IMLA
THE MUNICIPAL LAWYER MAGAZINE

September/October 2014
THE JOURNAL OF LOCAL GOVERNMENT LAW

The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer



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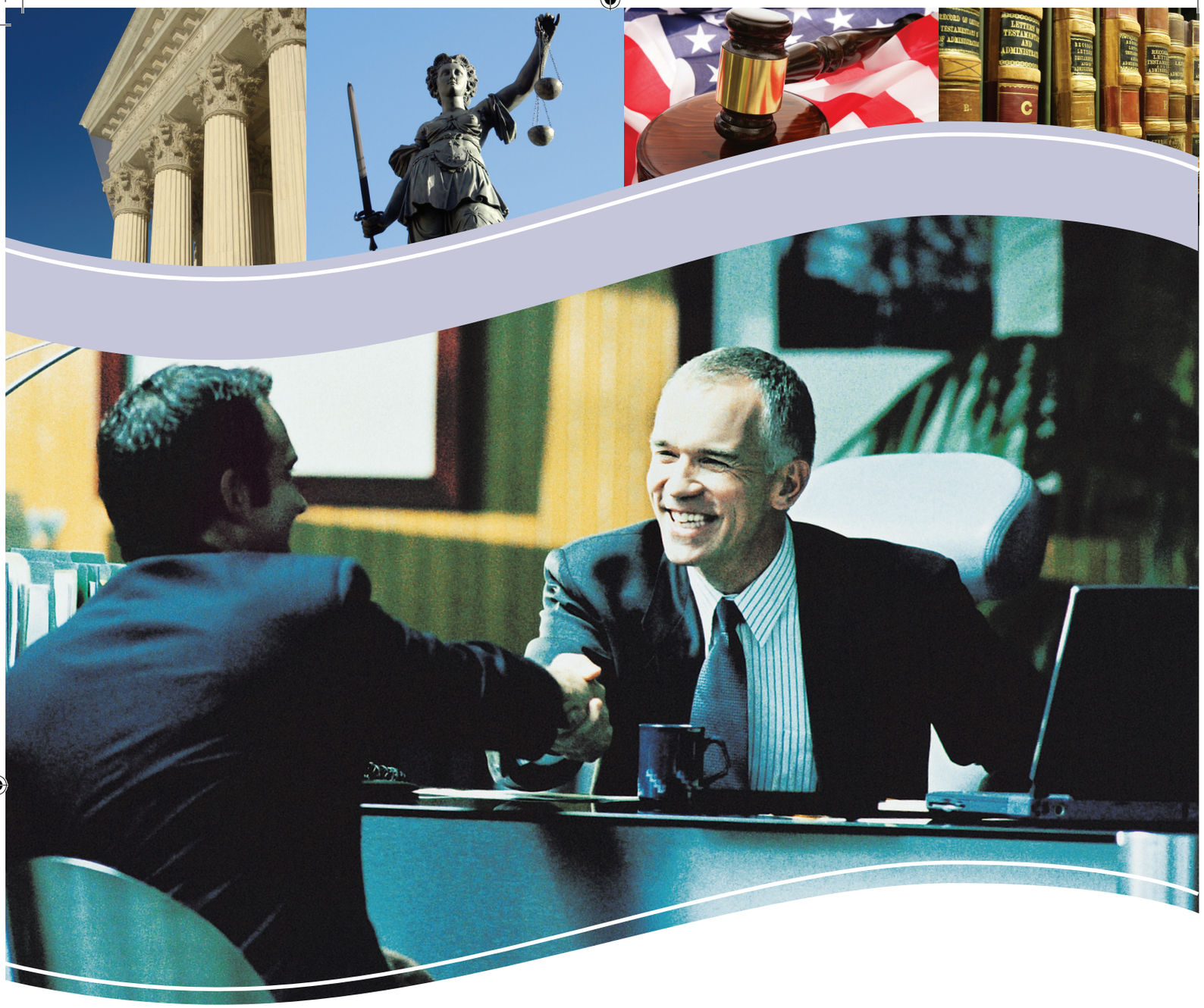

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The Responsible Use of Eminent Domain Post-*Kelo*

By Andrew G. Bailey and Elva E. Tillman

Now almost a decade old, *Kelo* upended notions that eminent domain could only be used to appropriate property for "governmental" use. The authors discuss some of the legislative tactics and case law which emerged as various state and local governments have confronted a potential "takings" feeding frenzy.

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The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer

By Michael A. Cardozo

What ethical, moral, legal and public policy considerations should guide the principal lawyer for a governmental body? Now a partner at a major New York firm, Michael Cardozo provides insights drawn from his 12 years of service as New York City's Corporation Counsel.

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Reflections on Public Lawyering

By Stephen H. Sachs

Rarely has a Keynote speaker at IMLA's Annual Conference evoked such a spontaneous and heart-felt response as did Stephen Sachs in Baltimore, and with good reason. We reprint in full his insights– from the critical fiduciary role of municipal attorneys to America's need for expanded legal services.

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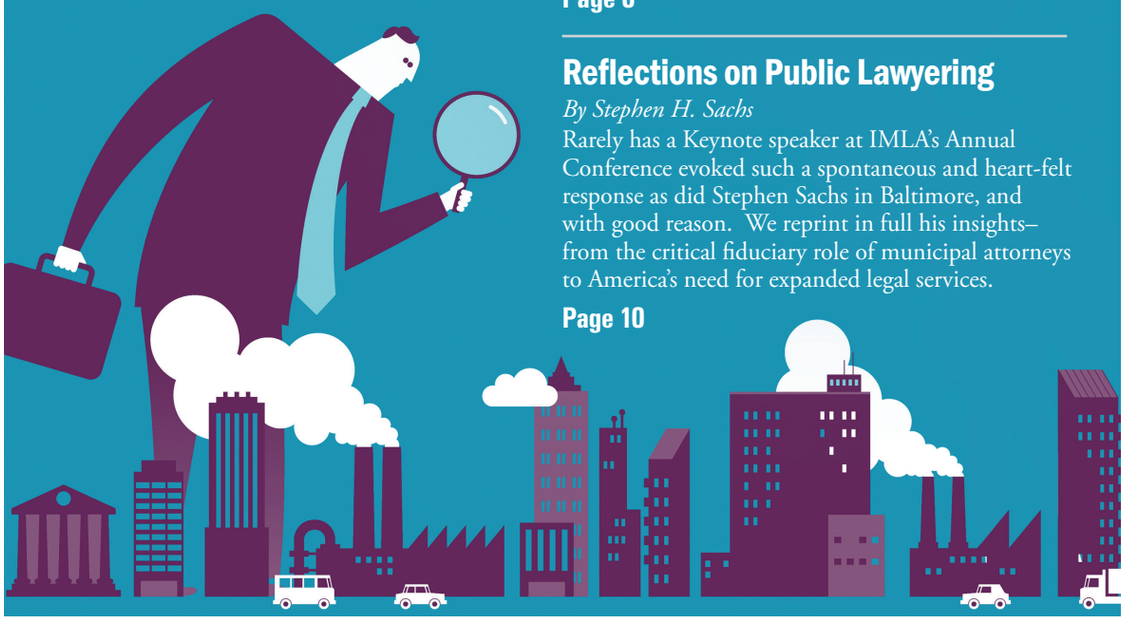

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EXECUTIVE DIRECTOR'S LETTER

A Year of Superlatives



Chuck Thompson, IMLA Executive Director and General Counsel

Our Annual Conference in Baltimore last month capped a 2013-2014 operating year that can only be described as a resounding success. The Baltimore meeting brought together a record 700-plus IMLA members to reconnect, discuss leading-edge issues of municipal law and celebrate the nation's 200th anniversary of our Star Spangled Banner—in the very epicenter of those festivities. I think it fair to say that George Nilson and the entire Baltimore Solicitor's office—along with the City's football and baseball teams, the Walter Art Museum, the Blue Angels and a massive fireworks display helped us to host a spectacular event. And based on members' evaluations, IMLA programming also hit it out of the park (we were, after all, steps from Camden Yards), providing some of the best educational programming we've ever had, from our joint Code Enforcement program with the Center for Community Progress to the inspirational keynote speech by Steve Sachs that we have included in this issue of the *Municipal Lawyer*.

To close our program we also celebrated 50 years of the Civil Rights Act with inspirational talks by Professor Larry Gibson and litigator John Rellman, both of whom have been leaders in securing civil rights over the years. Listening to Larry Gibson, Steve Sachs and John Rellman we are reminded of our founder Charles S. Rhyne and his lifetime of work to recognize the Rule of Law. Charlie was the force behind "Law Day" and worked tirelessly with leaders throughout the world to promote the "rule of law" over the "rule by force." Perhaps it is also a fitting reminder of the need for the Civil Rights Act to have had as our President, Sheryl King Benford, a person who rose above pervasive discrimination to become our President and Cleveland's Woman of the Year during 2014.

We thank each one of you for having played a part in our success this past year through your interest and involvement in IMLA on many levels.

But the past, as they say is prologue and we now begin a new operating year, inaugurating our ever-active and well-respected colleague from New York City, G. Foster Mills as our new President. We are building on last year's momentum and launching several new initiatives that we know will add value to membership and make being part of the IMLA family a great advantage to communities across the country. For example, the Construction Contract Drafting Initiative will launch model construction document amendments to standard AIA contracts. IMLA and AIA have entered into an agreement that allows our members who have licensed the AIA licensed documents to use our model amendments, which are copyrighted and may only be used by the IMLA member community. As another enhanced benefit, starting in January each IMLA member will receive ten hours of CLE-eligible distance learning cost-free, as part of their membership. And an additional 30 hours will be available to members for only $499 plus modest CLE fees in states where they apply, making distance learning through IMLA a great value. These programs will cover an ever-expanding range of leading-edge topics and will be brought to your desks by domain experts.

Foster is already under way working to energize our membership and we hope you will help him by passing along to colleagues the great value IMLA brings and getting them to join us. We'll be returning to the Omni Shoreham in Washington DC for our ever-popular Mid-Year Seminar next spring, where we plan to sponsor the admission of interested IMLA members to the Supreme Court. We'll launch our first-ever Chief Legal Officer's Forum at the Mid-Year Seminar (look for more information on the CLO Forum). And we'll host our 2015 Annual Conference next September in the excitement and energy of Las Vegas!

So, as great as 2014 has been, we expect even better things in the upcoming year. Thank you again for being part of our growing IMLA family. ML



FROM THE EDITOR:

IMLA
THE MUNICIPAL LAWYER MAGAZINE

Dear Reader:

Our September-October lead explores the ever-challenging ethical dimensions of service as a government attorney. Beyond the recurrent question of "who is my client," contributor Michael Cardozo of New York City raises other considerations—what is the municipal lawyer's responsibility to "do justice" or discourage the executive's preferred course of action?

We also consider municipal responses in the decade after *Kelo*, courtesy of George Bailey and Elva Tillman of Baltimore. Our "Inside Canada" department reemerges, thanks to Windsor, Ontario's Monica Ciriello, who will become a repeat provider of Canada-oriented articles and case summaries. Regular contributor Kelly Addy injects a cautionary note in "ListServ," David Wesner tracks gambling establishments in "Code Enforcement" and IMLA writers look at the federal Pregnancy Discrimination Act and an aggressive anti-nuisance ordinance in Michigan.

In his Executive Director's letter, Chuck Thompson looks forward to 2015 and reprises our successful Baltimore Conference. We include some pictorial high points of that event, courtesy of IMLA members Jim Lampke, Dan Crean and Kelly Addy. And we reprint in full the comments of our Baltimore keynote speaker, Steve Sachs, who delivered a most memorable address to more than 700 IMLA attendees. We trust you'll enjoy the read.

IMLA Editorial Team

ERRATA-

In Peter Bogdanoff's article "Tasing Soccer Moms, Police Use of Force and Officer Liability" (July-August 2014- vol. 55, no. 4, page 11) we inadvertently stated that a police training professional had never seen an officer succeed with a suspect " by being nice" The correct sentence was "He indicated that he has never seen a police officer face a lawsuit when getting a suspect to comply with his verbal commands 'by being nice.' " In the same issue, our article "Free Ride? Municipalities Flag Uber and Lyft" (July-August 2014-vol. 5, no. 4, page 26) stated that a ride via Uber from Santa Monica to LAX would cost as little as $6; the correct comparison was that a ride via Uber from West Hollywood to LAX would cost $27 while a taxi would charge $50.

