gilbert.* Further, Reed makes clear that view-point neutral regulation is not synonymous with content-neutral regulation. Good News Community Church (Good News) claimed that Gilbert's sign ordinance made impermissible content-based distinctions between "Temporary Directional Signs, Ideological Signs, and Political Signs." Good News, which holds services at

different locations from week to week, used signs directing congregants to each week's chosen location. Gilbert categorized such signs as "Temporary Directional." The Ninth Circuit disagreed with Good News, finding that the sign restrictions, including the distinctions among them, were content-neutral for purposes of free speech:

> [T]he distinction between Temporary Directional Signs, Ideological Signs, and Political Signs are content-neutral. That is to say, each classification and its restrictions are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign. . . . It makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted. Accordingly, as the speaker and event determinations are generally "content-neutral," Gilbert's different exemptions for different types of noncommercial speech are not prohibited by the Constitution.

The Supreme Court disagreed. The Court's majority opinion, authored by Justice Thomas, started with the well-recognized principle: "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and maybe justified only if the government proves that they are narrowly tailored to serve compelling state interests." The Court found that the ordinance is "content based on its face." According to the Court, the ordinance regulates based on the message conveyed: Temporary Directional signs convey a message directing the public; Political Signs are designed to influence the outcome of an election; and Ideological Signs communicate a message or idea. By regulating the message, Gilbert regulated the "communicative content of the sign," making the ordinance content based and subject to strict scrutiny review. Even though the ordinance may have a content-neutral justification, "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."

The Court went on to conclude that Gilbert's purported reasons for the regulation, preserving the Town's aesthetic appeal and traffic safety, were not adequate justifications to pass strict scrutiny review. Assuming that these interests were "compelling," the Court found the ordinance "hopelessly underinclusive" because the same restrictions were not placed on other types of signs. Thus, Gilbert failed to show that its ordinance was "narrowly tailored to further a compelling government interest."

The Court concluded the majority opinion by noting that its decision does not limit a municipality's ability to regulate signage, so long as the regulation is content neutral. For instance, "size, building materials, lighting, moving parts, and portability" may be regulated without reference to a sign's message. Further, "on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner."

The majority opinion does not cite to any of the majority opinions in the abortion clinic cases (including the 2014 decision in *McCullen v. Coakley*, where Chief Justice Roberts espoused a different view of content neutrality than the Court adopted in *Reed*), nor does it cite to some standard sign law precedents such as *Metromedia* and *Ladue*. The "secondary effects" cases relating to the regulation of adult business also go unmentioned. It may be difficult to reconcile

the Reed majority opinion with some of the holdings in these prior cases, and it remains to be seen whether Reed was truly intended to cut back at any of these earlier decisions.

The *Reed* decision does not mention the distinction between noncommercial and commercial speech. Older cases, including *Metromedia*, held that commercial speech gets less First Amendment protection than noncommercial speech. In the 30-plus years since *Metromedia*, however, commercial speech has received increasing protection. The 2011 case of *Sorrell v. IMS Health* reviewed commercial speech regulations under a time, place, and manner noncommercial speech analysis. It may prove to be that the Court's approach in *Reed*, the heavy citation to *Sorrell* in the *Reed* majority, and failure to mention the commercial speech doctrine suggests a gradual phasing-out or weakening of the commercial speech doctrine.

Although the decision was unanimous, the Justices filed three separate concurring opinions. Justice Alito, joined by Justices Kennedy and Sotomayor added "a few words of further explanation." Justice Alito stressed that municipalities are not powerless to enact sign regulation, and provided a non-inclusive list of content neutral criteria:

Lamar Advertising v. Zoning Board of Rapid City
http://ujs.sd.gov/Uploads/opinions/26254.pdf

Riya Cranbury Hotel, LLC v. Zoning Bd. of Adjustment of the Township of Cranbury (N.J. Sup. Ct. 2013)
http://www.njlawarchive.com/20130201101013470672563/

Town of Bartlett Board of Selectmen v. Town of Bartlett Zoning Board of Adjustment (N.H. 2013) http://www.courts.state.nh.us/supreme/opinions/2013/2013031bartlett.pdf

Brown v Town of Cary, 2013 WL 221978 (4th Cir. 2013)http://www.ca4.uscourts.gov/Opinions/Published/111480.P.pdf

Subdivisions

Town of Hollywood v Floyd, (S.C. 2013)
http://www.sccourts.org/opinions/HTMLFiles/SC/27252.pdf

Variances

Bartlett v. City of Manchester (N.H. 2013)
http://www.courts.state.nh.us/supreme/opinions/2013/2013017bartlett.pdf

Hydraulic Fracturing

Anschutz v. Dryden (NY App. Div. May 2, 2013)
http://earthjustice.org/sites/default/files/Dryden-Decision.pdf

John R. Nolon & Steven E. Gavin,
HYDROFRACKING: STATE PREEMPTION, LOCAL POWER, AND COOPERATIVE GOVERNANCE
http://law.case.edu/journals/lawreview/Documents/63CaseWResLRev4.pdf

David L. Callies,
FEDERAL LAWS, REGULATIONS, AND PROGRAMS AFFECTING LOCAL LAND USE DECISION MAKING: HYDRAULIC FRACTURING
The American Law Institute - Continuing Legal Education
Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation
August 14 - 16, 2013
http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/CV003_chapter_33_thumb.pdf

Cooperstown Holstein Corporation v. Town of Middlefield
In the Matter of Mark S. Wallach, as Chapter 7 Trustee for Norse Energy Corp. USA v. Town of Dryden

HTTP://WWW.NYCOURTS.GOV/CTAPPS/DECISIONS/2014/JUN14/130-131OPN14-DECISION.PDF

Robinson Township v. Commonwealth of Pennsylvania

HTTP://WWW.PACOURTS.US/ASSETS/OPINIONS/SUPREME/OUT/J-127A-D-2012OAJC.PDF?CB=1

State ex rel. Morrison v. Beck Energy Corp. No. 2013-0465, 2015 WL 687475, 2015-Ohio-485 (2015) (The Court held that a town ordinance prohibiting oil and gas drilling violated the Ohio State Constitution, which does not allow a municipality to discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state has permitted. The Court determined the ordinance to further be an exercise of police power and in conflict with state statutes addressing oil and gas drilling).

http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2015/2015-Ohio-485.pdf

https://www.sconet.state.oh.us/rod/docs/pdf/9/2013/2013-ohio-356.pdf

Masone v. City of Aventura and City of Orlando v. Udowychenko

http://www.floridasupremecourt.org/decisions/2014/sc12-644_Corrected.pdf

CTS Corp v Waldeburger
http://www.supremecourt.gov/opinions/13pdf/13-339_886a.pdf

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A Review of Negotiation Skills

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A REVIEW OF
NEGOTIATION SKILLS

I. DEFINITIONS. (1)

A. Negotiation - Negotiation is a process in which two or more participants attempt to reach a mutually acceptable decision on one or more matters. The goal of negotiation is to reach a decision that provides the greatest possible benefit to you or your client.

B. The Subject of Negotiation -

1. Distributive: A distributive negotiation is the process of dividing a fixed quantity of resources. Common examples are contracts for purchase or construction, negotiations over salary, and settlement negotiations over money damages.

2. Integrative: An integrative negotiation is one where the parties' interests are not directly in conflict, and agreements are possible in which the level of satisfaction of both parties can be increased on the same issue. Common examples are: negotiation of a policy or the resolution of a specific problem or complaint.

3. Combination.

C. Tactics - Specific negotiating behaviors.

D. Strategy - A series of tactics to obtain at least the minimally acceptable resolution (goal).

E. Types of Tactics and Strategies -

1. Competitive: Competitive tactics and strategies are designed to undermine the other party's confidence in their position and induce them to agree to a conclusion less advantageous than they would have prior to the negotiation. Examples: high initial demands, threats, "take it or leave it" positions.

2. Cooperative: Tactics or strategies based on what is fair and reasonable (objective measures) and the use of concessions and compromises to encourage the other negotiator to reciprocate. Examples: reasonable opening offers, open sharing of information, use of promises rather than threats.

3. Problem Solving: An approach to negotiation designed to identify and maximize opportunity for joint or mutual gain. Most applicable to integrative subjects, such as policy development, complaint resolution or problem solving.

F. Style: The impact and result of personality on the choice and use of tactics and strategies. Admittedly inexact...

G. The Interplay of Tactics and Style:

		STYLE	
		Competitive	Cooperative
TACTICS	Competitive	The Jerk	The Con Man
	Cooperative	People Who Don't Know Better...	A Friendly Negotiator

II. COMPONENTS OF NEGOTIATION PROCESS.

A. Planning and Preparation.

1. Clearly define the subject, situation or problem.

2. Determine What Information is Needed. Familiar issues require less new information; unfamiliar issues require extensive information gathering.

3. Determine Goals. The negotiator must determine the minimally acceptable result ("bottom line") and the ideal or target result. Equally important is to assess the other side's goals and understand their bottom lines and targets! You should understand your opponent's needs as well or better than you understand your own. Compare your bottom line and target results with theirs and anticipate problems based on the comparison .

4. Rank Order the Goals. Rank order your goals and those of the other side.

a. Need: The things that you or they must obtain are the minimum requirements of the negotiation. Are there alternatives for you?

Are there alternatives for them?

b. Want: The target or ideal results, but not absolutely required.

c. Giveaways: Those negotiable items that have value to one side but not necessarily to the other. These are the easiest items to give away or ask for in a bargaining or logrolling contest.

5. Choose a Strategy:

6. Prepare Notes or Outline: Include Need, Want and Giveaway items, and have specific information which may be required in the negotiation (e.g. cost projections, requirements, timeframes, or agreement language).

B. Opening Moves and Relationship Building. The initial orientation phase of a negotiation is critically important!

1. Gather baseline data on personality, style and probable negotiation strategy of the other side.

2. Develop appropriate relationship with the other party. Most probably this would be an expectation of professionalism and trustworthiness.

3. Determine limits and qualifications on the authority of the opposing negotiator.

4. Seek agreement on goals or parameters for the negotiation.

5. Agenda Control: If you intend to exercise agenda control, you must make the opening move. If you object to the other party exercising agenda control, stop it fast.

C. Information Gathering and Exchange.

1. Questions are the most valuable negotiating tactic available to you.

2. Information gathering and exchange is easier and more natural in the early stages of a negotiation. Information gets "tight" during the later stages.

3. Use information obtained to confirm or refine your predictions of the other side's minimum and target goals.

4. Be conscious of what and how much information you are giving up.

Trading of equivalent value information is a reasonable expectation; blurting out all your best data too early will leave you vulnerable in the later stages.

D. Offers, Proposals and Solutions.

1. Agenda Control: Should you start with the little issues or the big issues?

a. Least issues first: allows time to gather more information about the other side, their goals and strategies; builds relationship; prevents early breakdowns or impasses; builds "buy in".

b. Most Important Issues First: Quicker and more efficient; risks breakdown or impasse; tends to de-emphasize all issues past the "big ones".

c. Simultaneous Negotiation of Multiple Issues: Encourages concessions and trading ("logrolling"); no one issue kills a deal; but, beware, can end in "take it or leave it" package.

2. Who Should Make the First Offer?

a. If YOU make the first offer you exercise agenda control, set the tone of the negotiations, and define the proposed range of discussions and initial offers. However, you risk alienating the other side or missing the opportunity to gather more data.

b. If THEY make the first offer, you get more information about their strategy and goals. You retain flexibility. However, you lose agenda control.

3. Range of First Offers:

Extreme High---Reasonable Offers---First, Firm, Fair and Final or Low Offers
(Take it or Leave it)

E. Narrowing of Differences.

1. Your two goals are (1) to induce the other negotiator to agree to terms that are favorable to you, and (2) to determine what terms are acceptable to the other party.

2. Competitive tactics include threats, "walking out", real or feigned displays of anger, argumentative responses, and refusals to make

concessions.

3. Cooperative tactics include making or proposing mutual concessions, use of promises to obtain concessions, explanation of position as opposed to argumentative statements, and the use of objectively reasonable information supporting your position.

4. Problem solving tactics for narrowing differences include brainstorming, mutual data gathering, and open sharing of information.

F. Closure.

1. Competitive tactics to force closure include deadlines, ultimatums and "final offers".

2. Cooperative tactics to conclude negotiations include reciprocal final concessions and "splitting the difference".

3. Always summarize the elements of the agreement to assure mutual understanding. Where appropriate, reduce the agreement to writing.

III. CHOOSING A STRATEGY.

A. General Concerns: There is no single strategy which is appropriate for all situations. Your choice of strategy should always be a conscious choice. The choice should remain flexible so that changes in the situation or the other party's strategy may be compensated for.

B. Specific Issues to Consider in Choosing a Strategy:

1. The Issue to be Negotiated. Example: A purchase contact for office furniture is probably a competitive negotiation.

2. The other negotiator's probable strategy and style. (Do you fight fire with fire, or fight fire with water?) Note that profession, age, sex, cultural background, and amount of authority may influence style.

3. Relative Power of Parties. The less power a negotiator has the more cooperative the strategy should be.

4. The degree of risk acceptable.

5. Is this a "one-shot" negotiation or an on-going relationship or transaction? On-going relationships usually imply cooperation.

6. The history and context of this negotiation.

7. The values and norms of your organization.

8. Your personality.

IV. SPECIFIC TACTICS.

A. Competitive Tactics.

1. "Good Guy/Bad Guy": The use of an aggressive, competitive first negotiator to soften up the other side, followed by a pleasant, friendly negotiator who now seems eminently reasonable by comparison. When faced with this tactic, don't get aggravated or argue; simply sit and listen. When the "bad guy" has finished, then deal with the "good guy", BUT, consider the "good guy's" demands without comparing them to the "bad guy's" demands. In other words, ignore the "bad guy". Another **Counter Tactic** is to simply call their hand, i.e., point out that you know what they're doing.

2. Extreme Demands: If the other side tries to skew the midpoint between your position and theirs by making a ridiculously extreme offer, there are two basic choices: (1) the competitive response is to make an equal but opposite extreme demand or (2) the cooperative approach is to ask for good faith substantiation of their position and to call their hand by labeling the behavior.

3. Higher or Shifting Authority: Don't allow the opposing negotiator to get you committed and then say "I have to check with my boss" on all of his commitments. Establish at the beginning of each negotiation the authority of the negotiator on the other side to make a binding decision. **Competitive Counter Tactic:** Claim you must also get permission from higher authority or threaten to walk out. **Cooperative Counter Tactic:** Remind the other party of agreements they made at the beginning of the negotiations, call their hand on the use of a dirty tactic, and remind them of basic principles of fairness and honesty. Some experts believe you should never negotiate with anyone who has less authority to make concessions than you do.

4. Incomplete or Ambiguous Terms: Revisiting any assumed, vague or undiscussed terms of a deal to gain an additional advantage or increase the other party's cost. A common example is a lowball price for an article, which then quickly escalates as all the extras or change orders are added to it. **Counter Tactic:** Admit that you didn't understand it and demand that you start back at step 1. This time, though, get the deal in writing and

continually ask whether there are any other issues or items which could affect the item being discussed.

5. "Take It or Leave It" Ultimatums:

When this occurs, always leave your opponent a way out, a way to save face. Do not assume that the ultimatum is true. Rather, you should begin testing pieces of the deal to see if they are genuinely bottom lines. The tactic could just be a test of your skill, or an act of frustration by your opponent. Express a lack of understanding and ask the other party to re-explain terms, needs assumptions, or the process.

6. The Actor: This tactic is the deliberate use of feigned emotions to create a specific response in the opposing party. Examples include appeals to sympathy, guilt induction, false anger, feigned confusion (Lt. Colombo), false friendship, and fear. The best **Counter Tactic** for each of these emotional ploys is recognition. Once you have recognized the tactic, you may choose whether to ignore it, return it in kind, call attention to it and refuse to proceed until it stops, or make any other appropriate response.

7. The Non-Negotiable Issue: This is a claim that a particular issue is controlled by a policy or rule that the negotiator does not have authority to change. It may be true that there is such a rule, but it may not be true that it cannot be changed. Test it by asking a lot of questions. Government officials can use this tactic very effectively.

8. Nibbling the Deal: When the negotiation is wrapping up, and both sides think they have a deal, one side may "nibble" the deal by asking for one more minor concession. **Counter Tactic:** Suggest that you will trade for an equally minor reciprocal concession.

B. **Cooperative Tactics.**

1. When in doubt, ask a question! Asking a question will almost always be beneficial in some way. It may give you new information, diffuse a tense moment, lead to mutual problem solving techniques, identify new alternatives, or simply buy you enough time to think of a better response.

2. Bring the Process into the Open: If competitive tactics are being used against you, or the negotiations appear to be bogging down for some reason, calling attention to the original goals, summarizing what has been decided so far, or exposing competitive tactics being used against you, may refocus the negotiations in a positive and constructive direction. Done competitively, it may backfire; done sincerely it will probably help the

negotiations.

3. Mediators and Third Party Assistance: Sometimes bringing in an expert, a neutral third party or a mediator can break an impasse. For example, asking the advice or assistance of a recognized expert, or agreeing to take the case into mediation.

C. Telephone Negotiations.

1. If you have a choice, don't negotiate over the telephone. Negotiating by telephone tends to be more impersonal, involve less information exchange, and can become "bottom line" oriented much too fast. With no visual cues from your opponent, you must pay much more attention to the verbal cues (e.g. tone of voice, word choice and pacing).

