

Resistance Is Futile! You Will Be Assimilated!

by Kelly Addy

The professional environment of the North American municipal lawyer is evolving exponentially and it is a challenge to keep pace with our skill level. It is no longer a question of whether we are going to 'opt in' or 'opt out', however.

With the American Bar Association's new Comment 8 to Rule of Professional Conduct 6.1, the issue is not whether seasoned attorneys are going to engage with all the new technology available for research, case management and document creation, but when...and when needs to start pretty soon.

Rule 6.1 stated the obvious, that the attorney was obligated to provide 'competent representation' which required 'the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.'

Now we are being sent where no generation of lawyers has ever gone before – into cyber space – by the simple (and not so simple) observation that 'a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.'

As our State Bar Counsel said rather emphatically to a roomful of Yellowstone Area Bar Association members, 'How in the world can you advise your client competently if you have only the dimmest understanding of the tech-based environment in which they now must operate... or die?'

Her point was that everyone who represents people these days has to be able to perform competently at a work station. If you can't, she said, you are committing malpractice.

The days of having an associate do that stuff are over. If you want to keep doing it the way you have always done it, you are betting your retirement account on every outcome in every case.

Harkening back to the 1990s television series, 'Star Trek-The Next Generation', the episodes dealing with the attack of the Borg come to mind. The Star Ship Enterprise Captain Jean-Luc Picard is captured by people who have been modified so that machine parts are melded into their bodies.

He comes back at the end of one of the more vivid episodes in the series, modified as a full-fledged Borg and informs his stunned shipmates in a monotone voice, 'Resistance is futile. You will be assimilated.'

Anyone who watches the dizzyingly complex and numerous posts at CityAttorneyTech has frequent flashes of techitis. This manifests itself as a feeling of being lifted out of your desk chair and suddenly being inserted into the text of a science fiction novel.

Timelessness and weightlessness give way to feelings of cluelessness and helplessness. You can grasp the concept of the new device or software that is being discussed, and you can see that it is a complete game-changer that will shift outcomes in cases. How can we adjust to new realities at Warp Nine?

Our listServs, available to attorneys who practice municipal law provide a life line to practitioners who access the list and the topics that regularly run across the screen. It is better to be concerned about emerging issues than it is to be completely surprised by them.

If email listServs are not the perfect medium to raise and discuss these issues, they are as close to perfect as anything I can name. They operate in real time and we have additional opportunities to hear what is coming next before the blow strikes, alongside 700 proactive municipal law partners who know that my success is their success and their problem is my problem.

We are literally re-wiring our brains. We have come a long way, but we still have a long way to go. The challenges range from simply proofreading – which is different than taking ye olde red pencil to a piece of paper – to which predictive coding service we need to complete a judicially acceptable search of our digital database.

We are analogue creatures, living our lives inexorably from birth to death, but we now live in a digital world, that requires us to jump from our calendar to our email to online meetings to live council sessions. We don't do it all in a matter of days anymore, either, but in hours if we are lucky and in minutes if we are having the postmodern version of an Average Day.

'How can anyone possibly keep up?' you ask. With 700 of your closest cyber-partners, I reply. I can't think of a better tool for the municipal lawyer today than the email program at your desk at City Hall.

Now more than ever we are confronted by a baseline task that will take a total team effort to address professionally, competently and successfully. Now more than ever we require a little help from our friends. Now more than ever I need you to succeed if I hope to do the same.

Isn't it interesting to live in a day where the written word isn't just written any more? What Guttenberg did with moveable type printing, moving human history out of the Dark Ages and catapulting it into the Renaissance, was so big a sea change for civilization that it took centuries to see how the world was transformed by it.

We are in a similar time, with all the institutions and conventions of the past becoming unhinged in a way that we are still guessing at today. If ever there was a time that needed the abiding comfort of the Rule of Law we live in it.

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The old power centers of brick and mortar are being torn down again, but this time it's not the vandal hordes at the walls of Rome. In the midst of the chaos, a consensus in the land that the individual can still receive equal justice under law would be as effective a stabilizing element as any I can conceive.