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We look forward to hearing from you!

Questions? Please contact IMLA at info@imla.org.

The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer

By Michael A. Cardozo



(Editor's Note: This article is adapted from the Maurice Rosenberg Memorial Lecture, presented by the author April 8, 2014 at Columbia Law School.[1])

What is the proper role of the chief lawyer for a government entity? Drawing on my 12 years of experience as Corporation Counsel of the City of New York, I address in this article the ethical, moral, legal, and public policy obligations and values that should guide the actions of an attorney who is fortunate enough to be the principal lawyer for a government body.

In order to define properly the chief government lawyer's role as advocate and legal counselor, he or she must answer fundamental questions of policy and ethics. First, does that lawyer have an obligation to "do justice" when prosecuting civil litigation that affects his or her duty to the governmental client? And if so, what does "doing justice" mean? Second, what obligation does a government lawyer have to protect the long-term institutional interests of the governmental entity when those interests arguably conflict with the short-term policy goals of the present chief executive or incoming mayor-elect? And third, what does a government lawyer who is generally charged with defending the law do when faced with a challenge to an arguably illegal law that the executive does not like?

The common thread that runs through my answers to these questions is that, in my opinion, the responsibility of the chief government lawyer is to ensure that the government entity he or she represents enjoys all the benefits of vigorous advocacy. In this respect, the relationship between lawyer and government entity is no different than the relationship between attorney and client in private practice. Indeed, only through zealous advocacy can the government lawyer optimally advance the interests of the government entity and the rights of its citizens.

Who Is the Client?

The obvious starting point for this debate is defining who is the government lawyer's client. Most commentators agree that the client is whatever governmental entity the lawyer represents, in my case the municipal corporation known as the City of New York.[1] What this means is that the chief government lawyer must never forget that his or her first obligation is to the governmental entity itself and that lawyer's job is not simply to advocate on behalf of individual members of the executive or legislative branch. Just as counsel for a corporation takes day to day direction from the duly authorized con-stituents that are the corporate officers, but nevertheless has an overarching obligation to protect the interests of the corporation, even against the wishes of those officers, so, too, must the government lawyer represent in the first instance a city or state and not its mayor or governor.

In the corporate setting, Rule 1.13(f) of the Model Rules of Professional Conduct, to take but one example, requires the general counsel to make clear to board members and officers that his or her primary responsibility is to protect the interests of the corporation, when it appears that those interests may differ from those of the individual constituents[3] with whom the lawyer is dealing. However, while the rules of professional conduct for lawyers offer some general guidance to government lawyers, the authority and obligations of government lawyers are modified and sometimes augmented[4] by charter and statutory provisions. This similar-but-different quality of governmental lawyering is apparent from the relationship between government lawyer and the client entity.

As a practical matter, the government lawyer's job is almost invariably to advance the objectives and defend the interests of whoever is in charge of

making final decisions on the particular issue in question.[5] Since most litigations against the government challenge the legality of the actions of the governor, mayor, agencies they control, or their appointees or employees, it follows that these democratically elected or duly appointed officials, after receiving appropriate legal advice, should make the key decisions about the litigation objectives in particular cases. The means by which the entity pursues these objectives remains within the professional judgment of the lawyers.[6] Of course, if the challenged actions are clearly illegal, ethical rules would require the government lawyer, like one in private practice, to decline to defend them.[7]

It is worth pausing to consider what happens when two branches of government are on opposite sides of a dispute. In such cases, it is vitally important that both sides receive adequate representation. As the Preamble to the Rules of Professional Conduct makes clear, government lawyers may represent various government entities.[8] Unlike the private lawyer, the government lawyer may continue to represent multiple entities generally, even though in a particular legal controversy between two entities, he may represent one, but not the other. Thus a government lawyer could litigate on behalf of the mayor and be adverse to the city council in a legal dispute between the two, even though he still represents both entities outside the litigation. This would not be true in the private practice context: a private lawyer could not represent one client against another client in a single litigation and still represent both outside that litigation, because that would create a conflict of interest. In New York City, therefore, whenever the mayor and the city council are adverse in litigation, and consistent with New York Court of Appeals precedent,[9] the city council will retain private counsel or rely on its own in-house attorneys.

But identifying the client, and the relevant decision-maker for the client, does not tell us whether the chief government lawyer, in conducting civil litigation, has obligations beyond representing that client's interests and expressed objectives to the best of his or her ability. Phrased another way, does the government lawyer have an independent duty to "do the right thing" by virtue of his or her official position that limits the single-minded dedication with which the government lawyer can pursue litigation on behalf of a government entity?

[I]n the absence of a special constitutional or statutory duty to represent the public interest, there is no overarching responsibility for government lawyers to "do justice" that might temper their vigorous advocacy on behalf of the entity or its elected officials.

"Doing Justice"

The Attorney General of the United States recently suggested that some government lawyers have an independent duty "to do justice" whenever the government entity is party to civil litigation. Attorney General Eric Holder stated that "[t]his, after all, is the essential duty to which all of us—as attorneys general—have been sworn: not just to win cases, but to see that justice is done."[10] Several commentators share this position and extend the "do justice" admonition beyond elected attorneys general and place an additional ethical responsibility upon all government lawyers.[11] They have suggested that it may be wrong for government lawyers to make aggressive motions and assert every possible defense without regard to how sympathetic the facts of plaintiff's particular case may be. In my view, such a position is incorrect. It is not only a dangerous precedent to allow appointed government attorneys to determine what is just and what is not, but unwarranted restraint is also a disservice to the government entity the attorney represents.

The responsibilities of state attorneys general—especially elected ones—are distinguishable from those of their appointed counterparts, such as corporation counsels or city attorneys. Elected state attorneys general are often independent office holders who draw their authority directly from the state citizenry. This creates concomitant duties, derived from the statutes and constitutions that define the attorney general's duties and responsibilities, to protect the public interest. For example, the California Supreme Court has observed that the state attorney general "is often called upon to make legal determinations both in his capacity as a representative of the public interest and as statutory counsel for the state ... [but] that his paramount duty [is] to represent the public interest."[12] In such cases, there may be a special duty to "do justice" and act in the public interest. The nature and extent of such obligations will vary from state to state according to the terms of statutes and constitutions, and precise answers are beyond the scope of this article.[13]

By contrast, in the absence of a special constitutional or statutory duty to represent the public interest, there is no overarching responsibility for government lawyers to "do justice" that might temper their vigorous advocacy on behalf of the entity or its elected officials.[14] The various formulations of ethical rules offer some, but hardly definitive, guidance. The ABA Model Rules, for example, mandate that all lawyers, specifically including government lawyers,[15] should "zealously assert[] the client's position under the rules of the adversary system" and take "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[16]

The government lawyer is, of course, an essential participant in internal government policy debates, which adds an extra dimension of responsibility to what

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Michael A. Cardozo is a Partner with Proskauer Rose LLP and served as New York City Corporation Counsel from 2002 to 2013.

he or she does. I cannot emphasize strongly enough that the government lawyer must not only give legal advice, but must also forcefully express views on the desirability and morality of the particular policy question at issue. Indeed, Model Rule of Professional Conduct 2.1 has a special resonance in the government lawyer context:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

While the Model Rule therefore makes clear that the government lawyer should always make his or her moral stance clear to decision-makers at the advisory level, the Rule is permissive and puts the law first. In my opinion, the rule allows government lawyers to use morality as a reference point but does not enable them to elevate moral concerns above sound legal analysis.

The rule makers are perfectly capable of curbing single-minded advocacy if they so desire. In a different context, the Model Rules state that a criminal "prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[17] But they impose no comparable standard on civil government lawyers. The only vestigial trace of such a responsibility, found in the old Model Code of Professional Responsibility, is a non-mandatory ethical consideration that the "government lawyer in a civil action… has the responsibility to seek justice. … "[18] Yet the rule makers signaled their disapproval even of this non-binding suggestion when they elected not to include it in the new Model Rules. It is clear to me that, at least, there is no mandatory ethical duty per se that requires a government lawyer to exercise restraint in civil litigation for the purpose of "doing justice."

This issue is far from academic. The government lawyer's decision whether or not to pursue litigation zealously on behalf of a government entity has a clear impact on the entity and its citizens. To put this more concretely, should New York City, in an effort to reduce the more than $500 million it annually pays in damages from the more than 8,000 cases filed against it, insist on taking weak cases to trial rather than paying small settlement amounts to make them go away? Or, alternatively, should the Corporation Counsel's Office, to take but one of many examples, have "done justice," despite the City's overwhelming likelihood of prevailing at trial, and settled suits brought by innocent bystanders who were injured in the crossfire when the police shot at and killed a gunman, who had just murdered another man outside the Empire State Building?[19] Similarly, when over 10,000 cases, seeking in excess of $3 billion in damages, were brought against the city by people, described by many as "the heroes of 9/11," who alleged they had become ill as a result of their Ground Zero clean-up efforts, were city lawyers wrong to defend that mass tort case by raising every possible defense, including that of immunity under the New York State Defense Emergency Act?[20]

Clearly, it is in New York City's best interests to reduce the amount it pays out as a result of litigations. And it was my judgment that insisting on the trial of cases in which we believed the City would likely prevail would result in such a reduction. Therefore, Mayor Bloomberg and I determined that cases where Corporation Counsel was confident the city would prevail should be tried on their merits, or settled on very favorable terms, despite the sympathetic facts presented by a particular plaintiff.[21]

In my view, the government lawyer must give the needed legal advice to the government decision-maker, and then, barring a contrary directive from that individual, try or settle the case based on the lawyer's assessment of the ultimate litigation result.

I recognize that some feel deeply uneasy whenever the government takes on a sympathetic citizen in court. Yet this discomfort is an inevitable byproduct of the adversarial system through which the victim of an alleged wrong must seek compensation from the government. To paraphrase Judge Jack Weinstein, so long as government lawyers are playing this game by the present rules, we owe it to the taxpayer to play to win.[22]

The courts and the legislature set the rules of the litigation game by which the government must play. It is the courts and the legislature that decided the city is immune from liability when an innocent bystander is wounded by a cop's bullet unless negligence can be established.[23] Similarly, it is the legislature that has determined that the government is not liable in a civil defense emergency such as 9/11, even if there was negligence.[24] And certainly, if the long-term interests of the city and its citizens include reducing the amount paid out in litigation, and if one of the ways to achieve that goal is by refusing to settle weak cases, can the lawyer do anything other than insist on taking such cases to trial?

Under our judicial system and absent some statute or constitutional provision imposing a duty to protect the public interest, "the court, not the government lawyer, will declare what 'fairness' and 'justice' require."[25] More importantly, for a government lawyer to ignore these rules, as some have advocated, and litigate certain civil cases, but not others, based on personal preconceptions of fairness and without invoking available defenses, suggests the worrisome possibility that the appointed lawyer, rather than the elected decision-maker, makes the potentially dispositive policy decisions. We must not promote a government of lawyers above our government of laws.

The Client's Long-Term Interests

Another example of the ethical and policy tensions inherent in governmental lawyering arises when the long-term interests of the government institution are perceived to conflict with the policy desires of the present chief executive. To be more concrete: What should the chief lawyer for the governmental entity do if he or she concludes that the long-term interests of the city conflict with the chief executive's short-term policy preferences?

For example, was it proper for the Corporation Counsel's Office, relying both on arguably applicable public policy and precedent, to contend that

a particular state statute favored by the mayor was constitutional even though the statute's enactment had not been preceded by a home rule message from the city council, as was arguably required by the state constitution? Judicial acceptance of the lack of need for such a home rule message might weaken the city's long-term interest in resisting interference from future state legislatures in the operations of New York City, to the dismay of future mayors and corporation counsels.[26]

Other examples of this tension between short- versus long-term goals abound. If a city has a long-term interest in improving safety and the environment by restricting signs abutting city highways, what should the government lawyer do when a city commissioner wants to make an exception to allow for a particular sign, an exception that future would-be-sign-posters might point to as showing discriminatory treatment? Or, if it is not in a city's long-term interests to agree to consent decrees that put the city under the supervision of the courts for a period that in some cases have extended more than 30 years,[27] what should the lawyer do when a mayor, to solve a particular political and legal problem, decides to agree to another long-term consent decree?