2. If you must negotiate by phone, prepare extensive notes and an outline ahead of time. One advantage of telephone negotiation is that your opponent cannot see what you're doing, therefore, you can use notes, calculators, have other people in the room feeding you information, and make candid notes about your opponent's position.

3. If you must negotiate by phone, you make the call. If you wait for the other side to call you, they will be prepared and you will be caught off guard. A cooperative alternative is to agree on a set time for your negotiating call.

V. "BOTTOM LINES"; 6 BASIC "RULES"

1. Understand what you want.

2. Understand even better what the other side wants.

3. Consciously use your experience, knowledge, common sense and skills.

4. Don't allow the other side to intimidate you or confuse you such that you forget to follow Rule #3.

5. Ask questions.

6. When you get what you want, stop.

PART II: DEMONSTRATION

Participants: Three members of the group will be chosen to participate in a demonstration negotiation.

Assumptions: Be as realistic as possible. Don't make up any facts or change known reality unless not doing so would force you to end the negotiation without reaching a conclusion.

Audience Role: The audience will critique the participants and select a winner from among the three. The critique will be an open discussion of tactics, strategy and style.

Incentive: **The participant chosen by the group as the best negotiator will receive an incentive award provided by:**

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(1) Definitions adapted from Legal Negotiation, Theory and Applications, Donald G. Gifford, West Publishing, 1989, ppp. 13-24.

The Ethical Responsibilities of Supervisory Government Lawyers

Phillip M. Sparkes*

Technological, economic, political, and social forces are reshaping the profession of law. Government lawyers feel the resulting effects in common with private sector lawyers. The forces challenge some traditional notions of legal ethics. Some aspects, like multi-jurisdictional practice and nonlawyer ownership of law firms, are the subjects of considerable debate. Other aspects, like the proper response of managerial and supervisory lawyers, receive little attention. That there even is an ethical dimension to firm management and supervision catches some lawyers unaware. As one writer tells it:

> I am amazed by the number of times shareholders or partners of law firms express surprise and even dismay at learning they are responsible both ethically and civilly for those individuals working in or for their firm. The surprise and dismay often turns to astonishment and disbelief when they learn they also can be held responsible for the actions of shareholders or partners as well. I often hear the response that "the laws of our jurisdiction limit the liability of shareholders or partners thereby insulating us from personal liability for the negligence of the other attorneys in the firm." While this statement is often correct, it provides no safe haven and often creates a false sense of security among firm owners which leads to complacency or inattention to the very important duty of knowing what goes on in the firm. Failure to be aware of what goes on in your office is a recipe for disaster.[1]

Although the passage speaks of private lawyers in the traditional law firm setting, with minor changes it could just as easily be speaking about government lawyers in comparable positions in government law offices.

Underappreciation of managers' and supervisors' ethical responsibilities is, to a degree, understandable. Despite the insistence that law schools produce "practice ready lawyers,"[2] there is no assurance that a lawyer encountered the matter when a student in law school.[3]

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[1] Rob Tameler, *Become Your Partner's Keeper*, W. VA. LAW., Oct. 2003, at 16-17.

[2] *See*, William L. Sullivan *et al.*, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (2007).

[3] Texts for law students vary widely in their coverage of the supervisor/subordinate ethics. Compare Thomas D. Morgan, PROF'L RESPONSIBILITY (concise 11th ed. 2012), which devotes approximately 11 of its 497 pages to the matter, with Geoffrey C. Hazard, Jr. *et al.*, THE LAW AND ETHICS OF LAWYERING (5th ed. 2010), which devotes approximately 17 of 1173 pages to it. Further, a given instructor may choose not to assign or not to cover the material in class, though judging from course syllabi available online most do. Still, despite the fact that the topic is identified on the subject matter outline for the Multistate Professional Responsibility

Even if given exposure, might have thought managerial and supervisory responsibilities a distant prospect and comparatively unimportant. That is wrong, of course. The realities of legal employment today push many new lawyers into solo and small practices with more immediate managerial and supervisory responsibilities.[4] Moreover, even those new lawyers fortunate enough to find work in larger firms, prosecutors' and public defenders' offices, or other larger settings will quickly discover that virtually every lawyer is a supervisor of at least one person (typically the assistant who does the lawyer's administrative work).[5] Law school does not – some would say cannot – prepare students for supervisory and managerial responsibility.[6] That lawyers who later inherit managerial responsibility seldom have formal management training only compounds the problem. Nevertheless, ignorance of the rules and lack of managerial training or skill will not excuse an ethical violation.[7]

In September 2014, the ABA Committee on Ethics and Professional Responsibility issued a formal opinion addressing the duties of managerial and supervisory attorneys.[8] Specifically the opinion addresses the duties of prosecutors, but it is relevant to managerial and supervisory lawyers generally.[9] The remainder of this paper reviews the history and design of the relevant rules of professional conduct, surveys the recent formal opinion and discusses its import for other governmental law offices, and considers what managerial and supervisory lawyers might want to do in anticipation of future opinions by the ABA and state bar ethics committees.

Examination (available online from the National Conference of Bar Examiners, <https://www.ncbex.org), some instructors will leave the topic to coverage in commercial bar preparation courses>.

[4] Before 2008, no more than 3.5% of new law school graduates indicated that they planned to start their own solo practice immediately after law school. In 2011, the number hit 6.1%. Jennifer A. Rymell, *The Chair's Corner: The Growing World of Legal Entrepreneurs*, 31 GPSOLO (Jan./Feb. 2014), available at < http://www.americanbar.org/publications/ gp_solo/2014/january-february/the_chairs_corner_growing_world_legal_entrepreneurs.html>. According to the ABA's 2015 survey of lawyer demographics, the portion of lawyers in solo practice has been growing modestly larger for many years and now comprises more than 36% of all lawyers (<http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf>).

[5] Donald R. Lundberg, *Thoughts on Law Firm Management and Supervision*, RES GESTAE, Mar. 2014 at 18, 22.

[6] *See* Daniel B. Evans, *Why Lawyers Can't Manage*, <http://evans-legal.com/dan/manage.html> (originally published at 19 LAW PRACTICE MGT., Oct. 1993 at 26.).

[7] *See, e.g.,* Iowa Sup. Ct. Att'y Disc. Bd. v. Howe, 796 N.W. 360, 370 (Iowa 2005). *See also*, Whelan's Case, 619 A.2d 571, 573 (1992) ("The respondent's defense is basically one of ignorance of the Rules of Professional Conduct, which is no defense. We hold that lawyers, upon admission to the bar, are deemed to know the Rules of Professional Conduct.") and Att'y Grievance Comm'n v. Hall, 969 A.2d 953, 968-69 (Md. 2009) (attorney's ignorance of his ethical duties is not a defense in a disciplinary proceeding). Ignorance, while not a defense, is sometimes a mitigating factor in fashioning appropriate discipline. *See, e.g., Hall* and State ex rel. Okla. Bar Ass'n v. Combs, 202 P. 3d 830, 837 (Okla. 2008).

[8] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467, Managerial and Supervisory Obligations of Prosecutors under Rules 5.1 and 5.3 (2014)

[9] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 fn. 7.

I. History and Design of Rules 5.1 and 5.3

The American Bar Association introduced its Model Rules of Professional Conduct in 1983. Model Rules 5.1, 5.2, and 5.3 were the first formal attempt to address supervisory lawyers, subordinate lawyers, and nonlawyer employees of law firms.[10] The three rules had no direct counterpart in the predecessor Model Code of Professional Responsibility. Rather, they codified and amplified provisions scattered through the predecessor Model Code and added or elaborated on topics already implicit in the laws of agency and of tort.[11] To an extent, the rules serve to subject a lawyer to discipline for conduct that, previously, may have subjected the lawyer only to the risk of civil liability.[12]

Model Rule 5.1, now captioned "Responsibilities of Partners, Managers, and Supervisory Lawyers," addresses a lawyer's responsibility for management and supervision of another lawyer. As originally written, the rule left some doubt as to the generality of the responsibilities it imposed, suggesting that the rule was directed only at partners and supervisors.[13] That led the ABA Ethics 2000 Commission to modify the caption, text, and commentary to reflect that the rule applies to lawyers with managerial authority comparable to that of a partner.[14] Further changes, particularly to the definition of "law firm" in Rule 1.0, made clear that the rule applies to law firms regardless of their organizational form, to corporate legal departments, to legal services organizations, and to government law offices. The ABA included those changes in the 2002 version of the Model Rules.

Model Rule 5.3, now captioned "Responsibilities Regarding Nonlawyer Assistance," addresses a lawyer's responsibility for management and supervision of nonlawyers. It parallels Model Rule 5.1 structurally and in its legislative history.[15] The Ethics 2000 Commission's changes to the original Model Rule 5.3 reflect the changes it made to the original Model Rule 5.1 and clarify its applicability not just to law firm partners but to lawyers with managerial authority in corporate and government legal departments and legal

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[10] James R. Devine *et al.*, PROF'L RESPONSIBILITY: PROBLEMS, CASES, AND MATERIALS 97 (4th ed. 2013). Model Rules 5.1, 5.2, and 5.3 are set out in Appendix A.

[11] Ronald D. Rotunda and John S. Dzienkowski, PROF'L RESPONSIBILITY: A STUDENT'S GUIDE 888 (2007).

[12] *Id.*

[13] Annot., General Supervisory Responsibility, ANN. MODEL RULES PROF'L CONDUCT, Rule 5.1 (8th ed. 2015). The original definition of "law firm" in Model Rule 1.0 reinforced this: "'Firm' or 'law firm' denotes a lawyer or lawyers in a private firm and lawyers employed in a legal services organization."

[14] Ethics 2000 Comm'n, Reporter's Explanation of Changes, <http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule51rem.html>.

[15] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §11 likewise addresses a lawyer's duty of supervision. In contrast to the Model Rules, the Restatement sets out that duty in a single section. Nonetheless, the Restatement and the Model Rules accord with one another.

services organizations as well.[16] Subsequently, the Ethics 20/20 Commission proposed minor changes to Model Rule 5.3, and the ABA adopted those changes in 2012.[17]

Model Rules 5.1 and 5.3 sets out three categories of responsibility for the conduct of lawyers and nonlawyers "employed or retained by or associated with a lawyer."[18] Paragraphs 5.1(a) and 5.3(a) address lawyers with "managerial authority."[19] Paragraphs 5.1(b) and 5.3(b) pertain to lawyers "having direct supervisory authority over another lawyer"[20] or "having direct supervisory authority over the nonlawyer."[21] Paragraphs 5.1(c) and 5.3(c) apply to lawyers in either of two situations. Paragraphs 5.1(c)(1) and 5.3(c)(1) apply to any lawyer who orders or ratifies the conduct of another.[22] Paragraphs 5.1(c)(2) and 5.3(c)(2) apply where the lawyer has managerial authority or direct supervisory authority, knows of the conduct at a time when its consequences can be mitigated, and fails to take reasonable remedial action.[23]

A lawyer with managerial authority must, under paragraph 5.1(a), "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Paragraph 5.3(a) is similar; lawyers with managerial authority must "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that that the person's conduct is compatible with the professional obligations of the lawyer…." Managerial lawyers include "members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm."[24]

A lawyer with "direct supervisory authority" over another lawyer must, under paragraph 5.1(b), "make reasonable efforts to ensure that the other lawyer conforms to the Rules of

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[16] *See generally*, Am. Bar Ass'n, *Ethics 2000 Commission, Report on the Model Rules of Professional Conduct*, available at <http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html>.

[17] Ronald D. Rotunda and John S. Dzienkowski, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROF'L RESPONSIBILITY, R. 5.3 (2013-2014 ed.). The caption was changed from supervising "Nonlawyer Assistants" to "Nonlawyer Assistance" and the comments amended slightly to reflect that law firms who use nonlawyers outside of the firm to assist in representing a client must supervise them in a manner similar to those nonlawyers who are employees.

[18] MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (over lawyers) and R. 5.3(a) (over nonlawyers).

[19] *Id.*

[20] MODEL RULES OF PROF'L CONDUCT R. 5.1(b).

[21] MODEL RULES OF PROF'L CONDUCT R. 5.3(b).

[22] MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(1) and R. 5.3(c)(1).

[23] MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(2) and R. 5.3(c)(2).

[24] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 1.

Professional Conduct." Again, paragraph 5.3(b) is similar; lawyers with direct supervisory authority must "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer…." A supervisory lawyer can be any lawyer who directly supervises any portion of the work of another; supervisory authority does not need to extend to the entirety of the work of the person being supervised.[25]

The basic difference between paragraphs (a) and (b) is one of breadth. Managers are responsible for the ethical environment of the entire firm (as broadly defined) and must establish policies and procedures reasonably calculated to assure that the organization operates ethically.[26] Supervisors are responsible to implement those policies and procedures and to see that those whom they supervise conduct themselves in a manner consistent with the rules of professional conduct. Depending on the facts and circumstances, managers within paragraphs 5.1(a) and 5.3(a) may be, and often will be, direct supervisors within 5.1(b) and 5.3(b) as well.

Model Rule 5.1(c) makes a lawyer responsible for another lawyer's conduct if:

> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The responsibility in Model Rule 5.3(c) for the conduct of a nonlawyer is analogous. Rules 5.1(c)(1) and 5.3(c)(1) can apply to any lawyer. The lawyer need not be a manager or supervisor and need not be regularly associated with a firm – association only for certain periods or certain matters will suffice.[27] The Restatement characterizes this requirement as "a kind of accessorial responsibility."[28] A related concept is found in Model Rule 8.4, where professional misconduct includes violating the rules through the acts of another.[29]

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[25] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) at *4.

[26] Donald R. Lundberg, *Thoughts on Law Firm Management and Supervision*, RES GESTAE, Mar. 2014 at 18, 21.

[27] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) at *5 ("[A] lawyer who is a manager or supervisor may be responsible under Rules 5.1(c) and 5.3(c) even though he or she has no formal or structural relationship to the misbehaving lawyer or nonlawyer."). *See* Rachel Reiland, Note, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2, and 5.3*, 14 GEO. J. LEGAL ETHICS 1151, 1152 (2001). Reiland finds this "alarming," but the rationale underlying the rule was vindicated in *Ky. Bar Assoc. v. Chesley*, 393 S.W.3d 584 (Ky. 2013) (disbarring Chesley because he knowingly ratified the misdeeds of other lawyers in other firms with which his was affiliated in the Fen-Phen litigation).

[28] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §11, cmt. e.

[29] MODEL RULES OF PROF'L CONDUCT R. 8.4(a).

Model Rules 5.1(c)(2) and 5.3(c)(2) impose a duty to avoid or to mitigate the consequences of improper conduct and to take "reasonable remedial action" if there is an opportunity to do so. What constitutes reasonable remedial action will depend upon the circumstances.[30] "Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred."[31]

Both subsections of Model Rule 5.1(c), and the analogous provisions of Model Rule 5.3(c), predicate a lawyer's responsibility on knowledge of the misconduct. Knowledge means "actual knowledge of the fact in question," although actual knowledge may be inferred from the circumstances.[32] Courts and disciplinary authorities have been reluctant to find a lack of knowledge when managerial and supervisory lawyers failed to adhere to the prophylactic duties imposed by rules 5.1 and 5.3.[33]

Model Rules 5.1 and 5.3 are disciplinary rules; they were drafted with the intent to avoid introducing vicarious civil liability.[34] Still, as noted at the beginning of this section, one possible effect of these rules is increased exposure to civil liability.[35] Whether the rule works that result, says comment to Rule 5.1, "is a question of law beyond the scope of these Rules."[36]

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[30] Prof. Irwin Miller calls this the "duty to rectify," which he sees as ancillary to the rule's primary prophylactic function expressed in paragraphs (a) and (b). Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 278 at n. 86 (1994).

[31] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 5.

[32] MODEL RULES OF PROF'L CONDUCT R. 1.0(f). For a case in which the court inferred actual knowledge from the circumstances, see *Kentucky Bar Association v. Chesley*, 393 S.W.3d 584 (Ky. 2013).

[33] Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 GEO. J. LEGAL ETHICS 269, 298 (2012).

[34] *See* In re Phillips, 244 P.3d 549 (Ariz. 2010) (rule does not provide for vicarious liability for subordinate's acts, but mandates independent duty of supervision); In re Anonymous, 552 S.E.2d 10 (S.C. 2001) (Rule 5.1 does not create vicarious liability); and Stewart v. Coffman, 748 P.2d 579 (Utah Ct. App. 1988) (rejecting argument that Rule 5.1 creates vicarious liability for shareholder lawyers). *See generally*, Rachel Reiland, Note, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2, and 5.3*, 14 GEO. J. LEGAL ETHICS 1151 (2001); Douglas R. Richmond, *Law Firm Partners As Their Brothers' Keepers*, 96 KY. L.J. 231 (2007-2008).

[35] *See* Kathleen McKee, Annot., *Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Actions*, 50 A.L.R. 5th 301 (1997); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 52 and 58.

[36] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 7.

II. ABA Formal Opinion 467

ABA Formal Opinion 467 addresses specifically the managerial and supervisory obligations of prosecutors, but all lawyers with managerial or supervisory responsibilities ought to take note of it.[37] As the opinion says in a footnote:

> Of course all lawyers – e.g., lawyers in private practice, in public defenders offices, and in other state and federal agencies – have supervisory obligations under Rules 5.1 and 5.3. We leave for another day a specific discussion of how Rules 5.1 and 5.3 must be implemented by them. The general obligations described in this opinion with respect to prosecutors, however, apply to lawyers in those offices as well.[38]

This part briefly reviews the opinion itself, the full text of which is included as Appendix B. The next part considers some of the matters the opinion writers "leave for another day."