The pursuit of happiness ain't what it used to be, and it is going to take some very dedicated, socially-conscious, diligent lawyers, particularly in the public sector, to continue the world's greatest experiment in government of the people, by the people and for the people, as we all go where no one has gone before. ML

Religious Workplace *Cont'd from page 19*

gious harassment, but requiring a religious employee to cease proselytizing may result in liability for failure to reasonably accommodate the employee's beliefs.

What kind of guidance is available to deal with workplace proselytizing? Although the law is developing in this area, some guidance is available. An employee has a right to engage in religious conduct to the extent that it is not an undue hardship on the employer. Harassing another employee is likely to be an undue hardship. Recall, however, that harassment is a fairly high - but not impossible - standard.

So, while the line between permissible proselytizing and workplace harassment is blurry, important factors that bear on the analysis include:

- the pervasiveness of the proselytizing;
- its impact on coworkers and work performance (including profitability) and;
- the capacity and willingness of the employer to take steps to accommodate the aggrieved parties, such as by moving the proselytizing employee and the offended employee to different work stations.

May a company hire a "corporate chaplain?" Some companies hire corporate chaplains to serve their workplace. This practice is not inherently unlawful and may even prove beneficial. Although the courts have not weighed in on this subject, all of the above employment law rules likely apply to such a situation:

- An employer cannot lawfully require an employee to engage in religious activity, and so employers must take care that no employee is required or coerced into engaging in religious activity as a term or condition of employment.
- Evangelism (especially sustained evangelism) by a minister may constitute or serve as evidence of- a hostile work environment.
- An employee is likely to be entitled to opt out of meeting with the minister if her religious beliefs prohibit it.

May a company allow prayer groups? Yes, so long as participation in the prayer group is voluntary and that there are no employment-related consequences to participating or not participating. For example, if access to a supervisor who is involved in a prayer group leads to preferred assignments for an employee, other employees may have a claim for discrimination. If an employer insists on an employee's participation, that company may be liable for quid pro quo discrimination, as well. Finally, if pressure to attend is applied by supervisors or co-workers, an employer may be liable for a hostile work environment.

May an employee post posters, bible quotes, or other religious slogans? Employees do have certain rights to express their religious views in the workplace. For example, most employers will not be able to show that it would be an undue hardship to permit one employee to wear a yarmulke or another to display a cross in his or her private office. Title VII does not compel employers to accommodate employees' religious expression that could reasonably be perceived by patrons as an expression of the employer's views.[22] An employer can also restrict expression that disrupts operations or that is hostile or demeaning to customers or colleagues. [23]

Sample Scenarios

Scenario: A shipping company refused to hire a Jewish man as a driver because of his beard, which he wears for religious purposes. The company required him to either shave his beard or apply for an "inside," lower paying position that would not have contact with the public.

Answer: Title VII of the Civil Rights Act of 1964 requires employers to make reasonable accommodations to employees' and applicants' sincerely held religious beliefs as long as this does not pose an undue hardship. If the company cannot show why a beard is a hardship, it must hire the man as a driver. Notably, the company may not argue that its customers would prefer non-bearded drivers as "customer preference" is not a valid basis for a hardship.

Scenario: A restaurant chain fires a server because he has small, quarter-inch wide ring of tattoos on his wrist. He wears these tattoos as a part of his sincerely held belief that his faith, the Kemetic religion, requires them. Once he explained his religion to management, he was fired. At a corporate meeting, management stated that the company has "Christian" values and that the company seeks out "that all-American kid" from the suburbs for its server positions. The restaurant maintained that any change to its dress code – including prohibitions on tattoos -- would detract from its "wholesome image," and would thus be an undue hardship.

Answer: An employer is required to support its claims of undue hardship with more than hypothetical hardships based on unproven assumptions about image. Moreover, as noted above, customer preference is not a legitimate reason for not accommodating a religious need.

Scenario: An employer of a particular faith requires her employees to read passages from her preferred religious text out loud at company meetings, offers paid days off to attend religious gatherings, and works closely to help advance the careers those employees who adopt her faith.

Answer: An employee who refuses to participate in such activity must not be penalized An employer is not permitted to treat acceptance of religion or participation in religious rituals as a