One of my most distinguished corporation counsel predecessors, Fritz Schwarz, has answered these questions by arguing that government lawyers have a special responsibility to care for the long-term interests of the institutions they serve, which politicians will not do sufficiently.[28] I agree. The government lawyer must carefully explain to the elected official the potential adverse long-term consequences to the governmental entity of making a particular argument or taking a particular action. But this duty is advisory in nature.[29] The final decision of whether the short-term policy gain is worth the potential long-term consequence to the city—even assuming the lawyer could comfortably identify the long- versus the short-term gains involved—is one for the elected official, not the government lawyer, to make.

A slightly different example of the tension between short- and long-term goals can arise in the final days of a particular elected official's tenure, when the government lawyer is faced with deciding what course of action to take if he or she knows that a policy shift is imminent. This situation was presented in the waning days of the Bloomberg administration when it became clear that some of Mayor-Elect DeBlasio's policy goals differed sharply from those of Mayor Bloomberg. While changes of policy from one mayor to the next are the essence of democracy, the impact of the changes contemplated by the mayor-elect were complicated by the fact that many of those changes—including the controversial stop and frisk police tactics—were the subject of litigation.[30] This meant that the Corporation Counsel's Office might soon have to take different legal positions on issues it had advanced under Mayor Bloomberg. While some commentators suggested that Mayor Bloomberg's agenda should not have been advocated by the corporation counsel through the final hour of the mayor's tenure, in my view the last days of the administration were no different from the previous 12 years—my office and I had a client to serve, and it was our obligation to advance persuasive legal arguments on behalf of the present mayor.[31]

While the final decisions on litigation settlements, and whether or not to take positions that may not be in the government's long-term interests, should be made by the elected executive, not by the government lawyer, it does not follow that ... the attorney general, corporation counsel or city attorney must always do the executive's bidding.

Let me add that while I personally would have preferred for the now changed Bloomberg policies to have remained in effect, it was perfectly proper, when the new mayor took office, for my very able successor, Zachary Carter, to signal a "U-turn" and announce, as he did, that it is "the prerogative of the mayor and of the city to assert legal positions" even if this requires changing tack. [32]

The Ethical Limits on the Chief Government Lawyer

While the final decisions on litigation settlements, and whether or not to take positions that may not be in the government's long-term interests, should be made by the elected executive, not by the government lawyer, it does not follow that whatever the elected executive wants, he or she should get, or that the attorney general, corporation counsel or city attorney must always do the executive's bidding. As discussed earlier, the chief government lawyer has an overriding duty to represent the government institution and to see that its laws are defended. That obligation trumps his or her duty to the elected official.

This is best illustrated through one of the most difficult decisions I faced at the Corporation Counsel's Office. In 2005, a State Supreme Court justice declared the New York State Domestic Relations Law's prohibition of gay marriage unconstitutional.[33] Accordingly, she ordered the city clerk, represented by the corporation counsel, to issue a marriage license to the plaintiffs, a gay couple. Four other state Supreme Court justices had reached the opposite legal conclusion and had upheld the law's gay marriage ban.[34] The mayor strongly favored legalizing gay marriage, as did I.[35] Given the court's finding of unconstitutionality, I was faced with a dilemma. Should I file a notice of appeal and invoke the city's automatic right to a stay, which would have had the effect of preventing the decision from going into effect until the appeal was decided? Or instead, should I have "done justice" and declined to invoke a stay, which would have meant that the trial court ruling would go into effect allowing gay couples to be married even before the

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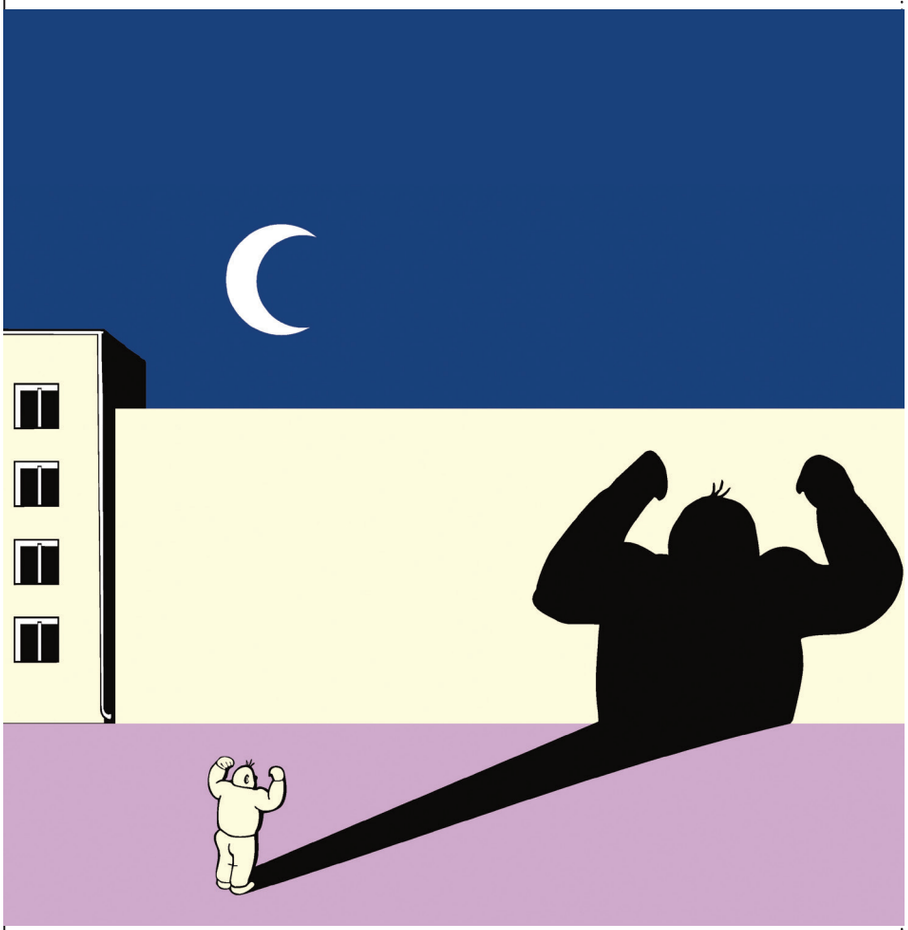
Reflections on Public Lawyering

By Stephen H. Sachs



(Editor's Note:This talk was delivered by Stephen Sachs as the keynote address at IMLA's Baltimore Conference, September 12, 2014).

This will be a very personal talk. I begin with an episode from my own public law days:

Early in my tenure as AG I visited a very large room in one of our state's mental hospitals. I was there to investigate a complaint by the Mental Health Association. The room was choked with scores of men and women ... half- clothed in filthy, ragged white gowns ... wandering about aimlessly ... often colliding, one with another. The place stank from urine and feces To the extent the inhabitants spoke, I heard only guttural moans.

These folks were developmentally disabled. They were **not** mentally ill. But the state had illegally warehoused them—some for many years—in a mental institution -- where they received none of the care ...or the training ... to which they were legally entitled.

We convinced the responsible state agency to comply with the law. Each of the inhabitants of that Bedlam was evaluated by experienced medical professionals. The most severely disabled were moved to state facilities where they received appropriate care. Many of the others began to receive the training that they deserved ... and to which they responded.

Some eventually were able to live in group homes where they did household chores ... shopped for groceries ... went to the movies ... and, in a few cases, held a job. One man who had not spoken for decades—*not spoken!*—now spoke ... and sang.

On the wall of my study at home is a photograph of that room taken about a year after my visit. Sunlight streams through large windows onto the floor of a room now vacant. That photograph means a lot It is a symbol of the triumph of the rule of law.

That episode can serve as prologue to what I'm going to share with you today.

My talk has two parts. First, I'm going to preach seven of my public-lawyering homilies (you won't like some of them) -- and I'll describe a few more vindications of the rule of law -- and then I'll recount one massive failure.

And in Part II I'm going to tell you how our country fails to redeem its promise of justice for all, and challenge you to enlist in a growing national effort to right that wrong.

But first—as an old time Maryland politician used to put it—" I want to say a few words before I start speakin':"

In my inaugural speech as Attorney General many years ago I said: " My heroes are those lawyers, some famous, many anonymous, who through time have practiced law in the public interest."

That's you guys. I meant it then ... and I mean it now.

My decade and a half as one of you were the most rewarding years -- I'm not talking dollars here—of my life at the Bar.

Even the novices among you probably have more autonomy and responsibility than young partners in a large law firm. It is you, the public lawyer, who—in the exercise of your judgment about zoning ... eminent domain ... mortgage foreclosure ... police misconduct ... procurement ... pensions ... retirement—about each of the issues you confront every day ... it is the public lawyer ... who has far greater impact on the lives of our fellow citizens than do the occasional decisions of our courts.

It is you who write the rules of the road. It is you who give voice every day to the commands of the law. Your client, in the final analysis, is the rule of

law itself. That is a very high privilege.

And with it comes an obligation. Not only prosecutors, but **every** government lawyer, is ... in the words of the Supreme Court ... "the representative of a sovereignty whose obligation to govern fairly ... is as great as its obligation to govern at all."

Judge Charles Fahy, solicitor general of the United States during the New Deal, and later judge on the United States Court of Appeals for the D. C. Circuit, (where I was lucky enough to clerk), once put it this way: " where the client is the government itself he who represents this vague entity often becomes its conscience ..."

That's the spirit that the following homilies reflect:

Homily One: Call 'em as you see 'em. Your agency client may wish for different advice and -- if there is genuine ambiguity in the applicable law—you might well accommodate it. But if there is not, it is your obligation to say so, and it is the agency's obligation to suck it up. You will not only have served the law. You may well have saved your agency from an expensive, losing lawsuit.

In any case, the oath of office you took was to the people ... and to the law ... not to your boss.

Homily Two: Admit the mistakes you will inevitably make. Research is imperfect. Precedents change. New statutes emerge. Perhaps you—or your predecessors—didn't get it right the first time. Say so.

Unlike your brothers and sisters in the private bar, your motto isn't "my client, right or wrong". You owe the court, the public, the profession -- and yourselves -- total candor. Maryland's Simon Sobeloff, a former Solicitor General of the United States, and note well, a former City Solicitor of Baltimore City, chief judge of both the Court of Appeals of Maryland and the Fourth Circuit, once told me that the confession of error was the highest form of advocacy because it confers priceless credibility.

Homily Three: Never engage in "smash-mouth" litigation tactics. That tough guy stuff is for the private bar. Trust me. I know ...and have the scars to prove it.

Years ago, opposing counsel in a deposition attempted, day after day, to rudely abuse my client. Provoked beyond endurance -- and proving the old Chinese proverb that in fighting your enemy you become like him -- I finally told my opponent that he was "the most obnoxious human being I have ever met." My outburst was on the record, and my words found their way into *The American Lawyer* magazine. I was terribly embarrassed. My opponent, on the other hand, boasts of his performance....the bastard!

Unlike your brothers and sisters in the private bar, your motto isn't "my client, right or wrong." You owe the court, the public, the profession and yourselves— total candor.

Don't get me wrong. You should be strong advocates for your client . But you must, as the Supreme Court has put it, strike fair blows not foul ones. The lawyer for the sovereign never stoops to conquer. Is there a double standard? Sure there is.

• • •

Homily Four: Don't rush to take advantage of an adversary's missteps, especially if that adversary is innocently mistaken, or a novice, or, indeed, if the party is unrepresented. "Never give a sucker an even break" is not your watchword. I always preferred the old Will Rogers line that he would rather be the guy who bought the Brooklyn Bridge than the guy who sold it.

Homily Five: Don't be stingy in complying with discovery requests. After over a half - century in and around courtrooms, I believe the consequences of discovery squabbles are miniscule. I rank the efficiency of depositions at about 15% and of interrogatories near 0. Requests for Admissions ?.... Maybe.