The opinion springs from the ethics committee's concerns about the frequency of prosecutorial misconduct nationwide as reported in criminal cases and disciplinary proceedings over the last fifteen years.[39] The problem, though, is much older than that,[40] as is criticism of disciplinary authorities for their weak response to it.[41]

One author calls the failure of disciplinary authorities to address prosecutorial misconduct "one of the two greatest scandals in lawyers' ethics."[42] Even so, commentators

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[37] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[38] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) at *2, fn. 7.

[39] *Id.* at *6-7.

[40] *See, e.g.,* Richard G. Singer, *Forensic Misconduct by Federal Prosecutors – and How It Grew*, 20 ALA. L. REV. 227 (1967-68), citing Roscoe Pound, CRIMINAL JUSTICE IN AMERICA 187 (1930):

> The number of new trials for grave misconduct of the public prosecutor which may be found in the reports throughout the land in the past two decades is significant. We must go back to the seventeenth century—to the trial of Raleigh or to the prosecution under Jeffreys—to find parallels for the abuse and disregard of forensic propriety which threatens to become staple in American prosecutions.

[41] *See, e.g.,* Edwin H. Auler, *Actions Against Prosecutors Who Suppress or Falsify Evidence*, 47 TEX. L. REV. 642, 645-56 (1969) (observing that disciplinary proceedings do not deter prosecutorial misconduct and that authorities, often unjustifiably, are reluctant to discipline a prosecutor). For more recent discussions, *see generally* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012) ("in reality there is no reason for prosecutors to fear professional regulation"), and Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors will be Disciplined by Their Offices of the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 540-43 (2011) (finding that studies of discipline of prosecutors reveal that prosecutors are "rarely, if ever" disciplined, even when engaged in egregious misconduct).

[42] Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 WASHBURN L.J. 1, 2 (2012). Freedman, citing Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 744-45 n.86 (2001), estimates the frequency of such discipline to be about one case per year over the last century. The other scandal is, in Freedman's opinion, the failure to discipline criminal defense attorneys who fail to give indigent defendants effective assistance of counsel. *See* Monroe H. Freedman, Professional

are skeptical that the threat of professional discipline can deter prosecutorial misconduct.[43] Effecting the needed cultural change may require stronger measures like those recently taken by a California judge. After acts of prosecutorial misconduct became known, the judge disqualified the entire Orange County (California) District Attorney's office from continuing to prosecute a major death penalty case.[44]

Although its primary audience is prosecutors, the opinion contains practical guidance on the ethical obligations of managerial and supervisory lawyers generally. First, it affirms the baseline requirement that managerial lawyers make reasonable efforts to establish internal policies and procedures that assure compliance with the rules of professional conduct.[45] These policies should address confidentiality obligations, how to detect and resolve conflicts of interest, dates by which actions must be taken in pending matters, and ways to ensure that inexperienced lawyers are properly supervised.[46] Further, those policies and procedures, insofar as they pertain to nonlawyers, must provide "appropriate instruction and supervision concerning the ethical aspects of their employment" in a way that "take[s] account of the fact that they do not have legal training and are not subject to professional discipline."[47]

The policies and procedures set by managers should include both substantive provisions that reasonably ensure compliance and procedural provisions to ensure that the policies and procedures will be effectively executed. What those specific measures are will vary. Among variables identified in the opinion are office (or firm) size, the personnel turnover rate, the size of caseloads, and the hierarchical structure of the office or firm. Large offices with several layers of hierarchy, it says, may need to establish a formal committee to coordinate and direct the internal reporting of misconduct and the monitoring for ethics violations.[48] In some offices, the opinion notes, it may be effective to have responsibility placed with a

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Discipline of Death Penalty Lawyers and Judges, 41 HOFSTRA L. REV. 603 (2013). *But see*, Charles E. MacLean, *Anecdote As Stereotype: One Prosecutor's Response to Professor Monroe Freedman's Article* "The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices," 52 WASHBURN L.J. 23 (2012).

[43] *See* David Keenan et al., *The Myth of Prosecutorial Accountability after* Connick v. Thompson: *Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011). *See also* H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and A Modest Proposal*, 63 CATH. U. L. REV. 51, 54 (2013). *Cf.* George A. Weiss, *Prosecutorial Accountability After* Connick v. Thompson, 60 DRAKE L. REV. 199, 258-62 (2011) (arguing for civil rights liability for a prosecutor's "failure to discipline").

[44] Dahlia Lithwick, *You're All Out*, <http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html>.

[45] MODEL RULES OF PROF'L CONDUCT R. 5.1cmt. 5.

[46] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) at *8.

[47] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 2.

[48] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) at *12-13.

specific supervisory lawyer, an ethics counsel for the firm.[49] Further, it notes that in all offices it is important to create a culture of compliance.[50]

III. Supervising Other Lawyers

A. Case Law

Rule 5.1 is admittedly rarely enforced, particularly against large law firms, corporate legal departments, and governmental law offices.[51] One writer thinks there are three reasons for this: the diffuseness of responsibility for fulfilling the broad managerial duties the rules impose, the vague reasonableness standards by which compliance with the rules must be judged, and the reactive nature of the disciplinary process itself.[52] That writer and others[53] therefore argue for general firm responsibility, but thus far only New York and the District of Columbia have adopted such an approach.

Despite the absence of cases involving government law offices, managerial and supervisory lawyers in government offices can draw lessons from the application of rule 5.1 to private law firms. Take, for example, *Kentucky Bar Association v. Weinberg*.[54] *Weinberg* involved disciplinary actions against three attorneys: Weinberg, Capello, and an unnamed attorney who was ultimately found not guilty of all charges. The matter arose from their representation of a single client in a single matter, a subrogation case. Shortly after receiving the case, Weinberg, the senior attorney in the firm, delegated it to his partner Capello, who later would delegate it to the unnamed attorney. While Capello was responsible for the case, he delayed filing a complaint until the statute of limitations had run on one of the claims. The trial court dismissed the complaint in its entirety, but, after receiving the case, the unnamed attorney successfully argued for reinstatement of one of the claims. Eventually, the unnamed attorney left the firm and Capello resumed responsibility for the case, but did nothing until nine more months had passed. A year later, the client asked Weinberg and Capello to withdraw from representation.

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[49] *Id.* at *12. *See infra* Part III-B.
[50] *Id.* at *11. *See infra* Part III-C.
[51] Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 GEO. J. LEGAL ETHICS 269, 298 (2012). A survey by the author of one state (Kentucky) bears this out. Of 756 reported disciplinary cases since the adoption of the rule, only seven involved a violation of it.
[52] Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 592 (2011).
[53] *See, e.g.,* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 305 (1994).
[54] Ky. Bar Ass'n v. Weinberg, 198 S.W.3d 595 (Ky. 2006).

Rule 5.1(a) requires managers to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." For failing to have in place institutional controls such as tickler systems, cover letters for transmitting copies of pleadings to clients, periodic review of files, or diary systems, Weinberg and Capello were found to have violated the rule. In addition, both Weinberg and Capello were found to have violated rule 5.1(b). Each received a public reprimand and was ordered to pay costs. As ABA Formal Opinion 467 emphasizes, the baseline requirement of Model Rule 5.1 is to make reasonable efforts to establish internal policies and procedures that assure compliance with the rules of professional conduct. That includes these kinds of institutional controls.[55]

Four Kentucky cases arising out of the scandal in the so-called Fen-Phen case[56] illustrate the "accessorial responsibility" of Model Rule 5.1(c)(1). The Fen-Phen case was a class action, and co-counsel from different firms represented the plaintiffs. One of the co-counsels was the subject of *Gallion v. Kentucky Bar Association*.[57] Gallion's responsibility was straightforward. He failed to supervise his associate, Helmers, and he both directed and ratified the associate's misconduct.[58] Another of the co-counsels was Mills, the subject of *Kentucky Bar Association v. Mills*.[59] Mills violated the rule by ratifying the misconduct of Gallion and a third lawyer, Cunningham. In *Kentucky Bar Association v. Helmers*,[60] discussed in Part V below, Helmers, although subordinate to Gallion and the other trial counsel, was disbarred because he knew of and ratified the misconduct of Gallion and Mills. *Helmers* shows that paragraph (c)(1), unlike paragraphs (a), (b), and (c)(2), does not require a lawyer to be in a supervisory or managerial position for accessorial liability to attach. The last case in the quartet is *Kentucky Bar Association v. Chesley*.[61] *Chesley* is interesting for the court's treatment of the requirement that a lawyer have knowledge of the conduct being ratified. There the court inferred knowledge from the circumstances saying, "While none of these facts alone is conclusive, all of them together complete the picture of Respondent's effort to conceal or hinder the disclosure of the misdeeds of Cunningham, Mills, Gallion, and Helmers, and thereby protect the improper payments he had accepted."[62]

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[55] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) at *8.
[56] Darla Guard, et al. or Jonetta Moore, et al. v. A.H. Robins Company, et al., Boone Circuit Court, Case Number 98–CI–795. *See, e.g.,* Debra Cassens Weiss, *How a Kentucky Solo Exposed the Fen-Phen Lawyers*, ABA JOURNAL (Sep. 8, 2009 1:36 p.m.), <http://www.abajournal.com/news/article/how_a_kentucky_solo_exposed_the_fen-phen_lawyers1/>.
[57] Gallion v. Ky. Bar Ass'n, 266 S.W.3d 802 (Ky. 2008).
[58] *See infra* Part V, discussing Ky. Bar Ass'n v. Helmers, 353 S.W.3d 599 (Ky. 2011).
[59] Ky. Bar Ass'n v. Mills, 318 S.W.3d 89 (Ky. 2010).
[60] Ky. Bar Ass'n v. Helmers, 353 S.W.3d 599 (Ky. 2011).
[61] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584 (Ky. 2013).
[62] *Id.* at 600.

A case discussing the remedial duty of rule 5.1(c)(2) is *In re Cohen.*[63] Cohen's son was an associate in the firm and the lawyer who did most of the work on the trademark application that precipitated the disciplinary proceeding. The father conceded that the firm had no system in place to impart rudimentary ethics training to lawyers in the firm, particularly the less experienced ones. Equally troubling to the court was the lack of a review mechanism that allowed an associate's work to be reviewed and guided by a supervisory attorney.[64] Nevertheless, the father contended he was not liable under rule 5.1 for the conduct of his son. The court rejected this position, calling Rule 5.1(c)(2) "a fair and necessary balance" between supervisory and subordinate lawyers. The rule denies supervisory lawyers "the ostrich-like excuse of saying, in effect, 'I didn't know and didn't want to know.'"[65] Here, "a lawyer of reasonable prudence and competence would have made the inquiry necessary to determine the status of the application proceeding" and so should have been able to take reasonable remedial action to avoid adverse consequences for the client.[66]

B. Designating an Internal "Ethics Counsel"

Formal Opinion 467 suggests it may be effective to have responsibility for in-house review placed with a specific supervisory lawyer or a group of lawyers within the office.[67] While lawyers who practice together often consult one another informally about ethical issues, it is becoming common for law firms to designate an ethics committee or a particular lawyer to serve as the firm's internal resource for deciding ethics questions.[68] Proponents of the approach assert that this arrangement heightens ethical awareness and contributes to an ethical culture within the firm.[69] Further, it encourages the designated lawyer or lawyers to stay current on the law governing lawyers just as other lawyers would stay current with the latest law in their practice areas.[70]

Thus far, the practice appears to be less common in corporate legal departments and government law offices. In part, this may be due to the differences that arise in the

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[63] In re Cohen, 847 A.2d 1162 (D.C. 2004).
[64] *Id.* at 1166.
[65] *Id.*
[66] *Id.*
[67] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) at *12.
[68] Ronald D. Rotunda, *Why Lawyer Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior – In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 702-11 (2011); N.Y.S. Bar Ass'n Comm. Prof'l Ethics Op. 789 (Oct. 26, 2005) citing Roy D. Simon, SIMON'S N.Y. CODE OF PROF'L RESP. ANN. 68 (2005). Simon suggests that firms of more than a dozen lawyers that do not yet have an ethics committee ought to form one. *Id.*
[69] Ronald D. Rotunda and John S. Dzienkowski, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROF'L RESPONSIBILITY § 5.1-1 (2013-2014 ed.).
[70] *Id.*

representation of the organizational client.[71] In a traditional law firm setting, the ethics counsel is the firm's lawyer under Model Rule 1.13; the ethics counsel has no relation to the client of the consulting lawyer. A corporate law department or government law office, on the other hand, has no identity separate from its organizational client. The ethics counsel and the consulting lawyer both owe duties to the organization, not to the legal department or law office. This raises a question whether the lawyer in need of consultation, say about his or her own misconduct, can prudently consult with another lawyer whose duty of loyalty is likewise to the organization. The necessary disclosures might not be treatable as privileged or confidential and might be seen as creating a conflict of interest between the lawyer and the organization.

ABA Formal Opinion 08-453 provides guidance on the use of internal ethics counsel, specifically in the context of internal consulting within a law firm.[72] Nevertheless, as with Formal Opinion 467, much of its guidance also appears to be applicable generally. The opinion concludes that under the Model Rules lawyers are authorized to make disclosures of otherwise confidential information in order to obtain ethics advice. It also notes that under Model Rules 1.6(b)(4) a lawyer may disclose client confidences to an outside lawyer to obtain professional responsibility advice. The use of an outside lawyer as a backstop may solve the conflict of interest problem when it arises.[73]

C. Establishing an Ethical Culture

Formal Opinion 467 advises that it is important to create a culture of compliance within a law office. This, it says, can be done by:

(i) emphasizing ethical values and imperatives during the hiring process;
(ii) providing incentives for ethical behavior, such as positive review, promotions, and raises;
(iii) protecting and rewarding lawyers who fulfill their up-the-ladder duties;
(iv) promoting initiatives that make compliance with ethical obligations less demanding for line prosecutors such as "open-file" discovery policies;
(v) publicizing ethical compliance reforms and internal policies within the office and to the public; and
(vi) internally disciplining lawyers and reporting lawyers who violate the Rules of Professional Conduct.[74]

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[71] *See* MODEL RULES OF PROF'L CONDUCT R. 1.13.
[72] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 453 (2008), "In-House Consulting on Ethical Issues." For a summary of the experiences of some law firms' internal ethics counsel, see Helen W. Gannarsson, *Ethics Counsels Divulge Risk Management Tips*, 31 LAW. MAN. PROF'L CONDUCT 464 (2015).
[73] For a fuller discussion, see Evan King and Jeffrey A. Parness, *Intra Law Firm Communications Regarding Questionable Attorney Conduct*, 5 ST. MARY'S. J. LEGAL MAL. & ETHICS 2 (2014).
[74] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) at *11.

Much of the list concerns personnel policies. How much policies for lawyers can differ from policies for other employees of the government that employs them will vary from government to government. Law firms retained as counsel to units of government may have greater flexibility to incentivize ethical conduct, at least financially.[75]

Incentivizing and recognizing ethical performance is important. Nevertheless, Robennolt and Sternlight write:.

> Given the very human ways in which people can fall prey to ethical temptations, entities should not assume that attorneys are behaving ethically, but should instead develop systems to provide checks on behavior--whether by using software to monitor billing patterns, having colleagues double-check what discovery or due diligence is produced, reviewing how attorneys conduct negotiations, or monitoring how attorneys prepare their clients for depositions or trial. It is most important to monitor situations in which attorneys, due to cognitive or temporal depletion or structural temptations, are most likely to engage in ethical misconduct. As noted earlier, when ethical improprieties are found, organizations should discipline attorneys found to have behaved inappropriately, determine whether systemic changes should be made, and provide appropriate feedback to the community.
>
> While structural systems to monitor ethical performance are perhaps necessary, research has found that intrinsic motives, identification with the rules of the organization, and believing that the organization is legitimate tend to have a greater effect on rule following (and a commitment to following the rules) than do perceptions of the likelihood of detection and the nature of the likely sanctions. Thus, even as they build systems to help attorneys avoid missteps, organizations should act in ways--enacting fair processes and treating attorneys fairly--that help attorneys see the entity as legitimate and as embodying values that are congruent with their own. Of particular importance are providing opportunities for input into organizational policies, making decisions in a neutral fashion using transparent and objective criteria, making decisions that treat people consistently and respectfully, and providing explanations for decisions reached. Developing such procedures can reap a variety of benefits:
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> > First, in a culture where transparent procedures are voluntarily embraced, the self-policing mechanisms that will thrive in the organization will be more likely to expose wrongdoing in its infancy…. Second, a culture in which rule-following is the expected

[75] For some low-cost and non-cash approaches used in a government office, see Merrill Douglas, *Rewarding Employees in Tough Budgetary Times*, Government Technology (Nov. 2011), available at <http://www.govtech.com/budget-finance/Rewarding-Employees-in-Tough-Budgetary-Times.html>.