I'll go further: in my view, you, the public lawyer, have an obligation to disclose, voluntarily, any information in your possession that substantially favors your adversary-- a sort of municipal *Brady* rule. This is perhaps not as radical as it sounds. Your opponent is likely to acquire the stuff in discovery anyhow. Part of that 15%

Homily Six: The attorney-client privilege should not be available to the public lawyer. The public is entitled to know how the lawyer for the government -- *its* lawyer -- views the law.

There may be less to this homily than meets the eye, however. Public policy requires that there be an **executive or deliberative privilege** that promotes freedom of internal debate in the executive branch. It also mandates a **work product privilege** that legitimately serves the adversary process.

(I have a confession to make here. In our AG's office we had gradations of opinions, not all of which we regarded as public property. Some opinions were formal, while others were informal. Many were written, but many others were oral...and a select few were what one wag in my office used to refer to as "extremely oral").

Homily Seven: Finally, the most important homily of all:

An overarching principle guided my public career. I saw my primary task as seeing to it that the State itself obeyed the law. My mantra was the well-known dictum of Justice Brandeis: " Our government is the potent, the omnipresent teacher. For good or ill it teaches the whole people by its example....If the

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Stephen Sachs served as Assistant US Attorney (Maryland) for three years before being appointed US Attorney for Maryland. He was subsequently elected Maryland's 40th Attorney General, serving two terms. He sought the nomination for Governor of Maryland in 1986 and thereafter served as a partner in Wilmer, Cutler, Pickering, Hale and Dorr (today, WilmerHale) for 13 years. In 2008, he was appointed by Maryland Governor Martin O'Malley to head an independent review of Maryland State Police intelligence gathering activities. He is a graduate of Haverford College, where he won a Fulbright Scholarship to Oxford University. He received his LLB from Yale Law School.

government becomes a lawbreaker, it breeds contempt for the law..." We believed this stuff-- I believed this stuff...George Nilson believed this stuff...Dennis Sweeney believed this stuff... And we did our best to put it into practice.

Earlier, with respect to those developmentally disabled folks, I recounted one of our successes at self-policing. Here are a couple of others:

It came to the attention of our anti-trust lawyers that many of the State's occupational boards were in violation of antitrust laws because their regulations unreasonably restricted entry into the regulated trades. The plumbers board, for example, required that you had to be an American citizen to be a Maryland plumber, (When your toilet is overflowing do you really give a damn whether the guy who can fix it fastest only has a "green card"?).

And the barbers! It required so much time and training to become a master barber that we used to say you could become a *brain surgeon* more quickly.

Anyhow, our "anti-trust audit" of the occupational boards and commissions insulated them from anti-trust liability. Alas... not all of our clients welcomed our advice. Some of them let me know it years later when I ran -- and lost -- for governor.

One more success: Across the Chesapeake Bay lies Maryland's Eastern Shore. The Shore did not come gently into the modern era. There are many fine people on the Shore. But old ways die hard. The Shore remained deeply racially segregated, with occasional racial conflict, well into the second half of the twentieth century.

One of the artifacts of the old ways was the maintenance of county-wide election districts, which had the effect of diluting the votes of blacks, whose homes, as the result of historic segregation, were typically clustered in discrete areas of the county.

Such dilution of the black vote was in pretty clear violation of federal law. Black activists were prepared to sue. We met often with local officials in an effort to convince them that, unless they reconfigured their voting districts, they were in danger of having the districts redrawn by federal judges. For the most part, county officials, albeit reluctantly , complied with our advice, which in a number of cases meant the defeat of some of those incumbent, white, officials at the next election.

Lawyers make a difference. That's why folks who can afford them, hire them. But there is a shameful "justice gap" in this country. The civil legal needs of over seventy percent of the poor—mortgage foreclosures, domestic violence, child custody, to name a few—are unmet.

Our massive failure: In 1985 the wave of state insured savings and loan failures that began in Ohio swept across Maryland. Many of Maryland's S&L's had engaged in risky enterprises and self-dealing with their depositors' funds. The state agency charged with regulation of these entities was wholly ineffective. The state - created insurance company that was supposed to insure deposits was grossly undercapitalized ... and manipulated by its "insureds"

Strictly speaking, I suppose, this was not a case of the state's failure to obey its legal obligations. It was a case of the state's inadequate discharge of those obligations. Arguably, it is not the business of agency counsel to monitor the effectiveness of the client. But the agency failure here was massive. We should have caught it ... sought to intervene ... and, if unsuccessful, blown the whistle. But we did nothing .... Until the tsunami struck.

Yes, we helped the Governor and the Legislature, create a plan -- at taxpayer's expense -- that made depositors whole. And, yes, our office successfully prosecuted and sent to prison many of the malefactors who caused the scandal. But we should have done more.

Some commentators liken the public lawyer to the Old Testament prophets whose duties were "to warn the people of transgressions." We should have been able to sound that trumpet. That we did not still disturbs my sleep from time to time.

(With respect to those malefactors I spoke of: Maryland. Alas, is no stranger to white collar crime and public corruption. Our checkered history is well captured by a New Yorker cartoon two guys in a jail cell regard with disgust the mush they have been served for dinner. "You know," one of them says, " the food was a lot better around here when **you** were governor !").

PART II

Lawyers make a difference. That's why folks who can afford them, hire them. But there is a shameful "justice gap" in this country.

The civil legal needs of over seventy percent of the poor -- mortgage foreclosures, domestic violence, child custody, to name a few -- are unmet.

In our nation's capital less than 10% of the poor get the legal assistance they need. Here in Maryland, a government study reported that only about 20% of the poor can address their legal issues with the help of a lawyer.

These facts are replicated across the U.S.A. Compared to most of Western Europe , to India, Japan, South Africa, Zambia, the Ukraine-- and to our good neighbors to the north -- we are a Third World country

There is a growing national movement to narrow that justice gap. It seeks a "civil *Gideon.*" The name, of course, refers to the iconic case of *Gideon v. Wainwright,* in which the

Supreme Court held that criminal defendants required "the guiding hand of counsel" and that lawyers "are necessities, not luxuries."

Unfortunately, the Supreme Court refused to extend the right to counsel to poor **civil** litigants.

After several decades of despondency, however, the American Bar woke up. Legislative and constitutional solutions are being sought in at least two dozen states. In 2006 the American Bar Association's House of Delegates weighed in ... unanimously.

My hope is that you -- who have the special cachet of being lawyers for the people -- will join this march to equal justice.

Here's how I signed up:

Over a decade ago I represented Deborah Frase in the Court of Appeals of Maryland. She was appealing severe restrictions that had been placed on her custody of her two year old son.

In the proceedings below -- before a court master and trial judge over in Caroline County on the Eastern Shore -- third- party neighbors sought custody of the child. They were represented by counsel. Deb couldn't afford a lawyer and couldn't get one from overburdened, and underfinanced, legal aid offices. Her requests for court appointed counsel were routinely denied.

But she soldiered on, clumsily attempting research in the courthouse library, scouring for witnesses. She fought the system. All alone. She was my Karen Silkwood ... my Norma Rae.

The hearing before the master had been a parody of the adversary process. Deb didn't know about pre-trial discovery. She didn't know how to introduce evidence. She didn't know what an expert witness was. She frequently expressed bewilderment . Her cross-examination of her mother -- a hostile witness -- was only an exchange of accusations.

Hearsay was rampant. Her direct testimony was mainly brief responses to cursory questions from the master. In short, she was never able to achieve -- as any trained advocate would have -- a coherent presentation of how she had been able to overcome an admittedly troubled past.

Counsel almost certainly would have prevented the master and the judge -- whose distaste for Deb was evident on the record -- from imposing conditions on the grant of custody.

Deb Frase won her case in the Court of Appeals. The court relied on a Supreme Court decision that held that a fit parent knows best what's in a child's best interest. (Deb had located several witnesses who testified to her current fitness as a parent.) The court struck the conditions on custody -- but it didn't reach our argument that her requests for counsel should have been granted.

Three concurring judges would have reached the right to counsel issue and held that Deb had a right to court appointed counsel. On behalf of the three, Judge Dale Cathell wrote these words:

"We should all try to imagine," he wrote, " how it must feel to be utterly poor and to receive a summons from the hands of a sheriff informing us that we are required to appear in court because... some third party is attempting to terminate our parental rights ... and we don't have any money with which to hire a lawyer. The poor face fears without the security of money that many others have. And it can be terrifying to realize how helpless you are when others are attempting to take your children away from you."

I can't state my effort to enlist you in this cause more movingly.

• • •

At the end of the oral argument, a newspaper reporter asked Deb Frase if she had any comment. "No," I heard her say, "Mr. Sachs spoke for me today."

She didn't intend it as a compliment and I don't take it as such. It was simply a statement of fact.

But how very much it said. She finally had an advocate. She finally had a voice. And it had made a difference That's what the fight for "civil *Gideon*" is all about.

The public must learn about it...legislative bodies must fund it ...our profession -- which witnesses the crying need in courthouses every day -- in housing court, in family court, to name only two -- our profession must take the lead. And you who serve the public can be the strongest, the clearest, the purest voices of all.

And when this movement succeeds -- and succeed it will--we will finally -- belatedly -- have redeemed the promise --carved in Vermont marble on the Corinthian columns that are portals to our Supreme Court -- the promise of "Equal Justice Under Law." ML

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Practice Pointers and Policy Considerations for the Responsible Use of Eminent Domain Post-*Kelo*

By Andrew G. Bailey and Elva E. Tillman



Introduction

In urban and older suburban areas, there is a constant struggle to control physical deterioration and tax base decline. Eminent domain has assisted with the redevelopment of many communities. As lawyers who represent governmental entities and agencies, we appreciate the *responsible* use of eminent domain.

During the past decade, much of the publicity and discussion about "Eminent Domain," more commonly known as condemnation, has been stimulated by the Supreme Court decision in *Kelo v. City of New London, vs. City of New London,*125 S. Ct. 2655 (2005). Next year marks the 10th Anniversary of *Kelo.* On June 23, 2005, the Supreme Court handed down a 5-4 decision in favor of the City of New London, Connecticut. In summary, the case sustained a government taking of privately owned property for the purpose of economic development. Viewed as a "win" for government and absolute "horror" for property owners, *Kelo* has stimulated a range of legislation and case law nationwide.[1]

As lawyers who represent government agencies, we endeavor to strike a balance when taking private property by weighing the need to redevelop an area with considerations of individual property rights, and the use of constitutionally sanctioned procedures.

In this paper, we review a variety of legislative and judicial responses to the *Kelo* case. We begin our examination with a closer look at *Kelo* to provide perspective. After a review of *Kelo*, we provide a summary of responses from across the country; and focus on the Maryland reaction. As our experience is centered in Maryland, we offer several cases that reflect how Maryland's highest Court, the Court of Appeals, has responded to *Kelo.* The judicial responses afford us the opportunity to examine recent cases from other states as well as Maryland's Court of Appeals. We conclude by offering some advice to minimize the potential of what has been characterized as "abusive use of eminent domain."

An Overview of *Kelo*

In *Kelo*, the Supreme Court sustained the taking of private property for economic development purposes. In short, the facts of the case reveal that the City of New London, Connecticut approved a development plan. The plan called for the construction of a waterfront hotel, restaurants, retail stores, residence, and office space; also, portions of the development area were to be used for marinas and for support services. The City authorized acquisition of property, pursuant to the development plan, through negotiated sales and eminent domain. Most of the property was acquired through negotiated sales; but, nine owners (including Susette Kelo) refused to sell. After condemnation cases were filed, the court found that the development plan served a public purpose and therefore constituted a public use under the Takings Clause of the Fifth Amendment. The plan was not adopted to benefit a particular class of identifiable individuals. Although the owners' properties were not blighted, the City's determination that a program of economic rejuvenation for the overall area was entitled to deference. There was no basis for exempting economic development from the broad definition of "public purpose." The Court declined to require a reasonable certainty that the expected public benefits would accrue, nor was it proper to second-guess the city's determination of the boundary of the development area. The judgment of the Connecticut Supreme Court was affirmed.