> norm and cynicism is low will be a far less comfortable environment for those who would prefer to break the rules. And finally, in a culture in which rule-following is the accepted norm, scoundrels and cheats will be far less likely to ascend to the positions of power in which they can do significant damage.[76]

Further, research shows that high emotional intelligence,[77] particularly in leadership, affects the ethical outcomes within an organization.[78] Lawyers tend to be thinkers rather than feelers.[79] Research shows that while lawyers exhibit high average IQ scores compared to the general population (in the 115-130 range) they exhibit lower EI scores (in the 85-95 range).[80] But, as one observer wryly noted, "You can't manage using lawyer skills."[81] Not only is emotional intelligence an important quality in managers and supervisors, it is essential to good lawyering as well (although typically it is not cultivated in the traditional law school curriculum).[82] It is a talent that one can develop, and it is increasingly being incorporated into professional training programs across the country.[83] Providing training to improve generally low emotional intelligence scores could enhance the development of an ethical culture. Beyond that, emotional intelligence training may improve lawyer job satisfaction, lawyer retention, and even improve lawyers' analytical and decision-making abilities.[84]

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[76] Jennifer K. Robbennolt, Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1180-81 (2013), quoting Tom R. Tyler, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS 117 (2011).

[77] Salovey and Mayer define *emotional intelligence* as involving "the ability to monitor one's own and others' feeling and emotions, to discriminate among them and to use this information to guide one's thinking and actions." Peter Salovey & John Mayer, *Emotional Intelligence*, 9 IMAGINATION, COGNITION AND PERSONALITY 185 (1989-90), cited in Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCH., PUB. POL'Y & LAW 1173, 1177 (1999) at n. 20..

[78] Lea Brovedani, *Emotional Intelligence and Business Ethics: The Necessary Factor for Transformational Leaders to Lead with Moral Principles* at *1, <http://www.leabrovedani.com/images/Emotional_Intelligence_and_Ethics_by_Lea_Brovedani.pdf>.

[79] Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCH., PUB. POL'Y & LAW 1173, 1180 (1999).

[80] Barry Law Library, *EQ and You,* <https://barrylawlibrary.wordpress.com/2015/02/23/eq-and-you/>.

[81] Gerry Riskin, founding partner of law firm consultancy Edge International, quoted in Deena Shanker, "Why are lawyers such terrible managers?", FORTUNE (Jan. 11, 2013 2:20 p.m.), <http://fortune.com/2013/01/11/why-are-lawyers-such-terrible-managers/>.

[82] *See*, Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCH., PUB. POL'Y & LAW 1173 (1999); *see also* Susan Swaim Daicoff, *Expanding the lawyer's toolkit of skills and competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 798 (2012).

[83] Rhonda Muir, *Emotional Intelligence for Lawyers* at *5, < http://www.americanbar.org/content/dam/aba/marketing/careercenter/muir_emotional_intelligence_for_lawyers.authcheckdam.pdf>.

[84] *Id.* at *6. See also Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 Geo. J. Legal Ethics 137, 177-79 (2011) (discussing the relationship of emotional intelligence to a productive workplace).

D. Policies and Procedures

Rule 5.1 requires that managing lawyers "establish internal policies and procedures."[85] Even if the commentary to the rule did not mention them, a lawyer's common sense ought to dictate a need for policies and procedures about detecting and resolving conflicts of interest, tracking dates when action is needed in pending matters, and periodic file review. The *Weinberg* case above nevertheless shows that such policies and procedures are not always in place. Beyond the kinds of policies and procedures mentioned in Formal Opinion 467 are two of current import to which government lawyers might want to pay attention – the impaired lawyer and new office technologies.

1. An impaired lawyer

David Dodge writes, "If you have, or suspect that you may have, an impaired lawyer in your firm, you need to know about [Rule 5.1]. If you are a partner or have managerial or supervisory responsibilities in your law firm, you are required to make sure that all lawyers, including the senior people in the firm, conform to the Rules of Professional Conduct. That includes competence, diligence, avoidance of conflicts and the other ethical considerations discussed previously. And if you ratify the acts of an impaired lawyer, or if you have managerial responsibilities over an impaired lawyer in your firm and fail to prevent his harmful conduct or fail to mitigate its effects, you may be personally responsible for any trouble he causes."[86]

The North Carolina State Bar observed in a recent ethics opinion, "As lawyers from the 'Baby Boomer' generation advance in years, there will be more instances of lawyers who suffer from mental impairment or diminished capacity due to age. In addition, lawyers suffer from depression and substance abuse at approximately twice the rate of the general population."[87] The opinion discusses the obligations of managerial and supervisory lawyers toward the impaired lawyer. It interprets Rule 5.1 to require a managerial or supervisory lawyer to "closely supervise" the conduct of the impaired lawyer because of the risk that the impairment will result in violations of the rules of professional conduct.[88] Referring to ABA Formal Opinion 03-429, the opinion says it may be necessary to confront the impaired lawyer, urging the lawyer to accept assistance, and accommodating the lawyer by changing the lawyer's work environment.[89]

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[85] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 2.
[86] David D. Dodge, *Ethics and the Aging Lawyer*, ARIZ. ATT'Y (Nov. 2013) at 12.
[87] N.C. State Bar, 2013 Formal Ethics Op. 8 (July 25, 2014) at *1.
[88] *Id.*
[89] *Id.* at *2, citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003). Formal Op. 03-429 provides the following examples of accommodation: "A lawyer who, because of his mental impairment, is

2. Legal Technology

Model Rule 1.1 requires a lawyer to provide competent representation. In part, this requires a lawyer to keep abreast of changes in law practice "including the benefits and risks associated with relevant technology."[90] Richard S. Granat and Stephanie Kimbro write:

> There are many potential ethical and regulatory issues presented by the use of legal technology. Many law students will decide to use technology that is not created specifically for lawyers without considering the Professional Rules of Conduct. This creates the potential for additional ethical issues that technology developed for lawyers may actually be designed to help prevent. Some of these ethics issues include, but are not limited to, the following: (1) duty of confidentiality (Model Rule 1.6(a)) and safeguarding client property (Model Rule 1.15) when using cloud-based technology; (2) legal compliance issues and security; (3) duties to prospective clients online (Model Rule 1.18) and establishing the scope of representation online and the use of unbundling legal services (Model Rule 1.2); (4) competency (Model Rule 1.1) and diligence (Model Rule 1.3); (5) responsibilities of partners, managers and supervisory lawyers, virtual assistants and paralegals (Model Rules 5.1-5.3); (6) unauthorized practice of law (Model Rule 5.5); (7) choice of ethics law in multijurisdictional virtual law practice (Model Rule 8.5); (8) using cloud-based tools for client development (Model Rules 7.1-7.5); (9) using technology in outsourcing practices; and (10) electronic discovery (Federal Rule of Civil Procedure 26).[91]

The precise meaning of technological competence under Model Rule 1.1, and how it fits with other elements of competence set forth in the rule, is likely to be the subject of extensive debate in ethics opinions and court decisions in the near future.[92] Among the issues receiving much attention for their ethical implications are the use of metadata,[93] cloud

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unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the [Rules] if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. For example, an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents."

[90] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8.

[91] Richard S. Granat & Stephanie Kimbro, *The Teaching of Law Practice Management and Technology in Law Schools: A New Paradigm*, 88 CHI.-KENT L. REV. 757, 775-76 (2013).

[92] James Podgers, *Lawyers struggle to reconcile new technology with traditional ethics rules*, A.B.A. J. (Nov. 1, 2014, 5:55 AM),
<http://www.abajournal.com/magazine/article/the_fundamentals_lawyers_struggle_to_reconcile_new_technology_with_traditio/>.

[93] *See, e.g.,* Steven C. Bennett & Jeremy Cloud, *Coping with Metadata: Ten Key Steps*, 61 MERCER L. REV. 471 (2010).

computing,[94] and the use of social media.[95] The Legal Technology Resource Center of the American Bar Association has links to many of the related ethics opinions.[96] The State Bar of California also has a compilation of technology-related ethics opinions from within California and without.[97]

As to cloud-based technology in particular, Shannon Brown writes, "Lawyers, as lawyers, face unique issues when evaluating cloud computing. At minimum, use of cloud computing potentially implicates the Preamble (A Lawyer's Responsibilities), Rule 1.1 (Competence), Rule 1.6 (Confidentiality of Information), Rule 1.15 (Safekeeping Property), Rule 5.1 (Responsibilities of Partners, Managers and Supervisory Lawyers), and Rule 5.3 (Responsibility Regarding Nonlawyer Assistants) of the Rules of Professional Conduct. However, lawyers also need to recognize the potential damage to reputation … and lurking malpractice issues when using cloud computing."[98]

That social media presents many ethical challenges is reflected in the recently updated guidelines from the New York State Bar Association, which run to 36 pages.[99] Compounding the challenges for the government law office is the interplay between ethical obligations under the rules of professional conduct and the openness requirements of sunshine laws, for example.[100]

IV. Supervising Nonlawyers

Government law offices, like any law practice, could not operate without nonlawyer staff – secretaries, paralegals, law clerks, etc. Private law firms must frequently reach outside the firm for support from investigators, process servers, appraisers, accountants, and a range of other service providers. Government law offices may do so as well, but may often find such

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94 *See, e.g.,* Andrew L. Askew, *IEthics: How Cloud Computing Has Impacted the Rules of Professional Conduct*, 88 N.D. L. REV. 453 (2012).

95 *See, e.g.,* Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking, and Blogging*, 28 TOURO L. REV. 129 (2012).

96 *Tech Overviews and Charts*, < http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis.html> (last visited Aug. 1, 2015).

97 State Bar of Calif., *Ethics Opinions Related to Technology*, < http://ethics.calbar.ca.gov/Ethics/EthicsTechnologyResources/EthicsOpinionsRelatedtoTechnology.aspx?> (last visited Aug. 1, 2015).

98 Shannon Brown, *Navigating the Fog of Cloud Computing Cloud Computing May Raise Ethical Questions. It Also Requires Technical Competence. Are You Ready?,* PA. LAW., Sep./Oct. 2011, at 18, 19-20.

99 N.Y.S. Bar Ass'n, *Social Media Ethics Guidelines* (June 9, 2015), available at <http://www.nysba.org/socialmediaguidelines/>.

100 *See, e.g.,* J. Anthony McLain, *Lawyers' Ethical Obligations When Representing Public Bodies*, 59 ALA. LAW. 91 (Mar.1998); Marion J. Radson, *Restoring the Attorney-Client and Work Product Privileges for Government Entities*, FLA. B.J. 34 (Jan. 2008).

providers elsewhere within the government itself. In such instances, the degree to which managerial and supervisory attorneys can control the selection of those individuals is usually more attenuated than is the case in a private firm. Nevertheless, these nonlawyer assistants will sometimes make mistakes and will occasionally commit acts of deliberate misconduct. If that happens, a supervisory lawyer may be ethically liable. That is the import of Model Rule 5.3.

A. Case Law

Disciplinary actions for violations of rule 5.3 are more frequent than they are for violations of rule 5.1. Rarely, though, is discipline imposed solely, or even primarily, for a violation of Rule 5.3.[101] When a violation of the rule occurs, it is usually in conjunction with violations of several other rules.

Among the more common bases for discipline under rule 5.3 is mishandling of attorney escrow accounts and firm finances.[102] As one writer says, "Trust accounts are a routine part of the legal business that lawyers tend to take for granted. It is easy to forget the importance of and the potential for problems with trust accounts."[103] The problem is common enough that many bar associations publish guidance on the subject.[104]

B. Special Concerns[105]

Like Rule 5.1, Rule 5.3 requires a lawyer to have in place policies and procedures that give reasonable assurance nonlawyers inside and outside the firm will act in a way that is compatible with the professional obligations of a lawyer.[106] Among the areas to which government law offices might want to pay particular attention are the use of investigators, confidentiality and imputed disqualification, and outsourcing work.

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[101] An exception is Gregory v. Ky. Bar Ass'n, 151 S.W.3d 31 (Ky. 2004). There an attorney moved the court to suspend him from the practice of law for 30 days after he discovered that for two years his secretary had commingled the lawyer's personal funds with client funds in his escrow account.

[102] *See* Edward C. Brewer III and Kelly S. Wiley, *Professional Responsibility*, 29 N. KY. L. REV. 35, 55-56 (2002).

[103] William H. Thedinga, *The ABA Guide to Lawyer Trust Accounts*, WIS. LAW. 48, 48-49 (Oct. 1997).

[104] *See, e.g.*, Jay G. Foonberg, THE ABA GUIDE TO LAWYER TRUST ACCOUNTS; Wash. State Bar Ass'n, *Managing Client Trust Accounts: Rules, Regulations, and Common Sense* (rev. 2014); State Bar of Tex., *A Lawyer's Guide to Client Trust Accounts* (2014).

[105] This section borrows heavily from Douglas R. Richmond, *Watching Over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants*, 61 U. KAN. L. REV. 441, 475-92 (2012).

[106] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 1.

1. Investigators

Model Rule 4.2, the so-called "no-contact rule," provides, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[107] What communications are authorized by law is not clear from the rule itself.[108] However, Comment 5 offers two illustrations, one of which is "investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings."[109]

The application of Rule 4.2 (and the related provision in Model Rule 8.4 that makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation") to investigative activities has been contentious. The Restatement notes that on the one hand "[r]igidly applying the anti-contact rule to prosecutors would create unfortunate incentives to eliminate them from involvement in investigations" while on the other hand the temptation for prosecutors to overreach or interfere in client-lawyer relationships in order to solve a crime argues in favor of an anti-contact rule for prosecutors.[110] Not surprisingly then, courts have been somewhat divided in their application of the rule to criminal investigations.[111]

Comment 5 to Rule 4.2 contemplates that the authorized-by-law exception applies to civil enforcement proceedings as well as to criminal enforcement proceedings. Examples of civil enforcement proceedings would include the use of civil rights "testers" to gather evidence of discrimination in employment, housing, or public accommodations.[112] Courts

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[107] MODEL RULES OF PROF'L CONDUCT R. 4.2. For a history of the rule, see Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's revision of Model Rule 4.2 (Part I)*, 70 TENN. L. REV. 121 (2002); Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321 (2003); and Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part III*), 70 TENN. L. REV. 643 (2003).

[108] It is worth remembering that it is the rule itself that is authoritative; the comments are only a guide to interpretation. Pierce, 70 TENN. L. REV. at 153.

[109] MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. 5. The other is "communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government."

[110] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. h.

[111] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 Reporter's Note cmt. h (collecting cases).

[112] *See generally*, Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties,* 67 IND. L.J. 549 (1992). *See also* Julian J. Moore, *Home Sweet Home: The (Mis)application of the Anti-Contact Rule to Housing Discrimination Testers*, 25 J. LEGAL PROF. 75 (2001). Commentators and courts point out that in such circumstances applying the misrepresentation rules does not further their purposes. *See* David B. Isbell and Lucantonia N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers,* 8 GEO. J. LEGAL ETHICS 791, 801-04 (1995) and *Apple Corps Ltd. v. International Collectors*

have upheld the legality of this practice and concluded that lawyer direction and involvement in the process is authorized by law and permissible under the no-contact rule.[113] However, some courts distinguish between criminal and civil investigations, disapproving deceptive undercover civil investigations.[114] At least one court has gone further, accepting the argument that lawyers – whether in private or government practice – may not misrepresent their identity or purpose in investigating either a civil or a criminal matter.[115]

Given the divergence of opinion about the propriety of the use of deception in undercover investigations, it is particularly important that managerial lawyers have in place clear policies to address the use of investigators. For the prosecutor, a starting point would be the Standards on Prosecutorial Investigations developed and approved by the American Bar Association.[116] Several writers offer suggestions for civil investigations.[117]

2. Preserving Confidences

Given the potentially large number of government employees who may be available to and called upon to assist a government law office, the potential that one of more such employees may possess confidential information about another party is quite real. A lawyer who acquired that information in the course of representing the other party is bound to keep those confidences and his knowledge could potentially be imputed to his current employer and require screening if not outright disqualification.[118] Nonlawyer assistants are not bound

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Soc., 15 F.Supp.2d 456, 475 (D.N.J. 1998), cited in Rotunda & Dzienkowski, PROF'L RESPONSIBILITY: A STUDENT'S GUIDE 866 (2007) at n. 24.

113 Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 824 (2009) (citing Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2001) and Gidatex, S.r.L. v. Campaniello Imps., 82 F. Supp. 2d 119, 120 (S.D.N.Y. 1999)).

114 Rotunda & Dzienkowski, PROF'L RESPONSIBILITY: A STUDENT'S GUIDE 866 (2007) (citing Sequa Corp v. Lititech, Inc. 807 F. Supp 653 (D. Colo. 1992), a case that involved a private rather than government investigation).

115 Rotunda & Dzienkowski, PROF'L RESPONSIBILITY: A STUDENT'S GUIDE 866 (2007) (citing In re Conduct of Gatti, 8 P.3d 966 (Or. 2000)). For a fuller discussion, see David B. Isbell and Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995). *See also* Eric B. Estes, *Undercover Investigations and Government Lawyers*, 37 U. ARK. LITTLE ROCK L. REV. 285 (2015).

116 Am. Bar Ass'n, Standards on Prosecutorial Investigations, available at < http://www.americanbar.org/publications/ criminal_justice_section_archive/crimjust_standards_pinvestigate.html>.

117 *See, e.g.,* Del O'Roark, *The Ethics of Civil Practice Investigations – Part I*, KY. BENCH & BAR 29 (Sep. 2007) and Del O'Roark, *The Ethics of Civil Practice Investigations – Part II*, KY. BENCH & BAR 31 (Nov. 2007).

118 For a recent example of an attempt to disqualify an entire government law office, albeit involving a lawyer rather than a nonlawyer, see Grimes v. D.C., 2014 WL 4430157 (D.C. Cir. July 21, 2015). Karl Grimes died while in a District of Columbia juvenile detention facility. His mother subsequently sued the district under 42 U.S.C. sec. 1983. She moved to disqualify the attorney general's office when it came to light that the attorney general, before taking office, represented a class of plaintiffs that included the deceased in a lawsuit involving overcrowding and unsafe conditions at the facility where he died. Without deciding the motion to disqualify,

by the rules of professional conduct, but rule 5.3 requires a lawyer to assure that the conduct of the nonlawyer is compatible with the rules. As an opinion of the Connecticut Bar Association says, "The question then becomes whether use of screening constitute a 'measure giving reasonable assurance that the [nonlawyer assistant's] conduct is compatible with the professional obligations of the lawyer.'"[119] The opinion answered in the affirmative so long as the nonlawyer had not already disclosed Rule 1.6 information, but not every jurisdiction might reach the same conclusion.[120] The Connecticut opinion closed with this advice:

> As the number of nonlawyer assistants in law firms grows and as nonlawyers play an increasingly larger role in assisting lawyers to carry out their professional obligations, firms might wish to consider adopting, in advance, policies and procedures not only for the specific situation addressed by this Opinion, but also to satisfy the requirements of Rule 5.3 in general.[121]

Any measures the law office puts in place "should take account of the fact that they do not have legal training and are not subject to professional discipline."[122] This is particularly important with respect to confidential information. As the Pennsylvania Bar Association has said:

> Rule 1.6(a) states that "a lawyer shall not reveal information relating to the representation of a client…." The Comment adds "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all "information relating to the representation, whatever its source." This prohibition applies to all classes of legal assistants, even the lowliest of whom may be exposed to information relating to the representation. They must be instructed not to reveal information even to their closest friends and relatives. Unless a matter of public record, even the name and identity of a client must be kept confidential.[123]

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the district court entered summary judgment for the District of Columbia. The appeals court held that it was error to rule on the summary judgment motion before considering the motion to disqualify "because the success of a disqualification motion has the potential to change the proceedings entirely." The appeals court said the mother raised at least a plausible claim of conflict of interest since the rules of professional conduct prohibit a lawyer from representing another party in the same or substantially related matter as that in which the lawyer represented a former client.

[119] Conn. Bar Ass'n Ethics Op. 00-23 (Dec. 27, 2000), 2000 WL 33157218.

[120] *See, e.g.,* City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839 (2006).

[121] Conn. Bar Assoc. Ethics Op. 00-23 (Dec. 27, 2000), 2000 WL 33157218 at *3.

[122] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 2.

[123] Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Resp. Op. 98-75 (Dec. 4, 1998, 1998 WL 998168 at *2, citing ABA/BNA LAW. MAN. PROF'L RESP. 55:307.

3. Outsourcing

Outsourcing is the practice of sending work traditionally handled in-house to an outside contractor for performance.[124] In Formal Opinion 08-451, the ABA discussed lawyers' obligations when outsourcing legal and non-legal support services. Generally, the opinion allows outsourcing provided the lawyer remains ultimately responsible for rendering competent legal services and satisfies the supervisory responsibilities towards lawyers and nonlawyers under Rules 5.1 and 5.3.[125]

Concerning supervisory guidelines, the opinion says:

> At a minimum, a lawyer outsourcing services for ultimate provision to a client should consider conducting reference checks and investigating the background of the lawyer or nonlawyer providing the services as well a s any nonlawyer intermediary involved, such as a placement agency or service provider. The lawyer also might consider interviewing the principal lawyers, if any, involved in the project, among other things assessing their educational background. When dealing with an intermediary, the lawyer may wish to inquire into its hiring practices to evaluate the quality and character of the employees likely to have access to client information. Depending on the sensitivity of the information being provided to the service provider, the lawyer should consider investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures. In some instances, it may be prudent to pay a personal visit to the intermediary's facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and nonlawyers it is procuring.[126]

To satisfy a lawyer's obligations under Rule 5.3, Douglas Richmond suggests the following:

> First, lawyers ought to reasonably investigate the provider's background and capabilities before engaging the company or person. … Second, lawyers should instruct the provider on confidentiality and conflict of interest issues before retaining the provider. Third, lawyers should carefully instruct the provider on the work to be performed and ensure that the provider understands the instructions. Fourth, lawyers ought to communicate with the provider during assignments to confirm that the provider's performance

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[124] Douglas R. Richmond, *Watching Over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants*, 61 U. KAN. L. REV. 441, 488 (2012)

[125] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008). *See also* N.C. State Bar Ethics Op. 12 (Apr, 25, 2008), 2008 WL 5021151; Colo. Bar Assoc. Formal Ethics Op. 121 (June 15, 2006)

[126] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) at *3.

> meets requirements. Finally, a lawyer should check the provider's work upon completion of the assignment to establish that it was performed appropriately.[127]

While the lawyer Richmond had in mind is a private practitioner, his advice holds for government lawyers who outsource portions of their work.

V. A Note About Subordinate Lawyers

A. History and Design of Rule 5.2

Model Rule 5.2 addresses the responsibilities of a subordinate lawyer.[128] It begins with a corollary to the rule that all lawyers must adhere to the Rules of Professional Conduct,[129] but then provides an escape hatch of sorts.

> Rule 5.2 Responsibilities Of A Subordinate Lawyer
>
> (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
>
> (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Despite some criticism of the rule, particularly of paragraph (b), neither the Ethics 2000 Commission nor the Ethics 20/20 commission proposed to change it.[130]

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127 Douglas R. Richmond, *Watching Over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants*, 61 U. KAN. L. REV. 441, 491-92 (2012) (citations omitted).

128 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §12 is similar.

129 *See* Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1019 (1997) ("As a matter of the law governing lawyers, every lawyer is an autonomous professional. As such, every lawyer is personally bound in full measure by obligations imposed on members of the profession—the Rules of Professional Conduct and the common law rules governing lawyers.").

130 *See*, *e.g.*, Robert R. Keatinge, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279 (1998); Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887 (1997); and Lawrence J. Fox, *Save Us from Ourselves*, 50 RUTGERS L. REV. 2189 (1998). Professor Rice argues that "[i]n sum, Rule 5.2(b) singles out precisely the issues that need ethical debate--the arguable questions--and chills that debate." 32 WAKE FOREST L. REV. at 890. *Compare* Andrew M. Perlman, *The Silliest Rule of Professional Conduct: Model Rule 5.2(b),* 19 PROF'L LAW. No. 3 at 14 (2009) with Douglas R. Richmond, *Academic Silliness About Model Rule 5.2(b),* 19 PROF'L LAW. No. 3 at 15 (2009).

Model Rule 1.1 obligates a lawyer to provide competent representation. Courts interpret this as creating a requirement that attorneys seek supervision when dealing with an unfamiliar area of law.[131] Nevertheless, subordinate lawyers might argue that, because their work is subject to the direction of other lawyers, they should somehow have less responsibility. Similarly, subordinate lawyers employed at-will might argue for lesser responsibility because they have limited control within the firm or organization.[132] The Model Rules and the Restatement respond to these arguments by drawing a distinction between a clear violation of the rules and an "arguable question of professional duty."[133]

Where there is no arguable question of professional duty, a lawyer under the direct supervisory authority of another cannot, by that fact alone, escape responsibility for a violation of the rules of professional conduct.[134] The subordinate must adhere to the rules of professional conduct, even in the face of a contrary instruction by a supervisor and even at the risk of being fired.[135]

On the other hand, where there is an arguable question of professional duty, the subordinate may defer to a supervisory lawyer's "reasonable resolution" of the question.[136] Even if it is later determined that the course of action approved by the supervising lawyer was impermissible, the supervised lawyer commits no violation provided the supervisor's decision was reasonably supportable.[137] (The supervisor, though, could theoretically be disciplined for making the wrong decision.)[138]

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131 Darya V. Pollak, *"I'm Calling My Lawyer . . . in India!": Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFFAIRS 99, 138 (2006).

132 *See, e.g.,* Disciplinary Counsel v. Smith, 918 N.E.2d 992, 997 (Ohio 2009): "Respondent argues that he cannot be disciplined for his actions because Chapman had control of the fees and the firm's checkbook. Even though Chapman was his superior, respondent has a responsibility to his clients. Respondent's counsel stated at oral argument that respondent prepared the disbursement sheets as a scribe would, following the dictates of his superior. Actually, respondent is not a scribe but an attorney, responsible for zealously representing his clients' interests. We have stated previously that "new lawyers are just as accountable as more seasoned professionals for not complying with the Code of Professional Responsibility." *Disciplinary Counsel v. Johnson,* 835 N.E.2d 354. The same general rule applies to lawyers who are directly supervised by their superiors within a law firm. A lawyer's obligations under the ethics rules are not diminished by the instructions of a supervising attorney."

133 MODEL RULES OF PROF'L CONDUCT R. 5.2(b); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §12(2).

134 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §12 cmt. b.

135 Andrew J. Seger, *Marching Orders: When to Tell Your Boss "No"*, FL. BAR J., Feb. 2013 at 34, 34; Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1020 (1997).

136 MODEL RULES OF PROF'L CONDUCT R. 5.2(b).

137 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §12 cmt. c.

138 Donald R. Lundberg, *Thoughts on Law Firm Management and Supervision*, RES GESTAE, Mar. 2014 at 18, 23. The supervisor may be liable for a violation of Rule 5.1 as well.

The terms "arguable question of professional duty" and "reasonable resolution" are sometimes subject to debate and interpretation.[139] One writer suggests that three types of situations can create an arguable question of professional duty. The first situation arises from unknown facts. In this situation, the lawyer has an obligation to investigate the facts; after resolution of the factual issues, the lawyer's duty would presumably be clear. The second situation involves an unanswered question of law. Here again, the lawyer must investigate in an attempt to resolve the legal question. If investigation does not clearly resolve the question, the lawyer may rely on a supervising lawyers' opinion as to how the question would be resolved. The third situation involves ambiguity in the rules of professional conduct. If the application of the rule is uncertain, a subordinate lawyer may rely on a supervising lawyer's determination of how the rule would apply.[140]

The reasonableness standard is premised on the assumption that the supervising lawyer has experience interpreting and applying the law and the rules of professional responsibility. The potential trap for the subordinate is that his or her own inexperience and unfamiliarity renders it difficult to determine whether the supervisor's resolution is, in fact, "reasonable." If subsequent events reveal, for example, that the determination was unreasonable because it was tainted by the supervisor's self-interest, the subordinate would fall outside the safe harbor of Model Rule 5.2(b). Rule 5.2(b) operates as a defense in a disciplinary proceeding. Like Rules 5.1 and 5.3, it is not necessarily a defense to civil liability.

McCurdy v. Kansas Department of Transportation[141] shows the interplay between the two parts of rule 5.2. The case concerned Claire McCurdy, a civil service attorney in the Kansas Department of Transportation suspended by her agency after refusing an assignment that presented her with an ethical conflict. The assignment required her to investigate a landowner's claim arising from a condemnation proceeding. In reviewing the file, she discovered that the attorney representing the landowner was an attorney in the same firm she had consulted previously about a personal legal matter. She then told her supervisor that she could not investigate the claim because of the pre-existing attorney-client relationship she had with the firm.

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[139] Ronald D. Rotunda and John S. Dzienkowski, PROF'L RESPONSIBILITY: A STUDENT'S GUIDE 900 (2007). *See* Matter of Howes, 940 P.2d 159 (N.M. 1997) (duty of Assistant United States Attorney to refrain from communicating with a represented criminal defendant was not subject to argument, and thus finding of violation of disciplinary rule was not precluded on basis of advice AUSA received from chief and deputy chief of felony section); Kelley's Case, 627 A.2d 597, 600 (N.H. 1993) ("Under the facts of this case, however, even if Cahalin was subordinate to Kelley, there could have been no "reasonable" resolution of an "arguable" question of duty. The potential conflict in this case would be so clearly fundamental to a disinterested attorney that undertaking the joint representation was *per se* unreasonable.").

[140] Andrew J. Seger, *Marching Orders: When to Tell Your Boss "No"*, FL. BAR J., Feb. 2013 at 34, 34-35.

[141] McCurdy v. Kansas Dep't of Transp., 898 P.2d 650 (Kan. Ct. App. 1995).

Before her supervisor would accept her explanation for declining the assignment, the supervisor told her he needed more information about her ethical problem. She declined to provide specifics, citing rules of professional conduct 1.7 and 1.16 as authority for declining the assignment. Dissatisfied with that explanation, the supervisor, and later the agency, found her to be insubordinate and suspended her for five days without pay. The state civil service board affirmed the agency's determination, and McCurdy sued. The trial court found for McCurdy, holding that the civil service board was wrong to conclude that she should have disclosed the exact nature of her conflict to her supervisor. The agency appealed.

On appeal, the agency argued that under rule 5.2(b) the supervisor had a right to insist that McCurdy disclose more information so that he could determine if a valid conflict of interested existed. The court rejected the agency's position, agreeing with the lower court that, while rule 5.2 allows subordinate attorneys to rely on the judgment of a superior, it does not require a subordinate to defer all questions of ethical conduct to a superior.[142] Under rule 5.2(a), a subordinate is responsible for his or her own professional acts. McCurdy knew that by accepting the assignment she would be violating the rules of professional conduct. She had not surrendered, and could not surrender, her professional autonomy to make that judgment. A claim that this might hinder the supervisor's effectiveness does not transfer to the supervisor the authority to decide whether or not there is an arguable question of professional duty.

Although not a case about a government lawyer, *Kentucky Bar Association v. Helmers*[143] further elaborates a subordinate's responsibility under rule 5.2. During law school, David Helmers worked as a clerk for the law firm of Gallion, Baker, and Bray. After graduating from law school, he joined the firm as an associate. Most of his work related to the Fen-Phen litigation.[144] The partner with whom he was working assigned him to create the schedule by which the settlement in the case would be allocated among the various plaintiffs and to meet with clients to discuss their monetary awards and obtain their releases. He did not, however, fully disclose to the clients the circumstances underlying the awards or that the partners had instructed him to offer each client an amount substantially below the amount the defendant had approved in the course of the settlement.[145]

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142 *Id.* at 653.

143 Ky. Bar Ass'n v. Helmers, 353 S.W.3d 599 (Ky. 2011).

144 *Darla Guard, et al. or Jonetta Moore, et al. v. A.H. Robins Company, et al.,* Boone Circuit Court, Case Number 98–CI–795.

145 For a discussion of associate lawyers receiving unethical instructions from partners, *see* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 297-302 (1985).

Most of the attorneys with whom Helmers worked were subsequently disbarred.[146] The disciplinary case against Helmers himself charged him with eight counts of violating the rules of professional conduct, including one count for violating rule 5.2(a). The Trial Commissioner found him guilty on six of the eight counts, including the violation of rule 5.2, and recommended a five-year suspension. The Trial Commissioner viewed Helmers's subordinate status as a mitigating factor in determining his punishment. The Board of Governors subsequently considered the matter *de novo* and recommended disbarment, a result accepted by the Kentucky Supreme Court which said:

> We are aware that Respondent has had no other disciplinary issues raised against him. We are aware that Respondent was a young law student when he first began working for Gallion, and that Gallion was then a well-regarded and reputable attorney. We are aware that as a new attorney working with Gallion, Cunningham, and Mills, Respondent was inexperienced, impressionable, and may have been influenced, and perhaps even led astray, by those more seasoned lawyers. But, we cannot ignore the fact it takes no technical expertise or experience in the settling of class action lawsuits, or any sophisticated understanding of the rules of ethics to know that Respondent's course of conduct, personally and directly deceiving his clients, some of whom had been egregiously injured, was wrong. That he did so at the direction of his employer does not permit us to overlook the serious deficiency in character revealed by the facts before us.[147]

While Helmers's inexperience did not mitigate his wrongdoing, in other disciplinary actions in other states inexperience has been a mitigating factor.[148]

B. Wrongful Termination

As the *McCurdy* case above shows, supervising lawyers or their employers may be liable for wrongfully suspending subordinates who refuse to engage in conduct that may violate the rules of professional conduct. Employers may also be liable for wrongful termination or retaliatory discharge. Courts are split on the issue, but the trend favors the cause of action.[149]

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146 *See* Gallion v. Ky. Bar Ass'n, 266 S.W.3d 802 (Ky. 2008); Cunningham v. Ky. Bar Ass'n, 266 S.W.3d 808 (Ky.2008); Ky. Bar Ass'n v. Mills, 318 S.W.3d 89 (Ky. 2010); Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584 (Ky. 2013).

147 Ky. Bar Ass'n v. Helmers, 353 S.W.3d 599, 602-03 (Ky. 2011).

148 *See, e.g.,* In re Helman, 640 N.E.2d 1063 (Ind. 1994).

149 Ronald D. Rotunda and John S. Dzienkowski, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROF'L RESPONSIBILITY § 5.2-2 (2013-2014 ed.). *See generally* Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043 (2008) (arguing that whether the rules governing the practice of law provide attorneys with protection from employer retaliation is "decidedly unclear.").