Despotic Power

In many states, the legislature and the judiciary have viewed eminent domain as a repressive power. As early as 1795, the U. S. Supreme Court described the power of eminent domain as "the despotic power." The danger of such an extreme power led the framers of the United States and state constitutions to limit the power in two ways—government can only take property for "public use" and government has to pay "just compensation" for the property.[2] While those terms may seem clear, most of the case law relating to eminent domain or condemnation centers on issues of public use, just compensation and what process was used to effect the taking. Often times, the approach to these issues may have an impact on the "just compensation" that is paid to the property owner.

After *Kelo*, cases across the country reflect varied responses from appellate courts:

Board of County Commissioners of Muskogee County vs. Lowery (Oklahoma, 2006)

In this case, decided less than a year after *Kelo,* the County filed condemnation proceedings against the landowners to acquire temporary and permanent right-of way easements for the installation of three water pipelines. The land for two of the pipelines was being taken to serve a privately owned electric generation plant which was proposed for construction. The landowners sought declaratory and injunctive relief on the basis that the County's proposed taking was an unlawful taking of private property for private use, and serving a private purpose of a private company, in violation of both the Oklahoma and United States Constitutions. *Board of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006).

The Supreme Court of Oklahoma held that:

1. The takings were impermissible takings of landowners' private property to confer a private benefit on the private party, in violation of the state constitution; and,

As early as 1795, the U.S. Supreme Court described the power of eminent domain as "the despotic power." The danger of such an extreme power led the framers of the United States and state constitutions to limit the power in two ways—government can only take property for "public use" and government has to pay "just compensation" for the property.

2. Economic development alone was neither a public use nor public purpose to justify the exercise of eminent domain as a matter of Oklahoma constitutional law, nor did it satisfy the public purpose requirement of the eminent domain statute. *Board of County Comm'rs of Muskogee County, supra.*

City of Norwood v. Horney (Ohio, 2006)

Several months later, in Ohio, the City of Norwood filed an action against landowners to take their property and transfer it to a developer of an urban renewal plan for a deteriorating area. The lower court sustained the City's action and determined compensation for the property owners. The property owners appealed. *City of Norwood v. Horney,* 110 Ohio St.3d 353 (Ohio, 2006).

The Supreme Court of Ohio held, among other things, that:

1. The Ohio Courts should apply heightened scrutiny when reviewing statutes that regulate the use of eminent domain powers; and,
2. Economic or financial benefit *alone* is insufficient to satisfy the public use requirement of the takings clause in the Ohio State Constitution. *Norwood v. Horney, supra.*

City of Austin v. Whittington (Texas, 2012)

More recently, the City of Austin ("City") condemned property to build a parking garage for a convention center and a facility to chill water to cool nearby buildings. The Texas Court of Appeals specifically examined and defined the scope of judicial review of legislative takings. The Texas Constitution and the Local Government Code authorize takings by municipalities when the municipality determines the property is necessary for a public use and provides just compensation to the owner. TEX. CONST. ART. I, § 17; TEX. LOC. GOV'T CODE § 251.001(a). The Texas Court of Appeals has long held that a taking may be challenged on the basis of fraud, bad faith, or arbitrary and capricious determinations by the condemnor. In this case, the Court of Appeals confirmed that principle. At trial, the property owners alleged that the City's determination that the property was necessary for public use was fraudulent, in bad faith, and arbitrary and capricious. The jury agreed. The trial court entered judgment on the verdict (invalidating the taking), and the court of appeals

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Elva Tillman is a Principal Counsel in the Baltimore City Department of Law. She has had progressive experiences as an urban planner, university professor (administrator/applied researcher) and lawyer. Her education includes a Master's Degree in Urban/Regional Planning from Virginia Tech and a Doctorate of Law from the University of Maryland. She has been recognized for her pro bono work and participation in legal associations.

affirmed. The SupremeCourt of Texas concluded that the City's determinations were not fraudulent, in bad faith, or arbitrary and capricious, reversed the judgment of the Court of Appeals, and remanded the case for entry of judgment in accordance with its opinion. *City of Austin v. Whittington,* 384 S.W.3d 766 (Tex. 2012).

State ex rel. Jackson v. Dolan (Missouri, 2013)

Just last year, the Southeast Missouri Regional Port Authority ("Port Authority") sought to purchase a 30 acre parcel of land owned by a family Trust. After negotiations with the Trustees failed, the Port Authority filed a petition for condemnation in the circuit court of the County seeking condemnation of the parcel. The Trustees filed a motion to dismiss, arguing that the sole purpose for the taking was economic development, in violation of the Missouri Constitution. After an evidentiary hearing, the circuit court ordered condemnation of the property. The circuit court concluded that the taking did not violate the constitution because, in addition to promoting economic development, the taking would facilitate construction of a loop track and would improve river commerce. The trial court also concluded that the taking did not violate the constitution; and, because it served a public purpose, any aid provided to a private entity was incidental to such purpose.

The Supreme Court of Missouri held that:

1. The condemnation by the Port Authority satisfied the public use requirement; but,
2. The taking violated the statute prohibiting the Port Authority from acquiring private property through eminent domain for solely economic development purposes. *State ex rel. Jackson v. Dolan*, 398S.W.3d 472 (Mo. 2013).

Utah Department of Transportation v. Carlson (Utah, 2014)

The Utah Department of Transportation ("DOT") initiated an eminent domain suit against a property owner, seeking to condemn the entirety of the owner's 15-acre parcel, even though only 1.2 acres was necessary for a light-rail transportation project. The lower court entered summary judgment for DOT, and the owner appealed. *Utah Dep't of Transp. v. Carlson,* 2014 UT 24.

The Utah Supreme Court, held that:
1. DOT has the statutory authority to acquire, by eminent domain, property in excess of that needed for public improvement; and,
2. DOT's statutory authority to acquire by eminent domain land in excess of that needed for planned improvement was not limited to condemnation for specifically enumerated public uses identified in the eminent domain statute.

Nevertheless, the case was remanded for the District Court to consider the owner's claim that the statute authorizing condemnation of land in excess of that needed for public use violated the Takings Clauses of federal and state constitutions. *Utah Dep't of Transp. v. Carlson, Supra.*

The Maryland Response

In 1975, thirty years before *Kelo*, the Court of Appeals of Maryland upheld the constitutionality of economic development takings in Maryland. The Court of Appeals specifically held that condemning private property for the development of an industrial park meets the "public use" requirement. *Prince George's County vs. Collington Crossroads, Inc.*, 275 Md. 171 (1975). Maryland courts historically have interpreted "public use" broadly and have "almost always" deferred to the legislature's decision to use eminent domain. *Collington Crossroads, Inc., supra.*[3] *Collington Crossroads* can be summarized as a case that involved the filing of a petition to condemn land to develop an industrial development park in Prince Georges' County, Maryland ("County"). The trial court dismissed the petition and denied the county's motion to amend. The County appealed. The Court of Appeals reversed and remanded for further proceedings. Upon further appeal after remand, the Court of Appeals held that the County's condemnation of land at the intersection of two major highways, to create a type of industrial development which was desired but not present in the county, for the purpose of providing employment and general economic benefit to the county, was for a 'public use' rather than private use, within the meaning of the constitution. Further, the fact that the commercial property would be owned by private entities did not offend the constitution. *Collington Crossroads, Inc., supra.*

The Task Force on Business-Owner Compensation in Condemnation Proceedings

In 2004, Maryland's Governor appointed a Task Force to review business-owner compensation in condemnation proceedings. The group was composed of a wide variety of private, public and non-profit organization representatives, with experience in eminent domain. *Maryland Manual On-Line* describes the Task Force on Business-Owner Compensation in Condemnation Proceedings as being authorized in July 2004 (Chapter 446, Acts of 2004).[4]

Note that the Task Force was not formed to address *Kelo*, having been created in 2004, the year before *Kelo* was decided. Nevertheless, as its work progressed, it did consider the *Kelo case.* The group was established to study issues involved in compensating business owners in condemnation proceedings, including the concept of business goodwill, particularly small business goodwill, i.e., whether business goodwill can be compensated and how to calculate such compensation in condemnation proceedings. The Task Force studied the feasibility of requiring a displacing public agency to conduct a study of the condemnation impact on businesses in the area where condemnation proceedings take place.[5]

In addition, the Task Force looked at the appropriateness of establishing a fund to provide financial assistance to businesses impacted by a condemnation proceeding and the feasibility of shortening the condemnation process

for businesses. A preliminary report was submitted to the Governor and General Assembly on January 21, 2005 and a final report on December 21, 2005. Authorization of the Task Force expired December 31, 2005.[6]

Legislative Failure and Success

Within four months after the *Kelo* decision, four states enacted eminent domain legislation. One passed a constitutional amendment. In 2006, the year after the *Kelo* decision, 21 states passed reforms to limit *Kelo.* Most used statutory provisions; but, some undertook constitutional amendments.[7] From 2005 to 2006, reforms fell into the following seven broad categories:

1. Prohibiting eminent domain for economic development, including for generation of increased tax revenues or for transferring property to another private party;
2. Limiting eminent domain to a "stated public purpose";
3. Restraining eminent domain to blighted properties or to where an area as a whole is considered blighted;
4. Imposing a moratorium on eminent domain economic development for a stated period, while legislative task forces evaluated the issue;
5. Increasing the compensation amount for condemned property where it is a person's principal residence;
6. Imposing greater procedural requirements on eminent domain use, e.g., greater public notice, more public hearings, good-faith negotiations and elected governing body approval; and,
7. Redefining "public use" as possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.[8]

In Maryland, after the *Kelo* decision, in an atmosphere of election year responsiveness and earnest Task Force efforts, more than 40 pieces of legislation were introduced in the General Assembly. Bills included efforts to provide business owners with compensation for the loss of goodwill if the business could not be relocated, as well as the loss of income during the period the business was interrupted. The primary bills, Senate Bill 3 and House Bill 1137, were introduced during the 2006 legislative session. The legislation essentially woul have required a specified government unit to make findings in writing before condemning and transferring private property to a private party for economic development purposes; established a standard for judicial review of government units' findings; provided that damages awarded for the taking of property used for a business or farm operation may include specified damages for the loss of "goodwill" under specified circumstance; etc. The bills were opposed by local government organizations--a strong opposition coalition had developed--and no such legislation passed that year.[9]

In 2007, paired down versions of the legislation made a re-appearance with a broader base of support. There seemed to be an agreement that "something" needed to be done to make property owners under condemnation "whole" and send a message that government should use eminent domain in a "responsible" manner.[10] The General Assembly session concluded with property owners under eminent domain reaping more compensation. The legislation passed allowing a higher compensation package for property owners, including relocation expenses. For instance, the legislation raised a $10,000.00 cap to $60,000.00 on costs to re-establish a farm, small business or nonprofit group. The legislation also requires Maryland state and local governments to initiate eminent domain proceedings within a four year period of obtaining authorization.[11]

Maryland Condemnation Case Law

While the Maryland Court of Appeals will sanction the use of eminent domain, there are constitutional standards that must be observed, and the Court will not tolerate the trampling of individual rights. Eminent domain in Maryland is not unfettered. The following four cases in Baltimore City provide a window into the Court's recent rulings.

Mayor and City Council of Baltimore City v. George Valsamaki (2007)

In February 2007, the Maryland Court of Appeals handed down an opinion which fundamentally changed the way in which the City of Baltimore had handled economic development projects through the use of "quick take condemnation." *Mayor and City Council of Baltimore City v. George Valsamaki,* 397 Md. 222 (2007). Quick-take condemnation is the method through which the condemning authority takes possession of the property prior to trial, upon payment into court of its estimate of the value of the property taken; the valuation of the property is determined at a subsequent time. In *Valsamaki,* a bar owner challenged the City's use of quick take condemnation pursuant to the Charles North urban renewal plan. This was the first time that the Court of Appeals had reviewed this expedited form of condemnation. Sustaining the ruling of the Circuit Court for Baltimore City, the Court wrote that the City has the burden to prove immediate necessity in order to proceed with a quick take condemnation. The Court further indicated that in carrying the burden, the City must show that the necessity is for a public use or purpose. In *Valsamaki,* the City had merely provided an affidavit indicating that it was taking the property for business development. The record revealed that the City did not have a specific plan. The Court also cautioned the City that it should adhere to the due process requirements that are set out under Maryland Real Property Article 12, for condemnation. *Valsamaki, supra.*

Sapero vs. Mayor and City Council of Baltimore City (2007)

The owner of the vacant former Chesapeake Restaurant and several adjacent properties challenged Baltimore City's taking of his properties for redevelopment of the Charles North urban renewal area. The evidence in this case was similar to that in *Valsamaki,* supra. The City provided an affidavit stating the purpose of the taking as "business development." The record

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Video Gaming: From Taverns to... Cafes?