In *Weider v. Skala*,[150] an associate in a law firm claimed his firm wrongfully discharged him because of his insistence that the firm comply with the disciplinary rules and report professional misconduct by another associate. (The other associate had neglected a matter assigned to him, lied to conceal his neglect, and, when confronted, admitted his misconduct.) Initially, the firm declined to act, but ultimately, because of Weider's insistence, reported the misconduct to the disciplinary authorities. After the firm fired Weider, he sued. The lower courts dismissed the case because Weider was an employee at will. The Court of Appeals reinstated Weider's case.

> [Defendants argue] that the law imposes no implied duty which would curtail their unlimited right to terminate the employment contract…. As plaintiff points out, his employment as a lawyer to render professional services as an associate with a law firm differs in several respects from the employments in [earlier cases]. The plaintiffs in those cases were in the financial departments of their employers, both large companies. Although they performed accounting services, they did so in furtherance of their primary line responsibilities as part of corporate management. In contrast, plaintiff's performance of professional services for the firm's clients as a duly admitted member of the Bar was at the very core and, indeed, the only purpose of his association with defendants. Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations. Practically speaking, plaintiff's duties and responsibilities as a lawyer and as an associate of the firm were so closely linked as to be incapable of separation. It is in this distinctive relationship between a law firm and a lawyer hired as an associate that plaintiff finds the implied-in-law obligation on which he founds his claim.
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> We agree with plaintiff that in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct, plaintiff contends, would subvert the central professional purpose of his relationship with the firm—the lawful and ethical practice of law.
>
> The particular rule of professional conduct implicated here (DR 1–103[A]), it must be noted, is critical to the unique function of self-regulation belonging to the legal profession. … To assure that the legal profession fulfills its responsibility of self-regulation, DR 1–103(A) places upon each lawyer and Judge the duty to report to the Disciplinary Committee of the

[150] Weider v. Skala, 80 N.Y.2d 628, 609 N.E.2d 105 (NY 1992).

> Appellate Division any potential violations of the Disciplinary Rules that raise a "substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects.…"
>
> Moreover, as plaintiff points out, failure to comply with the reporting requirement may result in suspension or disbarment…. Thus, by insisting that plaintiff disregard DR 1–103(A) defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position of having to choose between continued employment and his own potential suspension and disbarment. We agree with plaintiff that these unique characteristics of the legal profession in respect to this core Disciplinary Rule make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to the corporate employers in [the earlier cases]. The critical question is whether this distinction calls for a different rule regarding the implied obligation of good faith and fair dealing…. We believe that it does in this case, but we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied-in-law term in every contractual relationship between or among lawyers.[151]

Because "[i]nsisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship,"[152] Weider's case stated a valid claim.

Where *Weider* was about an associate in a law firm, *General Dynamics Corporation v. Superior Court*[153] was about an in-house counsel. There, the California Supreme Court concluded that there was no valid reason why an in-house attorney should not be able to pursue an implied-in-fact contract action claim for wrongful termination in the same way as could a non-attorney employee. The court also concluded that an in-house attorney could pursue a retaliatory discharge claim sounding in tort "*provided* it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship."[154] The attorney in *General Dynamics*, Andrew Rose, claimed that the company terminated his employment in part because of his efforts to expose illegal activity within the company. Rose was an at-will employee, and he sought to make out a claim under California's public policy exception to the doctrine of employment-at-will.

In its opinion, the court took note of the different position and role of an in-house attorney when contrasted with the traditional role of a lawyer in a firm. In the classic lawyer-

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151 *Weider*, 609 N.E.2d at 108-09.
152 *Weider*, 609 N.E.2d at 110.
153 Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994).
154 *Id.* at 490 (emphasis in the original).

client relationship, the client is completely free to discharge a lawyer at any time with or without cause. General Dynamics claimed the same power. Such power, said the court, "is inconsistent with the law in other areas, notably claims grounded in alleged violations of antidiscrimination laws and statutory rights to public collective bargaining."[155] That is not to say that General Dynamics is saddled with an attorney in whom it has no confidence; reinstatement may not be an available remedy, but the termination is not necessarily cost free if it breaches implied in law limitations on the employment contract or contravenes fundamental public policy. The court acknowledged that there is a substantial counterargument against allowing in-house counsel to pursue a retaliatory discharge claim,[156] but was not persuaded. "It thus seems bizarre that a lawyer employee, who has affirmative duties concerning the administration of justice, should be denied redress for discharge resulting from trying to carry out those very duties."[157]

At the other end of the spectrum are cases like *Wallace v. Skadden, Arps, Slate, Meagher & Flom*.[158] Wallace was an associate of Skadden, Arps discharged, she claimed, in part in retaliation for her reporting of wrongdoing within the firm. Among the matters she claimed to have reported to her superiors were inadequate and incompetent supervision of junior associates and the fabrication of performance evaluations, which today would be tantamount to accusing her bosses of violating rule 5.1. She claimed it would have been a violation of the rules, in particular rule 5.2, on her part had she not done so.

The District of Columbia earlier recognized a cause of action for wrongful discharge of an at-will employee where the sole reason for the discharge was the employee's refusal to violate the law as expressed in a statute or regulation. The rules of professional conduct, Wallace asserted, were equivalent inasmuch as they were binding on members of the bar. Neither the defendants nor the court expressly rejected that position. The court, however, found nothing in rule 5.1 or 5.2 that expressly imposed on a subordinate lawyer a duty to report anything to her superiors. Absent such a duty, Wallace's wrongful discharge claim failed. The kinds of conduct of which Wallace complained was not "sufficient to trigger the application of a 'public policy' exception to the 'at-will doctrine.'"[159] Other forms of misconduct might be sufficient triggers, but Wallace did not make that claim. As the *Weider*

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155 *Id.* at 493.

156 *Id.* at 498-500.

157 *Id.* at 500-01, quoting 1 Hazard & Hodes, THE LAW OF LAWYERING § 1.16.206.

158 Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873 (D.C. Ct. App. 1998). *See also* the cases cited in *General Dynamics*, 876 P.2d at 498-

159 *Id.* at 885.

court suggested, not every rule of professional conduct should be deemed incorporated as an implied-in-law term in every contractual relationship between or among lawyers.[160]

Recently, in *Pang v. Int'l Document Services*, the Utah Supreme Court considered whether the "reporting up" provision of Utah Rule 1.13 was sufficient to sustain the public policy exception to at-will employment. The court said rule 1.13 does not express "a clear and substantial expression of Utah public policy of sufficient magnitude to qualify…."[161] "First," said the court, "the rule regulates private conduct between attorneys and their clients, not matters of broad public importance. And second, the rules of professional conduct articulate a strong, countervailing policy of allowing organizational clients to obtain the representation of their choice, and this policy outweighs any Mr. Pang has raised in this case."[162]

Conclusion

In his book Moral Mazes, Robert Jackall argues that bureaucracy shapes moral consciousness.[163] He writes:

> [B]ureaucratic work causes people to bracket, while at work, the moralities that they might hold outside the workplace or that they might adhere to privately and to follow instead the prevailing morality of their particular organizational situation. As a former vice-president of a large firm says: "What is right in the corporation is not what is right in a man's home or in his church. *What is right in the corporation is what the guy above you wants from you.* That what morality is in the corporation."[164]

It is unrealistic to expect that this is any less true in the government workplace, and a study by the Ethics Resource Center bears this out. It reported that 63% of local government employees had seen at least one form of misconduct in the previous twelve months. Further, the study revealed that over a quarter of local government employees worked in an environment that was conducive to misconduct and that ethical culture in the local government workplace was weak.[165]

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[160] *Weider*, 609 N.E.2d at 109. *Cf.* Jacobson v. Knepper & Moga, P.C., 706 N.E.2d 491, 493 (Ill. 1998) (lawyer suing for being fired for bringing matter to attention of partner in the firm). "*Jacobson* has been roundly criticized for failing to appreciate that the cause of action really is necessary to support the public policy in promoting reporting." Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 333 (2003).

[161] Pang v. Int'l Document Servs., 2015 UT 63 [2015 BL 252329] at ¶ 31.

[162] *Id.* at ¶ 33.

[163] Robert Jackall, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988).

[164] Robert Jackall, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 4 (20th ann. ed. 2010) (emphasis in the original).

[165] Ethics Resource Center, *National Government Ethics Survey: An Inside View of Public Sector Ethics* 31-35 (2007).

Misconduct in the public sector makes news not because it is any more grievous or more frequent than misconduct in the private sector workplace but because the public expects a higher standard of conduct from those in public service. This expectation derives from the "American ideal of government as a public trust to be carried on by disinterested men."[166] Yet, many public servants, whether they hold public office or work in government jobs, either do not understand the idea of a public trust or are unmoved by it. At least privately, they regard working for a public employer as equivalent to working for a private employer and think it unfair that as public servants they should be held to a higher standard.[167]

Similarly, the public holds lawyers to a higher standard of conduct. In part, the rules of professional responsibility are a response to the public's expectation. Nevertheless, the rules of professional conduct alone will not bring about an ethical culture in the government law office.

> The professional [legal ethics] rules are merely the basement level, the lowest common denominator, of acceptable lawyer conduct. Lawyers who consider compliance with them to be complete fulfillment of legal ethics are the equivalent of the cave dwellers in Plato's The Republic who sincerely and contentedly believe that mere shadows are reality. But believing it so does not make it so.[168]

As lawyers, we have a predilection for rules, so it is not surprising that our professional code of ethics takes that approach. Certainly, hard-edged rules are preferable to fuzzy standards in many situations. But is the ethical atmosphere, not the rules themselves, that has the greater influence on the behavior of lawyers and nonlawyers alike. Managerial and supervisory lawyers must set that tone and so inspire "crimes of obedience"[169] within the office.

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166 Walter Lippman, *A Theory About Corruption*, in Political Corruption: Readings in Comparative Analysis 296, 297 (A. Heldenheimer, ed. 1970) cited in Edwin J. Delattre, *Ethics in Public Service: Higher Standards and Double Standards*, 8 Crim. Just. Ethics 2 (1989).

167 Edwin J. Delattre, *Ethics in Public Service: Higher Standards and Double Standards*, 8 Crim. Just. Ethics 2, 79 (1989.

168 Barrie Althoff, Director of Lawyer Discipline and Chief Disciplinary Counsel, Washington State Bar Association, quoted in Allen K. Harris, *The Professionalism Crisis-the "Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 550 (2002).

169 Danielle S. Beu & M. Ronald Buckley, *This Is War: How the Politically Astute Achieve Crimes of Obedience Through the Use of Moral Disengagement,* 15 Leadership Q. 551, 551 (2004) cited in Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 Geo. J. Legal Ethics 137, 183 (2011).

APPENDIX A

American Bar Association

Model Rules of Professional Conduct

Rules 5.1, 5.2, and 5.3

(Current to June 30, 2015)

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent

contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

APPENDIX B

American Bar Association
Standing Committee on Ethics and Professional Responsibility

Formal Opinion 467
Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3
September 8, 2014

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 467 **September 8, 2014**
Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3

Model Rules 5.1 and 5.3 require lawyers with managerial authority and supervisory lawyers, including prosecutors, to make "reasonable efforts to ensure" that all lawyers and nonlawyers in their offices conform to the Model Rules. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to ensure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices.

A. Introduction

Prosecutors have special duties under the Model Rules of Professional Conduct. They have "the responsibility of a minister of justice and not simply that of an advocate."[1] They must "refrain from prosecuting a charge that [they know] is not supported by probable cause."[2] They must "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."[3] They must "make timely disclosure to the defense" of exculpatory and mitigating evidence.[4] In short, and in words long ago written by the Supreme Court in *Berger v. U.S.*,[5] a prosecutor's duties are "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[6]

We believe that most prosecutors know and follow the rules of professional conduct. Indeed, the laudable efforts of such prosecutors have provided good examples, cited throughout this opinion. But there are prosecutors who do violate the rules, and for all prosecutors there are special challenges and obligations. This opinion provides

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1. ABA MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. [1].
2. ABA MODEL RULES OF PROF'L CONDUCT R. 3.8(a).
3. ABA MODEL RULES OF PROF'L CONDUCT R. 3.8(b).
4. ABA MODEL RULES OF PROF'L CONDUCT R. 3.8(d). For additional special duties of prosecutors, see also ABA MODEL RULES OF PROF'L CONDUCT R. 3.8(c)-(h) and cmts. [3]-[9].
5. Berger v. United States, 295 U.S. 78 (1935).
6. *Id.* at 88. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 at fn. 9 ("References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years.") (citations omitted). A "prosecutor" for purposes of this opinion is a lawyer employed by a government agency whose primary responsibility involves the investigation and prosecution of criminal cases and related matters. Where a prosecutor's duties also embrace civil authority, this opinion also applies to that sphere of their work. Federal prosecutors are covered by state ethics rules under the McDade Amendment, 28 U.S.C. §530B.

guidance on the special challenges and obligations of prosecutors with managerial and supervisory responsibility.[7]

B. ABA Model Rules of Professional Conduct 5.1 and 5.3 Apply to Prosecutors

Rules 5.1 and 5.3 address obligations of lawyers with managerial authority (hereinafter sometimes referred to as "managers") and supervisory lawyers within a "firm" or a "law firm." Rule 1.0(c) defines "firm" or "law firm" to include "lawyers employed in a legal services organization or the legal department of a corporation or other organization." Comment [3] makes clear that government organizations are included.[8] The comments to Rule 5.1 also specifically reference government agencies.[9] Prosecutors' offices are *government* organizations.

Rule 3.8, which specifies the "Special Responsibilities of Prosecutors," also makes clear that prosecutors have supervisory obligations under Rules 5.1 and 5.3. Comment [6] to Rule 3.8 reads, "Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office."[10] Finally, ABA Formal Opinion 09-454 emphasizes that these obligations apply to prosecutors: "Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations."[11] Formal Opinion 09-454 adds, "[S]upervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations."[12]

C. Who Has Responsibility Under ABA Model Rules 5.1 and 5.3 in a Prosecutor's Office?

Rules 5.1 and 5.3 set forth three types of responsibility for the conduct of lawyers and nonlawyers "employed or retained by or associated with a lawyer."[13] Paragraph (a)

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7. Of course all lawyers--e.g., lawyers in private practice, in public defender offices, and in other state and federal agencies--have supervisory obligations under Rules 5.1 and 5.3. We leave for another day a specific discussion of how Rules 5.1 and 5.3 must be implemented by them. The general obligations described in this opinion with respect to prosecutors, however, apply to lawyers in those offices as well.

8. ABA MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. [3] ("[w]ith respect to the law department of an organization, *including the government*, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules") (emphasis added).

9. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [1] ("[p]aragraph (a) [of Rule 5.1] applies to lawyers who have managerial authority over the professional work of a firm. . . . This includes . . . . lawyers having comparable managerial authority in a . . . government agency. . . ").

10. Comment [6] to Rule 3.8 gives examples: "Paragraph (f) [of 3.8] reminds the prosecutor of the importance of these [supervisory] obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case." Paragraph 3.8(f) also "requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor."

11. Formal Op. 09-454, *supra* note 6, at 8 (citing Rules 5.1(a) and (b)). See also the opening summary of Formal Op. 09-454: "Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation."

12. Formal Op. 09-454, *supra* note 6, at 8 (citing Rules 5.1(b) and (c)).

13. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (over lawyers) & R. 5.3(a) (over nonlawyers). With respect to nonlawyers, the obligation is to make sure that the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."

addresses lawyers "with managerial authority."[14] Paragraph (b) pertains to lawyers "having direct supervisory authority over another lawyer" or "having direct supervisory authority over the nonlawyer".[15] Paragraph (c) applies to lawyers who either (i) order or ratify the conduct of another, or (ii) have managerial authority or direct supervisory authority, know of the conduct at a time when its consequences can be mitigated, and fail to take reasonable remedial action.[16] We address each below.

1. Managerial Responsibility

Under paragraph (a), "managerial" lawyers "shall make reasonable efforts to ensure that [their organization] has in effect measures giving reasonable assurance that all lawyers in the [organization] conform to the Rules of Professional Conduct." Managerial lawyers include "members of a partnership, the shareholders in a law firm organized as a professional corporation and [other lawyers] having comparable managerial authority."[17] This group also includes "lawyers who have intermediate managerial responsibilities."[18] Rule 5.3(a) imposes a corresponding obligation with respect to nonlawyers "employed or retained or associated" with the office.

In a prosecutor's office, managerial lawyers are the top prosecutors and all other prosecutors with managerial or executive functions in the office. This group would include, for example, the District or County or U.S. Attorney him or herself, as well as executive staff, bureau or unit heads, and similarly positioned others who, among other duties, make policies and set procedures for the office as a whole or for individual units. As part of their functions, these individuals may also be direct supervisors under 5.1(b) and 5.3(b) discussed below--depending on the facts and circumstances--but they have overarching special duties under Rules 5.1(a) and 5.3(a).[19]

Managers must make "reasonable efforts" to ensure compliance with the Model Rules of Professional Conduct by all lawyers in the office, including other lawyers with comparable managerial authority. As discussed further in this opinion, "these efforts can take many forms, so long as they are reasonably calculated to eliminate or inhibit violations [of the Rules]."[20]

2. Supervisory Responsibility

Under Rule 5.1(b) "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Under Rule 5.3(b) "[a] lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." This

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14. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1(a) & 5.3(a).
15. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1(b) & 5.3(b).
16. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1(c) & 5.3(c).
17. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [1].
18. *Id.*
19. *See* GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING §42.4 (3rd Ed., Supp. 2010) [hereinafter HAZARD & HODES] (partners and other managers are "'supervisory' lawyers *per se*"); RESTATEMENT OF THE LAW GOVERNING LAWYERS (3rd Ed.) §11, at 112 (managerial lawyers have "general supervisory" duties over lawyers and nonlawyers).
20. HAZARD & HODES, *supra* note 19, §42.4.

category "applies to lawyers who have supervisory authority over the work of other lawyers [and nonlawyers] in the [office]" regardless of their status in the organization.