By David Wesner, Corporation Counsel, Danville, Illinois

For many years now the State of Illinois has discussed the expansion of gambling, focusing on increasing the reach of casinos. While not seeming to actually move off the mark, the State did in fact take a step in that direction when it legalized video gaming (a recognition of Illinois' desperate need of revenue).

As may be similar with other states that have legalized gambling, the State put in many restrictions and regulations governing every aspect of the video gaming process. The regulations also limited the locations at which the machines could be located. Only the following sites are permitted to have video gaming machines: truck stops (as defined in the statute); veterans' organization establishments; fraternal organization establishments; and what is termed a "licensed establishment". These types of establishments are required to have a liquor license that authorizes consumption on-premises. A further restriction under the statute is that any establishment authorized to provide video gaming may only have five such machines within their premises—a parameter likely added in response to the casino lobby which would have argued that without some limitation their business would be negatively impacted. The statute was also designed to provide that gambling would be authorized in all municipalities, unless the municipality passed a referendum prohibiting video gaming.

Subsequent to the State's legalizing video gaming, my Mayor and City Council began discussions on whether they would seek a referendum prohibiting video gaming and, if not, whether to impose additional licensing and regulations on the companies and establishments who would be involved in video gaming in our community. The City Council was not opposed to video gaming. It recognized that some establishments were already using video machines for gaming, in order to keep their doors open. So Council members discussed the need to change certain ordinances to be consistent with the State statute – and considered whether to impose additional licensing and regulations. While the Council understood a need to impose some further licensing and regulation, it they wanted the additions to be minimal since the State statute already provided extensive licensing and regulation. When it was all said and done, the City Council adopted an ordinance that provides licensing of each machine (similar to our ordinance on amusement devices) and the establishment where the machines would be located.

Many establishments in town have gone through the process of getting the appropriate licensing to permit video gaming in their businesses. What we have seen is that some locations generate significant revenue while other establishments only generate minimal proceeds. As such, we have not seen a large proliferation of video gaming in town.

However, we recently had a discussion at a City Council committee meeting about a potential next level in video gaming that could have some negative consequences. Our Mayor has been approached by some companies about establishing what they call video gaming cafes. These companies understand the state and local licensing requirements which are necessary to allow video gaming in a location, specifically the type of liquor license necessary. These companies are asking if a certain type of liquor license could be created to meet the standard set by the State but would not necessarily be a full-blown liquor license such as a tavern needs to serve its customers. They are looking to have minimal offerings and perhaps even provide free drinks to patrons; the idea being that they would have five machines in a small establishment with only minimal alcohol, to allow low overhead and make substantial profit from gaming. And, although the State declined to expand casinos, these companies are also suggesting they would subdivide retail storefronts to have a couple of entrances and run several of these "video gaming cafes" side-by-side.

This concept begs many questions and poses concerns for businesses that already offer video gaming machines. The State statute defines a licensed establishment as "any licensed retail establishment." If a video gaming café does not sell any product or item, is it considered a "retail" establishment? The other aspect of licensing and regulation is the view that the majority of a business would be the sale of those items falling within the category of the license. The concept of a video gaming café would be that the nature of the business is gambling only and the business would not be expecting or concerned with the sale of any tangible goods such as the liquor associated with the required liquor license. The bigger problem would be the impact on local business if video gaming cafes could be established. We believe we would see a proliferation of store fronts and subdivision of buildings to try and fit as many cafes in as possible because of a belief in the pots of gold

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Canada's Anti-Spam Legislation: Municipal Government Implications

By Monica Ciriello

"Canadians should not receive emails that they do not want or did not ask to receive."
-Industry Minister James Moore

On July 1, 2014 Canada's Anti-Spam Legislation (CASL) came into effect. This means that consumers will now have control over who can send them a commercial electronic message or business email. The Canadian Radio-television and Telecommunications Commission (CRTC) will enforce CASL and prohibit individuals and companies (including municipalities), from sending commercial electronic messages (CEMs) without implied or express consent, unless an exemption applies. The CRTC has indicated the following,

> "CASL does not apply to the activities of the federal, provincial and territorial governments. CASL does apply, however, to crown corporations, including municipal governments, when the corporation is acting in the course of any commercial activity."

Furthermore, even though consumers may have consented to receiving these messages, individuals and companies will still have to identify themselves in all their emails and provide a way for the customer to unsubscribe from receiving further messages.

It is clear that the provincial and federal governments are exempt from CASL, but the CASL implications on a municipality remain questionable (aside from the debate that a municipal government is not a crown corporation). A municipal government may be subject to CASL depending on their course of action, and whether or not it is a commercial activity. A "commercial activity" means any activity that is of a commercial character, whether or not such activity is conducted with the expectation of profit. This demonstrates that CASL regulates the type of activity and not the entity conducting the activity. As a precaution, municipal governments should review the content that is being sent out, and should not assume all electronic messages fall outside of CASL.

Penalties for violating CASL can be as high as $1 million for individuals and $10 million for businesses, although there are no automatic penalties for violation. The CRTC judges each case individually based on a series of factors, including the nature of the violation, any previous history with CASL, whether the business or individual benefited financially from the violation and the business's or individual's ability to pay a penalty. Additionally, beginning July 1, 2017, individuals and companies who feel they have been affected by a breach of CASL can bring an action in court, and may be able to recover actual and statutory damages.

Municipalities Anti-Wind By-Laws

East Durham Wind Inc. v. The Municipality of West Grey, 2014 ONSC 4669.
East Durham Wind Inc. holds a provincial Renewable Energy Approval (REA), under the *Green Energy Act*, to build a 14-turbine wind farm in the Municipality of West Grey. West Grey adopted two municipal by-laws that required wind projects to obtain permits, and subsequently refused to provide East Durham those permits. East Durham successfully applied for judicial review of the two by-laws.

The issue surrounded "entrance permits" to connect access roads on private lands, and "oversize/overweight haulage permits" to allow for the conveyance of large and heavy project material along public highways. West Grey declared in a council resolution that the municipality "is not a willing host for any further industrial wind turbines" and ultimately denied the permits to East Durham.

The case raised the question of "when and how a municipal by-law or policy may frustrate the purpose of a provincial legislative instrument." The Ontario Superior Court of Justice found that the two municipal by-laws in question frustrated the purpose of the *Green Energy Act*, which is to streamline the process for developing green energy in Ontario. Prior to the *Green Energy Act*, an energy provider had to apply to various agencies and levels of government.

HELD:
The Ontario Superior Court of Justice held that section 14 of the *Municipal Act* lays out the test for conflict between a municipal by-law and provincial legislation; a by-law is without effect to the extent of any conflict with an instrument of a legislative nature, including an order, license or approval, made or issued under a provincial or federal law. This section indicates that there is a conflict where a by-law frustrates the purpose of that act, regulation, or instrument. The court indicated that, "where a municipal government is opposed to wind energy projects generally, the potential for conflict is obvious" but ultimately held that both by-laws were inoperative to the extent that they frustrate the purpose of East Durham Wind's REA, which is to authorize the building of the project in furtherance of the province's goal of increasing renewable energy generation. The court did not note that this holding did not affect the parties' abilities to engage in good faith negotiations around reasonable conditions, including sufficient financial security.

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Monica J. Ciriello is articling with the City of Windsor, Ontario legal division. She received her law degree from the University of Detroit.



Mom and Apple Pie: The EEOC and the High Court Take on Pregnancy Discrimination

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

On July 1, 2014, the Supreme Court granted certiorari in *Young v. Untied Parcel Services, Inc.*, a case involving the Pregnancy Discrimination Act (PDA), which is on appeal from the Fourth Circuit.[1] Shortly thereafter, instead of waiting for the outcome of *Young,* the Equal Employment Opportunity Commission (EEOC) issued its first enforcement guidance on the PDA (the "Guidance") in over thirty years.[2] The Guidance is not without controversy as it directly contradicts the Fourth Circuit's ruling and the Supreme Court's decision in *Young* may end up mooting at least part of it. Nonetheless, the Guidance provides the EEOC's position on the PDA and at least for the time-being, that position will be enforced at the EEOC and it provides persuasive authority for pregnancy discrimination claims brought in court.

EEOC Issues Guidance Two Weeks After Supreme Court Grants Certiorari in Young

On July 14, 2014, the EEOC issued the Guidance which sets forth the EEOC's position on the PDA as well as the Americans with Disabilities Act (ADA) as it relates to pregnant workers.[3] Among other issues, the Guidance addresses and discusses the following:

- The fact that the PDA covers not only discrimination based on a current pregnancy, but also discrimination based on past pregnancy, pregnancy-related medical conditions, and a woman's potential to become pregnant;
- The PDA and ADA and the circumstances under which employers may have to provide light duty for pregnant workers who are similar in their ability or inability to perform the essential functions of the job as non-pregnant workers;
- The Family Medical Leave Act, and issues related to leave for pregnancy and for medical conditions related to pregnancy;
- Stereotyping and the PDA's prohibition against requiring pregnant workers who are able to do their jobs to take leave;
- When employers may have to provide reasonable accommodations for workers with pregnancy-related impairments under the ADA and the types of accommodations that may be necessary; and
- Best practices for employers to avoid unlawfully discriminating against pregnant workers, including sections on: hiring, promotion, leave and fringe benefits, terms and conditions of employment, and reasonable accommodations.[4]

The Fourth Circuit Holds that PDA Was Not Violated by Employer's Failure to Provide Light Duty to Pregnant Worker

Young involves the interplay of a number of United Parcel Service (UPS) policies that implicate both the PDA and the ADA.[5] The job description in *Young* required employees to be able to lift packages weighing up to 70 lbs.[6] However, the Collective Bargaining Agreement (CBA) to which UPS is a party provides that employees who suffer on the job injuries are to be afforded temporary light duty assignments, which do not include the lifting requirement.[7] A pregnant employee at UPS is not afforded these same light duty assignments, but may continue to work so long as she can perform the essential functions of the job (including the lifting requirement).[8]

In this case, the employee informed her boss that she was pregnant and she provided a doctor's note indicating that she should not lift more than 20 lbs.[9] As a result of the restriction, UPS determined that she was unable to perform the essential functions of her job and would not allow her to return to work until the restriction was lifted.[10] In accordance with its policies, UPS did not offer her light duty.[11]

Young brought suit under the ADA and PDA. The district court granted summary judgment in favor of UPS on both claims.[12] On appeal to the Fourth Circuit, the employee claimed that UPS impermissibly regarded her as disabled under the ADA and that UPS discriminated against her on the basis of her pregnancy in violation of the PDA by failing to offer her light duty work when UPS offers that work to other employees.[13] She claimed that the failure to offer her light duty violated the PDA's "command to treat pregnant employees the same 'as other persons not so affected but similar in their ability or inability to work.'"[14]

The Fourth Circuit concluded that the light duty accommodation for pregnant

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Daniel P. Curtin Young Public Lawyer Award winner Ariel Levinson-Waldman with Sheryl King Benford.



James H. Epps III Longevity of Service Award winner Daniel Matson with member Peter Letzmann.



Chuck Thompson, Sheryl King Benford and Outstanding Associate Award winner Tip Torres.



Charles S. Rhyne Lifetime Achievement in Municipal Law Award winner Marc Hansen and family.



G. Foster Mills accepts the president's gavel from Sheryl King Benford.



New IMLA Fellows Kinley Hegglund, Cecilia Abbott and Monica Anne Buck.



Joseph I. Mulligan, Jr. Distinguished Public Service Lawyer Award winner Gwen Trombley with George Nilson.



Joseph I. Mulligan, Jr. Distinguished Public Service Lawyer Award winner Brad Cunningham with Sheryl King Benford.