In a prosecutor's office, a "supervisor" is a lawyer who--regardless of his or her position or title in the office hierarchy--directly supervises the work of another prosecutor in a particular matter, proceeding, inquiry or other event or series of events involving a case. "Even if a lawyer is not a partner or other general manager, he or she may have direct supervisory authority over another lawyer."[21]

Further, a manager within the meaning of paragraph (a) can also be a supervisor within the meaning of paragraph (b). For example, a unit or bureau chief whose job description consists mainly or principally of executive or managerial functions may also directly supervise individual prosecutors in any proceeding, application, inquiry, investigation, trial, appeal, or other matter. When managers function as direct supervisors, they have obligations under paragraph (b) as well.

The key to responsibility under paragraph (b) is the relationship between the two lawyers in the matter. The supervisory authority "need not be over the entirety of the second lawyer's practice. . . [5.1(b)] would apply to direct supervision in a particular case, to a senior or mid-level [lawyer] with supervisory authority over a junior [lawyer's] work in that or a series of cases, or to one partner [or manager] who has been given supervisory authority over another partner [or manager's] work in a case or practice area."[22]

Finally paragraphs (a) and (b) impose some overlapping duties. For, example, a direct supervisor "has the same responsibility as a partner or manager to assure compliance with the ethical rules by those lawyers under her direct supervisory authority."[23] In fact, as noted in G. Hazard, W. Hodes & P. Jarvis, *The Law of Lawyering* (3rd Ed., 2010 Supplement), Rule 5.1(b) "*is essentially identical to Rule 5.1(a),* except that it applies to all lawyers who have 'direct supervisory authority over another lawyer,' whether or not they are partners or managers or other partner-equivalents" and whatever their practice setting.[24] And, "Rule 5.1(b), like Rule 5.1(a), can require proactive, as distinct from merely reactive or passive, measures."[25]

3. Responsibility for Another's Conduct Under ABA Model Rules 5.1(c) and 5.3(c)

Rules 5.1(c) and 5.3(c) make a lawyer responsible for another lawyer's or a nonlawyer's conduct if the lawyer "orders or, with knowledge of the specific conduct, ratifies the conduct involved" or if "the lawyer is a partner or has comparable managerial

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21. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 5.1-2(b), at 1009 (2014) [hereinafter ROTUNDA & DZIENKOWSKI] (citing Rule 5.1(b)).

22. HAZARD & HODES, *supra* note 19, §42.5. *See also* ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [5] ("Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter.").

23. ROTUNDA & DZIENKOWSKI, *supra* note 21, §5.1-2(b), at 1009.

24. HAZARD & HODES, *supra* note 19, §42.5 (emphasis added).

25. *Id.*

authority in the [office] where the other lawyer practices [or the nonlawyer is employed], or has direct supervisory authority of the other lawyer [or nonlawyer], and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[26]

These obligations supplement the obligations of managers and supervisors under paragraphs (a) and (b), even though they are not directed at supervisors and managers alone. Indeed, the obligations set forth in Rules 5.1(c)(1) and 5.3(c)(1) apply regardless of whether the ordering or ratifying lawyer is a manager or a direct supervisor. But it is important to make clear--as we do here--that a lawyer who is a manager or supervisor may be responsible under Rules 5.1(c) and 5.3(c) even though he or she has no formal or structural relationship to the misbehaving lawyer or nonlawyer.[27]

Rules 5.1(c)(2) and 5.3(c)(2) also impose a duty to avoid or mitigate the consequences of improper conduct if there is an opportunity to do so.[28] A lawyer who is "a partner or has comparable managerial authority . . . or has direct supervisory authority over the other lawyer [or non-lawyer] and knows of [misconduct] at a time when its consequences can be avoided or mitigated" must take "reasonable remedial action."[29]

What constitutes "reasonable remedial action" will depend on the circumstances, but in any event requires "prevention of avoidable consequences" of the misconduct if the manager or supervisor learns of the misconduct when that can be achieved.[30] Steps to avoid future similar acts may be important for other reasons, but Rules 5.1(c)(2) and 5.3(c)(2) require steps that look back -- that will "remedy or mitigate the consequences of [a] violation" that has already occurred. In the case of prosecutors, the immediate turnover of material to the defense might be required.[31] In other instances, reporting the conduct to disciplinary authorities might be required.[32] But the obligation to take reasonable remedial steps "extends to all known violations"--not only those covered by

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26. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1(c) & R. 5.3(c).

27. RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 19, §11, at 110 (the obligation of a partner or managerial lawyer to take remedial action as described in 5.1(c) "attaches even if [the partner or managerial lawyer] has no direct supervisory authority over the other lawyer"). *See also* HAZARD & HODES *supra* note 19 §42.6 ("[P]artners and those with comparable managerial authority cannot rely upon the fact that they have, or had, no direct responsibility for or supervisory authority over the lawyer engaged in wrongdoing. Partner status, equivalent managerial status, and direct supervisory authority all equally trigger a responsibility to take remedial action under Rule 5.1(c)(2)"). Further, "most violations of [(c)(1) will] also constitute violations of Rule 8.4(a)"). HAZARD & HODES, *supra* note 19, §42.6. Model Rule 8.4(a) provides that it is "professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

28. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(1)-(2) & 5.3(c)(1)-(2). *See also* HAZARD & HODES, *supra* note 19, §42.6.

29. *Id.*

30. *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [5] ("[a]ppropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension"). *See also*, HAZARD & HODES, *supra* note 19, §42.6.

31. *In re* Myers, 584 S.E.2d 357, 362 (S.C. 2003) (Solicitor (a supervising or managerial prosecutor) violated Rule 5.1(c)'s obligation to remediate when he failed to notify the defense lawyer about improper eavesdropping by his subordinates immediately upon learning of the misconduct).

32. RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 19, §11 cmt. e.

an applicable reporting obligation[33]--and should, in some recognizable measure, remedy or mitigate the consequences of misconduct that has occurred.

D. Background: The Need for Guidance

In recent years, reports, court opinions, and other authorities have drawn attention to prosecutorial misconduct--notwithstanding the many excellent prosecutors who scrupulously follow or exceed the mandates of the Rules of Professional Conduct. These reports, opinions and authorities suggest a need for more guidance.[34] For example, in *Connick v. Thompson*,[35] the Supreme Court reversed a $14 million judgment awarded against the New Orleans Parish District Attorney's Office in favor of John Thompson, an innocent man who spent 18 years in prison--14 of them on death row--because prosecutors withheld exculpatory evidence. The majority opinion rejected Mr. Thompson's theory of liability based on 42 U.S.C. §1983,[36] and did not address the Rules. But the opinions in *Connick*--both majority and dissenting--document events that demonstrate the need for guidance on the managerial and supervisory obligations of prosecutors under the Rules of Professional Conduct. And, only one year later in *Smith v. Cain*,[37] the Supreme Court reversed a conviction for *Brady* violations by the same office.[38]

In 2013 the Supreme Court of Oklahoma disciplined a former Assistant District Attorney for the Oklahoma County District Attorney's Office and criticized the District Attorney's office for a lack of managerial and supervisory effectiveness.[39] The Court said:

> We must recognize that the [Assistant District Attorney] was acting under the direction, supervision, and policies of the then elected District Attorney. Responsibility for the respondent's conduct and

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33. *Id.*

34. *See, e.g.*, Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA TODAY (September 23, 2010), http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm; Joaquin Sapien, *Out of Order: When Prosecutors Cross The Line*, PROPUBLICA, http://www.propublica.org/series/out-of-order (last visited July 6, 2014); KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 (2010), *available at* http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct_Exec_Sum.pdf. *See also* United States v. Olsen, 737 F.3d 625 (9th Cir. 2013) (denying petition for rehearing en banc, Kozinski, Pregerson, Reinhardt, Thomas, and Watford dissenting, writing, "There is an epidemic of *Brady* violations abroad in the land.").

35. Connick v. Thompson, 131 S.Ct. 1350 (2011).

36. "Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused [the District Attorney's Office to fail to disclose certain evidence to Thompson]." *Id.* at 1355. *See* 42 U.S.C. §1983 (1996) provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

37. Smith v. Cain, 132 S.Ct. 627 (2012) (reversing a murder conviction for *Brady* violation by the New Orleans Parish District Attorney's Office).

38. Brady v. Maryland, 373 U.S. 83 (1963).

39. State ex rel. Oklahoma Bar Ass'n v. Miller, 309 P.3d 108 (Okla. 2013) (assistant prosecutor suspended for 180 days for violations of, *inter alia*, Rules 8.4, 3.8 & 3.4). The Tenth Circuit has also expressed concern about prosecutorial misconduct in the Oklahoma County District Attorney's office. *See* Le v. Mullin, 311 F.3d 1002, 1029 (2002) ("While it is true that any prosecutor will have his share of trial-outcome challenges, over the last fifteen years, the Oklahoma County District Attorney's office has been cited for actions deemed improper, 'egregiously improper,' deceitful and impermissible in striking foul blows, deplorable, 'perhaps inappropriate,' worthy of condemnation, and, in this very case, 'condemned' and 'certainly error.'"; "The prosecution's actions in this case suggest defiance of Oklahoma courts and disregard for Oklahoma law.") (footnotes omitted).

> trial tactics falls partially to the District Attorney as the chief administrator of the office.[40]

The New Orleans and Oklahoma examples alone would justify examination of the obligations of managerial and supervising prosecutors under Rules 5.1 and 5.3. But the frequency of prosecutorial misconduct nationwide documented by, *inter alia,* opinions in criminal cases and disciplinary proceedings reported in the last fifteen years, also underscores this need. These decisions reveal numerous violations of *Brady* in criminal cases[41] (which are also violations of Rule 3.8), and show other examples of misconduct, e.g., prosecutors using false evidence or failing to correct false statements to the court;[42] prosecutors engaging in other improper courtroom conduct;[43] and prosecutors engaging in conduct that would violate, *inter alia*, Rule 4.2,[44] Rule 3.6,[45] Rule 8.4(a), and Rule 8.3(a).[46]

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40. State ex rel. Oklahoma Bar Ass'n v. Miller, 309 P.3d at 119.

41. *See, e.g.*, Monroe v. Angelone, 323 F.3d 286, 314 (4th Cir. 2003) (failure to reveal leniency agreements with key witness and then stressing absence of such deals in closing statement[s]); Tassin v. Cain, 517 F.3d 770, 781 (5th Cir. 2008) (failure to disclose a "beneficial sentencing agreement that hinged directly on [a government witness's] testimony"; failure to correct misleading statements by the witness regarding the agreement; and, arguing to the jury, on the basis of the misleading testimony, that the witness had no reason to lie) (footnote omitted); Silva v. Brown, 416 F.3d 980, 986 (9th Cir. 2005) (failure to disclose an arrangement where the prosecutor agreed to drop murder charges against the chief prosecution witness in exchange for the witness's agreement to refrain from undergoing a psychiatric evaluation before testifying; "The existence of this deal evidencing the prosecution's concern as to the mental state of [the witness] was obviously impeachment evidence favorable to the defense."); Douglas v. Workman, 560 F.3d 1156, 1174-76 (10th Cir. 2009) (failure to disclose plea deal with witness linking defendant to murder; the witness was "indispensible" to the state's case). *See also* Brad Heath & Kevin McCoy, *supra* note 34 (finding *Brady* violations in many federal cases). Indeed, the failure to turn over exculpatory evidence has been described as the "most common form of [prosecutorial] misconduct cited by courts in overturning convictions." *See* Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html (last visited July 7, 2014). *See also Rampant Prosecutorial Misconduct*, NY TIMES (Jan. 4, 2014), http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?_r=0; Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Ramey, 512 N.W.2d 569 (Iowa 1994) (indefinitely suspending an experienced prosecutor for making false statements regarding a chain of custody and for failing to disclose exculpatory evidence); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195 (Ohio 2003) (six month stayed suspension for failing to disclose DNA test results in a child sex abuse case); *In re* Jordan, 913 So. 2d 775, 784 (La. 2005) (deferred three month suspension for failing to disclose *Brady* material in violation of 3.8(d) and 8.4(a); deferral "subject to the condition that any misconduct . . . during a one-year period following [the date of the suspension] may be grounds for making the deferred suspension executory, or imposing additional discipline. . . .") (rehearing denied).

42. *See, e.g.*, Napue v. Illinois, 360 U.S. 264, 265, 269-270 (1959) (failure to correct witness testimony the prosecutor knew to be false); Drake v. Portuondo, 553 F.3d 230, 233, 241-243 (2d Cir. 2009) (knowingly presenting false expert-witness testimony); Hobbs v. Cappelluti, 899 F. Supp. 2d 738 (N.D. Ill. 2012) (helping detective coerce a false video confession and pursuing conviction with the false confession); Dow v. Virga, 729 F.3d 1041 (9th Cir. 2013) (knowingly eliciting and failing to correct a detective's false testimony; "textbook prosecutorial misconduct"); *In re* Jordan, 91 P.3d 1168, 1173-1175 (Kan. 2004) (public censure for prosecutor's, *inter alia*, false statements to the court and failure to disclose evidence in violation of Rules 3.3, 3.4, 3.8, and 8.4.)

43. *See, e.g.*, United States v. Perlaza, 439 F.3d 1149, 1172-1173 (9th Cir. 2006) (improper comment that presumption of innocence disappears when jury starts to deliberate); Marshall v. Hendricks, 307 F.3d 36, 65 (3d Cir. 2002), *cert. den.*, 538 U.S. 911 (2003) (improper mischaracterization of defense witness's testimony); State v. Rogan, 984 P.2d 1231, 1249-1250 (Haw. 1999) (forbidding re-prosecution on double jeopardy grounds after mistrial based on prosecutor's impermissible appeals to racial prejudice during summation; discussing Rule 3.8 and ABA PROSECUTION FUNCTION STANDARDS 3-5.8 (3d ed. 1993)).

44. *See, e.g.*, United States v. Koerber, 966 F. Supp. 2d 1207 (D. Utah 2013), *app. dismissed*, (10th Cir. 2014) (granting defendant's motion to suppress evidence gained by the prosecutor during interviews that violated Rule 4.2).

45. *See, e.g.*, United States v. Bowen, 269 F.Supp. 2d 546, 568, 574 (E.D. La. 2013) (granting defendants' motion for a new trial based on anonymous comments by prosecutors on a website that was viewed by jurors; noting, *inter alia*, the special duties of prosecutors under Rule 3.8; "[T]he government's actions, and initial lack of candor and credibility thereafter, is like scar tissue that will long evidence infidelity to the principles of ethics, professionalism, and

E. Basic Requirements

1. Establishing Office-Wide Policies

To accomplish the goals set forth in Rules 5.1 and 5.3, managers must "establish internal policies and procedures."[47] Generally, these policies and procedures should address confidentiality obligations, how to detect and resolve conflicts of interest,[48] "dates by which actions must be taken in pending matters,"[49] and ways to "ensure that inexperienced lawyers are properly supervised."[50] In the prosecutorial context, these policies and procedures should specifically facilitate compliance with ABA Model Rule 3.8. As we wrote in ABA Formal Opinion 09-454, "Supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations. To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. *Internal office procedures must facilitate such compliance.*"[51] Further, in light of the "intensely difficult ethics issues" that arise for prosecutors, more elaborate procedures may be necessary to ensure compliance.[52]

With respect to nonlawyers, managers must establish policies and procedures that provide for "appropriate instruction and supervision concerning the ethical aspects of their employment . . . [that] . . . take account of the fact that [nonlawyers] do not have legal training and are not subject to professional discipline."[53] These policies and procedures for nonlawyers must, among other things, specifically facilitate compliance with Rule 3.8.

For lawyers and nonlawyers the policies and procedures set by managers should include substantive provisions that reasonably ensure compliance, as mandated by paragraph (a), and procedural provisions identifying specific measures that direct supervisors and other responsible individuals should implement to ensure that the policies

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basic fairness and common sense necessary to every criminal prosecution, wherever it should occur in this country."); Lawyer Disciplinary Bd. v. Sims, 574 S.E.2d 795 (W. Va. 2002) (public reprimand for violating Rules 3.6, 3.8, and 8.4(a) by, *inter alia*, making improper statements to the press); Att'y Grievance Comm'n. of Md. v. Gansler, 835 A.2d 548 (Md. 2003) (public reprimand for violating Rules 3.6 and 8.4(a) by making improper extrajudicial statements).

46. *See, e.g.*, *In re* Riehlmann, 891 So. 2d 1239, 1247-1249 (La. 2005) (public reprimand for violating Rule 8.3(a) by failing to report a colleague's suppression of exculpatory evidence).

47. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [2].

48. *Id.* Situations that may give rise to conflicts for prosecutors include, for example, (i) former-client and revolving-door issues under Rule 1.11, (ii) negotiations for private employment, and (iii) relationships with defense counsel and other lawyers. *See also In re* McKinney, 948 N.E.2d 1154 (Ind. 2011) (prosecutor suspended for 120 days because he prosecuted criminal matters as a part-time prosecutor while, at the same time, pursuing related civil forfeiture cases as a private attorney, where he would earn 25% of the amounts collected in the civil forfeiture cases).