During our 2014 Annual Conference in Baltimore, IMLA acknowledged these members for their exceptional contributions to municipal law. We congratulate each of them!

CHARLES S. RHYNE LIFETIME ACHIEVEMENT IN MUNICIPAL LAW AWARD

Marc P. Hansen, County Attorney, Montgomery County, Maryland

JAMES H. EPPS III AWARD FOR LONGEVITY OF SERVICE TO A COMMUNITY

Barry A. Lindahl, City Attorney, Dubuque, Iowa
Daniel C. Matson, City Attorney, DeWitt, Michigan
Donna J. Mouzayak, First Deputy City Solicitor, Philadelphia, Pennsylvania
Grant F. Langley, City Attorney, Milwaukee, Wisconsin
Howard Paperner, City Attorney, Winchester and Maryland Heights, Missouri

DANIEL P. CURTIN YOUNG PUBLIC LAWYER AWARD

Ariel Levinson-Waldman, Senior Counsel to the Attorney General for the District of Columbia

JOSEPH I. MULLIGAN, JR. DISTINGUISHED PUBLIC SERVICE LAWYER AWARD

Gwen Tromley, Chief Solicitor, Baltimore, Maryland
Sam Edwards, Chief Counsel, Greater Nashville Regional Council
Bradford T. Cunningham, Municipal Attorney, Lexington, South Carolina
Edward J. Sullivan, Partner, Garvey Shubert Barer, Portland, Oregon

WILLIAM I. THORNTON, JR. IMLA FACULTY AWARD

Hillary B. Ruley, Chief Solicitor, Baltimore City Department of Law

OUTSTANDING STATE LEAGUE COUNSEL AWARD

Randall D. Van Vleck, General Counsel, New Mexico Municipal League

BRUCE A. NOBEL AWARD FOR CANADIAN MUNICIPAL LAWYER OF THE YEAR

David Neil Robertson, Q.C., Partner, Robb & Dowling, Regina, Saskatchewan

IMLA PRESIDENT'S AWARD FOR OUTSTANDING STATE CHAIR

Lisa M. Robertson, Assistant City Attorney, St. Joseph, Missouri

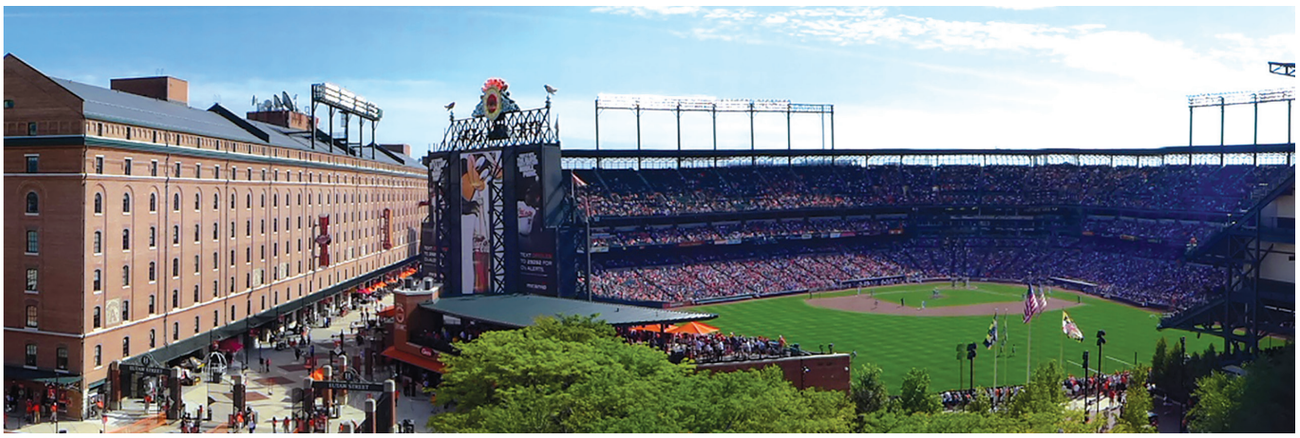
IMLA PRESIDENT'S AWARD FOR OUTSTANDING ASSOCIATE

Steven A. "Tip" Torres, Partner, Pannone Lopes Devereaux & West LLC, Providence, Rhode Island

2014 IMLA FELLOWS

We also welcomed these new inductees as 2014 IMLA Fellows. Congratulations!

Monica Anne Buck, Assistant City Attorney, Bellevue, Washington
Cecilia Abbott, Senior Managing Attorney, Kansas City, Missouri
R. Kinley Hegglund, Jr., Senior Assistant City Attorney, Wichita Falls, Kansas



The Conference Hilton provided exceptional views into Camden Yards (courtesy Kelly Addy).



One of many tall ships (Courtesy Jim Lampke).



Spectacular fireworks as seen from our host law firm, Tydings & Rosenberg (Courtesy Dan Crean).



The ever-popular IMLA Conference softball outing, circa September 2014 (Courtesy Jim Lampke).



The Muddy Magnolias launching a musical career? (Courtesy Dan Crean).



Don't Send Guido

By Kelly Addy, Civil Deputy City Attorney, Billings, Montana

The problem solving continues apace at the IMLA listserv sites. A city attorney in Florida helps find a way to make things better in Kansas. Somebody from Wyoming knows who to call to get a sewer trunk line in Montana flushed out.

We have ways of drawing the spotlight to any problem in any corner of the country. This has been our version of Open Source problem-solving since before the term 'open source' became popular.

We are way ahead of the technology wonks who are inventing the words we use to describe it. How could things possibly be any better?

Wait a minute. We have over 700 municipal law practitioners subscribed to the list. I suppose I see 100 different names on the emails we trade every day.

Who are the other 600 watchers on the list? Who else is listening to every word that is said?

There are some entrance requirements that have to be met before anyone can sign up and share from their corner of the greatest nation in the history of the world. Every attorney on the list has to certify that a substantial part of their practice is devoted to representing local governments.

If you are a full-time city attorney, that is more than enough. But if you are in private practice and you represent cities as outside counsel, you have to solemnly swear to the gatekeepers at MuniCode that representing local governments is a substantial portion of your practice.

This self-screening process gets vetted when each new list member is introduced to everyone on the list. Their name, firm, address and municipal clientele are described in a paragraph or so.

They are routinely welcomed by many, but their name is also up there for all to see, to give everyone notice who else is listening on the Internet's version of a party line we call the IMLA listserv.

This double screening is especially important when communicating via email, where all of the meet-and-greet sessions are virtual. It is likely that we have never met the person before and we do not see them, but we will be discussing business with them on a continuous basis from this day forward, for better or for worse.

But our business is our client's business, and we have a duty to maintain the confidentiality of the matters entrusted to us to the best of our ability. So how do we ask our questions on the listserv and protect our clients' confidential information at the same time?

ABA Model Rule 1.6 provides that 'A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation...'

So as you pose your listserv question, before hitting the Send button, ask yourself if you have shared any information about your client or the legal matter your client has entrusted to you that is confidential.

This is email, and the Pause Before Sending rule is always hard to remember, which makes it that much more important to Pause Before Sending, particularly when asking for collaboration from your fellow municipal lawyers.

There is an informality and intimacy to email. It's like chatting with a friend. The physical accoutrements of privacy are all present. You are in your office, the door is closed and no one is listening.

Since Watergate, the presumption of privacy, particularly concerning matters before public agencies from the White House to City Hall has been questioned routinely and vigorously.

On the one hand, that means that our municipal clients have less confidential information to protect. But on the other hand, it means that what confidentiality our public clients have is far more precious to them.

It would be easy, but perilous, to overlook the privacy rights of third parties implicated in the matters we may be discussing. While our municipalities have no right to privacy, public employees have not waived their personal privacy rights by accepting public employment, and third parties who have asked for our help or reported matters of public concern do not automatically waive their right to privacy when place their call for assistance.

Asking your client for consent to query the listserv can resolve many of these issues in advance, but it should not be the end of the inquiry.

Asking another listserv member, perhaps the general counsel for your state municipal league association, to post the question with generalized facts can also eliminate issues before they become issues.

The bottom line is to be aware of the hazards here and to plan in advance to avoid any inadvertent disclosures because waiver as to one part of your case may be deemed a general waiver for purposes of your case.

The listserv is such a good tool, but it is a double edged sword we unsheathe as we protect and defend the citizens and officials who ask us for our help because we are so astute and informed and because we know how to do things right.

May we never give them occasion to reconsider the high opinion they have of their chosen counsel. ML



ORDINANCES

Burning Down the House: Destruction or Repair Who Makes the Call?

by Erich R. Eiselt, Assistant General Counsel and Editor

It is axiomatic that no American can be deprived of life, liberty or property without due process of law. A Michigan condemnation ordinance which tests the scope of that due process was recently considered for *certiorari.*

In January 2009, Leon and Marilyn Bonner were notified by James Rowell, the building and code enforcement officer for Brighton, Michigan, that three structures owned by them on the City's East North Street were "unsafe" in violation of the Brighton Code of Ordinances (BCO) and constituted public nuisances under Michigan common law. The two homes and barn had been unoccupied and generally unmaintained for more than 30 years, leading to a finding of numerous defects by the City, including "collapsing porch structure and foundations for same; collapsing porch roof structure; damaged or missing shingles; rotted roof sheathing; lacking platform at front door; rotted and damaged wood siding; damaged/collapsing rear porch roof structure; damaged or missing stairs, handrails, guardrails at rear porch; damaged/missing footings for rear porch; rotted rafters; fascia and exterior trim; damaged and/or lacking foundations; and damaged chimney."

Based on these flaws, the building official determined that it was "unreasonable" to repair the structures under the standard set forth in a Brighton ordinance, BCO § 18-59, which provides as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, **such repairs shall be presumed unreasonable** and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair. (emphasis added).

The "unreasonable-to-repair" presumption can be overcome by property owners who present a viable repair plan including evidence from experts that repair costs will not exceed 100 percent of the property's value, or other evidence that the structure possesses some sort of artistic, cultural, historical or familial attribute—but the Bonners apparently could not evince such superlatives for their decrepit buildings.

The Brighton ordinance also provides for certain extenuating circumstances beyond the control of the property owner, but these too did not mitigate the Bonners' decades of inaction:

> This section is not meant to apply to those situations where a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood or other Act of God. If a structure has become unsafe because of an event beyond the control of the owner, the owner shall be given by the city manager, or his designee, reasonable time within which to make repairs and the structure shall not be ordered demolished without option on the part of the owner to repair.

Based on its determination that repairs would cost more than 100 percent of the cash value of the Bonners' structures, the City ordered them to demolish the residences and barn without allowing the Bonners any option to rehabilitate the properties.

The Bonners appealed the City's demolition order before the City Council, but were unsuccessful. They then commenced an independent action in Livingston Circuit Court, launching a facial challenge to BCO § 18-59. The Circuit Court and subsequently the Court of Appeals each agreed with the Bonners that the ordinance's "unreasonable to repair" tautology was a facial violation of substantive due process. The lower courts held that requiring an owner to demonstrate that the cost of repair is less than true cash value violates substantive due process. Those judges found that the nuisance posed by the Bonners' dangerous structures could be eliminated by repairs as well as by demolition. As the Court of Appeals reasoned, a property owner might well want to repair a dwelling for sentimental, historic or family reasons and might be willing to spend more than the structure's cash value on the City's tax rolls.

Brighton appealed to the Michigan Supreme Court. In a unanimous decision, the court's seven members reversed, concluding that the Court of Appeals erred when it failed to analyze separately the Bonners' substantive and procedural due process claims. As the Michigan Supreme Court elucidated, they are distinct: the *substantive* element of due process protects against the arbitrary exercise of governmental power, whereas the *procedural* component ensures that constitutionally-adequate processes are followed to protect life, liberty, and property interests.

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IMLA's 2014 Salary Survey is Underway We Want Your Input!

Once again we are producing one of IMLA's most useful and most popular offerings—the Annual IMLA Salary Survey for Local Government Attorneys. The Survey covers IMLA member offices of all sizes across the nation and is invaluable as a benchmarking tool.