49. R. 5.1 cmt. [2], *supra* note 46. For example, prosecutors should know the timing requirements applicable to investigations and prosecutions so as not to prejudice a matter.

50. *Id.*

51. Formal Op. 09-454, *supra* note 6, at 8 (emphasis added) (footnotes omitted).

52. *See, e.g.*, *In re* Myers, 584 S.E.2d 357, 360-361 (S.C. 2003) (public reprimand of the Solicitor for the Eleventh Judicial District for violation of Rule 5.1(b) by failing to ensure that a deputy prosecutor disclosed, *inter alia*, eavesdropping by investigators on a confidential conversation between the defendant and his lawyer; "We hold that . . . the Solicitor's Office is a law office where complex ethical questions arise, which necessitate a more elaborate system to ensure that the attorneys in the Solicitor's Office comply with the Rules [of Professional Conduct]").

53. ABA MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

and procedures established by the managers will be effectively executed. What those specific measures are will vary, depending on the size and structure of the office; no one size fits all. But some measures must be adopted and implemented. Recommendations for such measures are set forth below.

2. Guidance on Specific Measures

The ABA Standards for Criminal Justice Prosecution Function and Defense Function Standards (the "ABA Standards"), the National District Attorneys Association, National Prosecution Standards published by the National District Attorneys Association (the "District Attorneys Standards"), substantial literature on prosecutorial conduct,[54] and compliance programs implemented by law firms and corporate legal departments in response to the requirements of the Sarbanes-Oxley Act[55] all provide examples of the types of measures that might be adopted. We set forth our recommendations below, based on these and other sources.

a. Training

The ABA Standards recommend that supervising prosecutors train incoming lawyers regardless of their previous experience.[56] We recommend that the training cover the ethical and legal obligations imposed by the Rules of Professional Conduct, including what disclosures and other obligations Rule 3.8 imposes, what public statements may be made under Rules 3.6 and 3.8 (including statements on social media, websites, and blogs), what must be revealed to a tribunal under Rule 3.3, what contacts may be made with represented and unrepresented persons under Rules 4.2 and 4.3, what statements may be made in closing argument, and what conduct by other prosecutors must be reported under Rule 8.3(a). We also recommend that training cover what constitutes *Brady* material. Others have suggested that the initial training also address office policies and procedures, technical skills, other relevant substantive law, and court rules.[57] In

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54. *See, e.g.*, Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010) (advocating an entity-based compliance approach in prosecutor's offices).

55. Responding to the regulations promulgated by the Securities and Exchange Commission (the "SEC") under Section 307 of the Sarbanes-Oxley Act --- which sets forth minimum standards of professional conduct for attorneys --- law firms and corporate legal departments adopted internal policies which include but are not limited to distributing written policies describing the up-the-ladder reporting requirements, creating compliance committees and setting up training programs. *See* James L. Sonne, *Sarbanes-Oxley Section 307: A Progress Report on How Law Firms and Corporate Legal Departments Are Implementing SEC Attorney Conduct Rules*, 23 GEO. J. LEGAL ETHICS 859, 864-65, 868-69 (2010).

56. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARDS § 3-2.6 & Commentary (3d ed. 1993) (the "ABA Standards") ("[t]raining programs should be established within the prosecutor's office for new personnel and for continuing education of the staff"; "[e]ven lawyers with extensive experience in the trial of civil cases must undergo new training … before they can function effectively in the trial of a criminal case"). *See also* National District Attorneys Association, NATIONAL PROSECUTION STANDARDS §§ 1-5.3, 1-5.4 (2009) (the "District Attorneys Standards") ("At the time they commence their duties and at regular intervals thereafter, prosecutors should participate in formal training and education programs. Prosecutors should seek out continuing legal education opportunities that focus specifically on the prosecution function . . . . Each prosecutor's office should develop written and/or electronically retrievable statements of policies and procedures that guide the exercise of prosecutorial discretion and that assist in the performance of those who work in the prosecutor's office."). Both the ABA Standards and the District Attorneys Standards state that they are intended only as guides to professional conduct, but the ABA Standards constitute ABA policy. The District Attorneys Standards do not constitute ABA policy. For additional guidance *see, e.g.*, Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2244-46 (describing benefits of "Clear Office-Wide Definitions of What Is or Is Not Brady Material").

57. *See* NATIONAL PROSECUTION STANDARDS § 5, Commentary (2009) ("A basic orientation package for assistants could include familiarization with office structure, procedures, and polices; the local court system; the operation of local police agencies; and training in ethics, professional conduct, courtroom decorum, and relations with the court and the defense bar."); CTR ON THE ADMINISTRATION OF CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES: A REPORT OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW'S CONVICTION INTEGRITY PROJECT, at 17 (2012), available at

addition, making office policies and procedures available to all lawyers in hard copy or electronically retrievable format may help ensure compliance. Updating those policies and procedures regularly is advisable.

Supervising lawyers should also provide initial training for nonlawyers who are "employed, retained or associated with" the office. This group would ordinarily include detectives and investigators, forensic experts in the office, paralegals and clerical staff. The training should include education on the ethical and legal obligations of prosecutors and related office procedures, e.g., proper handling, filing, and retention of forms and documents, and the preservation of evidence.[58] The training should be adequate to insure that the conduct of nonlawyers is compatible with the professional obligations of prosecutors.

Training sessions should be offered as frequently as needed to update lawyers and nonlawyers on relevant subjects, for example, when an important decision is rendered that directly bears on a prosecutor's professional obligations. Policies, procedures, and training manuals should also be updated regularly, as events require, and key court decisions on prosecutorial conduct should be circulated with explanatory memos.[59] When a court criticizes the conduct of a lawyer or nonlawyer in the office, supervising prosecutors should consider holding special training or educational sessions as appropriate to avoid any repetition.

b. Supervision

Effective supervision would require that supervisors keep themselves informed of the status of and developments in pending cases by, for example, requiring periodic written or oral reports on pending cases.[60] Other examples of appropriate measures include: (i) requiring that supervising prosecutors participate in major decisions, e.g., granting immunity, deciding charges, identifying *Brady* material, and, where feasible, documenting the basis for these decisions in writing;[61] (ii) establishing a system of individual oversight of line prosecutors, including during the preparation for and the conduct of trials; (iii) pairing untrained or newly-trained prosecutors with more experienced prosecutors; (iv) holding prosecutors with Rule 5.1(b) and 5.3(b) obligations accountable for the conduct of their subordinates; and (v) designating a specific attorney to oversee the review of files for *Brady* material.

F. Other Recommendations

1. Creating a Culture of Compliance

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http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf [hereinafter CONVICTION INTEGRITY PROJECT REPORT] ("Both new and experienced prosecutors must be trained and educated about their ethical and professional obligations. Ongoing training programs are not an admission that an office has a problem with attorney misconduct; they are a necessary component of reminding prosecutors about their unique job responsibilities.").

58. *See* NATIONAL PROSECUTION STANDARDS § 5, Commentary.

59. For a sample manual, *see, e.g.*, DIST. ATT'YS ASS'N OF THE STATE OF N.Y., "THE RIGHT THING:" ETHICAL GUIDELINES FOR PROSECUTORS, *available at* http://www.daasny.org/Ethics%20Handbook%209.28.2012%20FINAL.pdf (last visited July 3, 2014).

60. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [3] notes managerial lawyers "may not assume that all lawyers associated with the firm will inevitably conform to the Rules." Keeping abreast of the developments in the matters under supervision and requiring such periodic reports are reasonable measures to check any such assumptions. *See In re* Anonymous Member of S. Carolina Bar, 552 S.E.2d 10, 14-15 (S.C. 2001) ("[u]ndoubtably, the supervision of attorneys by other attorneys in their firm is one of the most effective methods of preventing attorney misconduct"; "[w]hen an attorney has allegedly violated Rule 5.1, it is not a complete defense to prove that the attorney did not know about the underlying misconduct. . . . In fact, a complete lack of knowledge can lead to a finding of poor supervision if the subordinate's violation is such that reasonable supervision would have discovered it.").

61. *See generally* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1005-06 (2009).

"[T]he ethical atmosphere of [an organization] can influence the conduct of all its members . . . ."[62] Managers and supervisors in prosecutors' offices should create a "culture of compliance."[63] This can be done by, e.g., (i) emphasizing ethical values and imperatives during the hiring process;[64] (ii) providing incentives for ethical behavior, such as positive reviews, promotions, and raises; (iii) protecting and rewarding lawyers who fulfill their up-the-ladder duties;[65] (iv) promoting initiatives that make compliance with ethical obligations less demanding for line prosecutors[66] such as "open-file" discovery policies;[67] (v) publicizing ethical compliance reforms and internal policies both within the office and to the public;[68] and (vi) internally disciplining lawyers and reporting lawyers who violate the Rules of Professional Conduct.[69]

2. Enforcing "Up-the-Ladder" Obligations

Prosecutors, like lawyers in other government offices, have obligations under Rule 1.13 to report conduct by an employee or other constituent that is a violation of law that might be imputed to the office.[70] This raises especially complex issues for prosecutors and other lawyers who work in government offices about the identity of their clients and the nature of their obligations.[71] We do not address these Rule 1.13 issues in this opinion. We focus here on how prosecutors might implement their supervisory and managerial obligations under Rules 5.1 and 5.3 by developing an internal system for "up-the-ladder" reporting of violations of the Rules of Professional Conduct whether or not such violations would also trigger the up-the-ladder reporting obligations of Rule 1.13.

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62. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [3].

63. *See* Barkow, *supra* note 53, at 2116 ("Whether or not an office is responding to a history of misconduct, creating a culture of compliance and ethical behavior is in the interests of prosecutors who head the office.").

64. *See* CONVICTION INTEGRITY PROJECT REPORT, *supra* note 56, at 16 (recommending posing ethical hypotheticals and asking "potential hires to discuss key ethical rules or obligations").

65. See discussion of a prosecutor's up-the-ladder duties, *infra* at Part F2.

66. *See, e.g.*, Formal Op. 09-454, *supra* note 6, at 4 (Rule 3.8 "requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.") (footnotes omitted).

67. An "open-file" discovery policy includes, for example, the office disclosing all exculpatory evidence of which they are aware, without evaluating materiality, in an effort to avoid both intentional and unintentional withholding of *Brady* evidence. *See* Barkow, *supra* note 53, at 2111 ("Another way of improving transparency and monitoring without imposing substantial costs would be for prosecutors' offices to adopt an 'open-file' discovery process. Many offices already follow open-file policies, and several scholars have touted these policies as a protection against Brady violations.") (footnote omitted); *See also* CONVICTION INTEGRITY PROJECT REPORT, *supra* note 56.

68. This provides interested "stakeholders" the opportunity to comment on these policies. *See* Barkow, *supra* note 53, at 2111; CONVICTION INTEGRITY PROJECT REPORT, *supra* note 56, at 33-34 (discussing the benefits to prosecutors of publicizing their efforts to curb prosecutorial misconduct).

69. ABA MODEL RULES OF PROF'L CONDUCT R. 8.3(a) provides: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

70. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.13(b). R. 1.13 cmt. [9] reads, "The duty defined in the Rule [1.13] applies to governmental organizations." "Up the ladder" obligations are also imposed by the Sarbanes-Oxley rule for lawyers appearing and practicing before the SEC. *See* 17 C.F.R. §§ 205.3(b), 205.4 & 205.5 (2013) (establishing responsibilities for supervisory and subordinate lawyers to report material violations of the Sarbanes-Oxley Act). For a model up-the-ladder policy, see ASSOC. OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE TASK FORCE ON THE LAWYER'S ROLE IN CORPORATE GOVERNANCE, App. F (2006), which establishes specific procedures, provides for an appropriate level of confidentiality, prohibits retaliation, requires training on reporting requirements, and provides for annual written certification by all lawyers that they are aware of their obligations and will comply.

71. For example, actions by constituents in a prosecutor's office could lead to liability under 42 U.S.C. §1983, as alleged in Connick v. Thompson, 131 S.Ct. 1350 (2011), and might require up-the-ladder reporting under Rule 1.13. So too might the apparent failure to supervise and train in the Oklahoma County District Attorney's office noted by the Tenth Circuit in Le v. Mullin, 311 F.3d 1002 (2002), where the Court said that the prosecutor's actions "suggest defiance of Oklahoma courts and disregard for Oklahoma law." In such instances there could be violations of Rule 1.13 separate from any violations of Rules 5.1 and 5.3.

Though not addressing Rule 1.13, we recommend that managerial and supervising prosecutors establish a similar system for up-the-ladder reporting concerning possible violations of the Rules of Professional Conduct by lawyers in the office. Such internal reporting procedures would enable managers and supervisors to correct, remedy, and sometimes avoid such violations. A system for this up-the-ladder reporting could include (i) designating a specific attorney or committee to receive reports and address and resolve the issues;[72] (ii) permitting confidential review, as appropriate, to promote increased reporting of potential ethical issues;[73] and (iii) requiring the reporting of any reprimand or other criticism by a judge, as well as written complaints or allegations of ethical misconduct by any person, to a supervising prosecutor or to a prosecutor designated for this purpose.[74] In addition, supervising prosecutors should make clear that any lawyer who knows of a violation of the rules of professional conduct may be required to report that information to a supervising prosecutor, or pursuant to an established up-the-ladder regime instituted to comply with Rules 5.1 and 5.3.

3. Discipline

The training and supervision described in this opinion can be enhanced with appropriate remediation and discipline. For example: (i) imposing sanctions within the office; (ii) requiring remedial education targeted at particular types of misconduct;[75] (iii) intensifying, in appropriate cases, the scrutiny of prosecutors who have engaged in improper conduct or whose conduct has been criticized by a court; (iv) demotion or dismissal; and (v) where appropriate, referring the matter to an outside authority under Rule 8.3(a).[76] It may be effective to have responsibility for in-house review placed with a specific supervisory lawyer or a group of lawyers within the office.[77]

G. Organizational and Structural Variables

Organizational and structural differences, such as the size of an office, the personnel turnover rate, the manner in which cases are prosecuted, the size of caseloads,[78] and the hierarchical structure may have an impact on which of the measures we recommend should be used to ensure compliance. Large offices with several layers of hierarchy may need to establish a formal committee to coordinate and direct the internal reporting of misconduct and the

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72. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [3] ("Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee.").

73. *Id.*

74. *See* Barkow, *supra* note 53, at 2110.

75. For example, if the office is criticized for a *Brady* violation, appropriate remedial education is imperative.

76. *See, e.g.*, *In re* Brizzi, 962 N.E.2d 1240 (Ind. 2102) (public reprimand for improper public statements); *In re* McKinney, 948 N.E.2d 1154 (Ind. 2011) (120 day suspension for conflict of interest); *In re* Miller, 677 N.E.2d 505 (Ind. 1997) (reprimand for advancing the cause of a civil litigant while serving as a prosecutor). *But see,* Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 541-42 (2011); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 2 ("[D]isciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d)"); United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, Pregerson, Reinhardt, Thomas & Watford dissenting) (denying petition for rehearing en banc) ("[p]rofessional discipline [for Brady violations] is rare").

77. *See* CONVICTION INTEGRITY PROJECT REPORT, *supra* note 56, at 16 (discussing creation of "Best Practices Committees"). For an analogous discussion of the benefits of having a general counsel in private firms, *see* ROTUNDA & DZIENKOWSKI, *supra* note 21, § 5.1-1.

78. High caseloads are a particular risk factor. Whether a caseload is manageable may depend on, *inter alia*, the type and complexity of cases being handled by each lawyer, the experience and ability of each lawyer, and the resources available to support the lawyers. *See also* Va. Standing Comm. on Legal Ethics, Advisory Op. 1798 (2004) (addressing whether a chief prosecutor violates Rule 5.1 when he assigns too high a caseload; "[w]here a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney's ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1").

monitoring for ethics violations. Such formalized assignments, on the other hand, are unlikely to be required for small prosecutor's offices that employ 10 to 15 prosecutors, or even fewer. Supervising prosecutors in these smaller offices may make "reasonable efforts" by simply, for example, adopting an open-door policy for reporting misconduct or assigning a specific person in the office to hear such reports.

Direct supervision and monitoring also may vary with organizational and structural differences. For example, some offices assign multiple prosecutors to handle a case and each prosecutor is responsible for only one stage of the process.[79] In these offices, a monitoring scheme is unlikely to be reasonable if no special attention is paid to ensure that important information, such as *Brady* material, is not lost in the transition from prosecutor to prosecutor. The handling of this transition is especially delicate in offices with high turnover rates--much can be lost with frequent transitions. By contrast, where only one prosecutor handles a case from start to finish and through all stages in the process, a different monitoring regime will be appropriate.[80]

H. Conclusion

Prosecutors with managerial authority and supervisory lawyers must make "reasonable efforts to ensure" that all lawyers and nonlawyers in their offices conform to the Rules of Professional Conduct. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to insure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices, as set forth in this opinion.

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79. Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships, Contextual Constrains on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 13 (2013) ("horizontal prosecution" refers to matters handled by "multiple prosecutors, each handling the case at one stage of the process").

80. *Id.* at 12 ("vertical prosecution" refers to matters handled by one prosecutor at all stages). *See also* Formal Op. 09-454, *supra* note 6, at 8 ("[W]hen responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. . . . Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.").