The online link to Survey is now active and ready to receive your data, at this link: http://urls.ht/3As which you can copy and paste into your browser. You can also email salarysurvey@imla.org to receive the link or access it from our website (www.imla.org). As always, the Survey will reflect only aggregated data and individual responses will be kept strictly confidential.

Every jurisdiction that completes the Survey will receive the Survey results absolutely FREE. Survey results will also be available for purchase by jurisdictions that do not participate in the Survey (with discounted IMLA member pricing).

Additionally, we will be ***randomly selecting ONE participant from the list of completed responses to receive a complimentary registration* to our upcoming Annual Conference in Las Vegas, October 4 – 7, 2015.*** The winner will be announced after the close of the Survey and will be notified using the contact e-mail provided in the Survey response. And, if that's not enough, we are also selecting FIVE jurisdictions/persons from the list of completed responses to receive complimentary registration to a 2015 IMLA Teleconference or Webinar.

The Survey becomes exponentially more informative -- and more valuable -- as participation increases. So help yourself and help IMLA by participating.

(We ask that you select ONE person in your office to complete the Survey, so that we do not receive multiple responses from a single locality).

We anticipate that the survey will take no more than 20 minutes to complete. Please submit all Survey responses no later than November 15, 2014.

Again, to start the Survey, please copy this link into your browser: http://urls.ht/3At.

or e-mail salarysurvey@imla.org to receive the link to start the Survey.

IMLA sincerely thanks you for participating in the 2014 Salary Survey!

***Includes one complimentary registration to the IMLA Annual Conference. Does not include coverage for travel, hotel and other expenses.**

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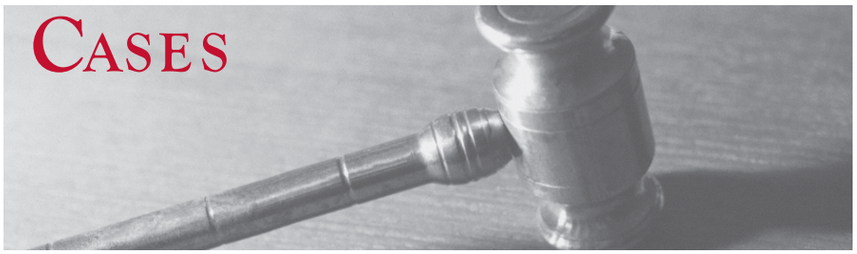

By IMLA Editorial Staff

Elections: Injunction Against Wisconsin Voter ID Law is Stayed

Against a spirited dissent, and in a result paralleling similar decisions around the country, the Eighth Circuit has upheld a late-breaking challenge to Wisconsin's voter ID law, staying a lower court injunction and allowing the ID requirement to apply to the November 2014 elections—including votes via absentee ballot.

In April 2014 a federal District Court enjoined the implementation of Wisconsin's voter ID law, which requires a photo ID for voting, including via absentee ballot. The State asked the Seventh Circuit to stay the federal injunction so the ID law could be implemented in the fall 2014 election. A Seventh Circuit panel granted the stay. Plaintiffs moved for reconsideration.

HELD: The panel granted the reconsideration and upheld its stay. Subsequently, a request for rehearing en banc was denied by a divided court.

DISCUSSION: In a *per curiam* decision the Seventh Circuit panel affirmed the stay. Based on the Supreme Court's upholding a similar Indiana voter ID law in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the panel determined Wisconsin was likely to succeed. It further noted that there is an important public interest in implementing laws enacted through the democratic process until a final determination is made, and pointed out that the voter ID law was democratically-enacted by the Wisconsin legislature.

Plaintiffs argued that the court was imposing a "radical, last-minute change" on the State, and that the State would be unable to absorb the consequences of the change in the 53 days before the November election. The Seventh Circuit disagreed, pointing out that election officials themselves that asked for the stay, that the State had implemented the law three years prior and used it in a primary before it was enjoined by the District Court, and that the court did not "impose" anything on the State, but simply stated in its order that the "State of Wisconsin may, if it wishes (and if it is appropriate under rules of state law), enforce the photo ID requirement in this November's elections." As a result, if seven weeks was too short a time, the court said, the State could simply choose not to implement the law.

Finally, the court rejected the plaintiff's argument that "equitable considerations" counseled in favor of leaving the injunction in place given that many voters, in September 2014, lacked the ID necessary to vote in November 2014. The court noted the District Court had not made a determination as to the ultimate number of voters that had tried but had been unable to obtain the necessary ID to vote. It also noted that Wisconsin had passed legislation making birth certificates—key documentation for obtaining a photo ID—free to indigent applicants. While around 9% (slightly under 300,000 voters) of the State's roughly 3 million voting population lacked the ID, the Seventh Circuit stated that such a statistic "appears to reflect how many persons have not taken the necessary time [to get the ID], rather than a number of persons who have been disfranchised."

DISSENT: Chief Judge Wood and Circuit Judges Posner, Rovner, Williams, and Hamilton would have voted to hear the matter en banc. The judges noted that the stay invalidates all absentee ballots that have already been mailed in and any mailed in between its publication and the election because those voters did not present the necessary ID. They further argued the stay injured 10% of the State's registered voters who lack the ID needed to vote. Put in context, in 2010 the Wisconsin governor's race was decided by 124,638 votes, while the senate race was decided by 105,041 votes. The fact that more than 90% of Wisconsin's registered voters already had voter IDs was unavailing:

> the right to vote is not the province of just the majority. It is not just held by those who have cars and so already have driver's licenses and by those who travel and so already have passports. The right to vote is also held, and held equally, by all citizens of voting age. It simply cannot be the answer to say that 90% of registered voters can still vote. To say that is to accept the disenfranchisement of 10% of a state's registered voters; for the State to take this position is shocking." Moreover, the dissenters highlighted that it is impossible for those registered voters to obtain the necessary documents to vote because to do so would require the State to issue 6,000 licenses a day in the 26 business days between the date of the decision and Election Day; most DMV's in Wisconsin are only open two days a week.

It was also noteworthy to the dissenters that continuing the injunction would not irreparably harm Wisconsin. In hundreds of elections across the State without voter IDs, Wisconsin had failed to provide one instance of voter impersonation at polls. Thus, waiting until the 2016 election cycle to implement whatever law is ultimately deemed valid in the courts would not harm the state or its voters.

***Ruthelle Frank v. Scott Walker*, Nos. 14-2058, 2059 (7th Cir. Sept. 30, 2014).**

Speech: Ordinance Barring Verbal Narrowly Tailored

The Seventh Circuit has upheld a Springfield, Illinois panhandling ordinance that prohibits verbal requests for immediate contributions of money but

allows requests via a sign or for contributions in the future, relying in part on Justice Kennedy's language in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) that upholds solicitation ordinances designed to limit only "aggressive" or "threatening" panhandling.

Springfield, Illinois' panhandling ordinance (§131.06 of the Municipal Code) prohibits panhandling in its "downtown historic district"—less than 2% of the City's area but containing its principal shopping, entertainment, and governmental areas, including the Statehouse and many state-government buildings. The ordinance defines panhandling as an oral request for an immediate donation of money. The law does not prohibit asking for money to be sent later or the use of signs to request money. The Springfield scheme thus appears to view signs or requests for deferred donations as less imposing than oral requests for an immediate handout, which some persons (especially at night or when no one else is nearby) might find threatening. Don Norton and others were cited under this ordinance. The group filed suit, alleging the law violated the First Amendment and seeking a preliminary injunction. The District Court denied the plaintiffs' motion, holding the ordinance, on its face, is content-neutral.

HELD: The majority affirmed that the ordinance is content-neutral and a lawful time, place, and manner restriction.

DISCUSSION: Plaintiffs argued that the ordinance was not content-neutral because it distinguished between verbal requests for money now (which was prohibited) and requests by sign or for money later (which were allowed). In essence, the plaintiffs' position was that the very efforts Springfield had made to limit the scope of the ordinance—prohibiting only potentially threatening solicitations for money—caused the law to be unconstitutional.

The Seventh Circuit noted a split among other appeals courts on the question of whether rules similar to Springfield's are content-based. Three circuits have answered "yes" and held them invalid. *ACLU v. Las Vegas*, 466 F.3d 784 (9th Cir. 2006); *Clatterbuck v. Charlottesville*, 708 F.3d 549 (4th Cir. 2013); and *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013). But two circuits have concluded that anti-panhandling laws are content-neutral and valid. *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 954–55 (D.C.Cir. 1995); and the recently-decided *Thayer v. Worcester*, 755 F.3d 60 (1st Cir. 2014) (Souter, J.).

The Circuit Court looked past the appellate-level split to find guidance in Supreme Court precedent. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), holds that a state fair may prohibit panhandling and other fundraising by anyone walking its grounds, limiting solicitation to rented booths. *United States v. Kokinda*, 497 U.S. 720 (1990), holds that the Postal Service may forbid all fundraising on a sidewalk leading to a post office. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), holds that an airport authority may prohibit all solicitation and receipt of funds within the terminal.

Plaintiffs maintained that these decisions were irrelevant, because each rested in part on a conclusion that the venue was not a traditional public forum. But the Seventh Circuit found them, particularly *Lee*, to be dispositive. In *Lee*, Justice Kennedy concluded that an airport should be treated the same as a city street and that restricting panhandling is permissible in both settings. As the Seventh Circuit explained:

> What made the regulation permissible, [Kennedy] concluded, was that it had been narrowly tailored so that it dealt only with potentially threatening (or advantage-taking) confrontations. He explained (505 U.S. at 707, citation omitted): "we have held that to be narrowly tailored a regulation need not be the least restrictive or least intrusive means of achieving an end. The regulation must be reasonable, and must not burden substantially more speech than necessary. Under this standard the solicitation ban survives with ease, because it prohibits only solicitation of money for immediate receipt."

In other words, what saved the regulation in Justice Kennedy's eyes was exactly what condemned it in plaintiffs' eyes: the limit to solicitation for immediate receipt, which Justice Kennedy saw as "the soul of reasonableness."

Moreover for the majority, the government's regular practice of distinguishing speech by subject matter is of no special concern. Citing *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), it noted there have ever been issues with making a course of conduct illegal because it was initiated or carried out by language – for example, it is perfectly legal to limit information exchange under the SEC rules, and the exchange of price and product information between competitors, and to prohibit employers from threatening retaliation against employees. For the majority, this meant that "content-based" regulations, and the limits on them, were a unique subset of speech laws in general broken into two categories – restricting speech based on the ideas it conveys and because the government disapproves of the message it conveys. The Springfield anti-panhandling ordinance did not violate either prohibited category.

The fact that there has been much disagreement about how to distinguish between content-based and content-neutral regulations, and a circuit split on this, indicated to the majority it was "difficult to be confident about how the line . . . is drawn." But in evaluating the regulation for time, place, and manner restrictions the ordinance was deemed within Springfield's power.

DISSENT: Judge Manion dissented, arguing the ordinance was content-based. As for the three Supreme Court cases the majority evaluated, the dissent pointed out the regulations in those cases banned all forms of solicitations.

The dissent disagreed that *Thayer*, the recent First Circuit opinion upholding Worcester's anti-panhandling law, conflicted with the three circuits that deemed the ordinances content-based.

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appellate courts had had the opportunity to determine the law's constitutionality? If the mayor, and I suspect the city council, favored gay marriage and wanted the ban to be nullified, how could I, as their lawyer, invoke the city's automatic right to a stay? [36]

In fact, I did invoke the stay, and ultimately the New York Court of Appeals, in a 4-2 decision, upheld the constitutionality of the gay marriage ban.[37] I invoked the stay and pursued the appeal, even though the mayor wanted the ban voided, because in my view I had been sworn to uphold the laws of the State of New York.[38] Until the Court of Appeals had declared the law unconstitutional, it was my obligation to defend it. I was very troubled by the possibility that Michael Cardozo, by failing to invoke a stay, would, as a practical matter, have arrogated to himself the unilateral power to nullify a long-standing and duly enacted state law, the constitutionality of which was clearly subject to debate.

Let me pause here to contrast my position with that of Attorney General Holder in the *Windsor* Defense of Marriage Act (DOMA) case. The attorney general took the position then, the basis for which he articulated in a recent speech, that in "exceptional circumstances" government lawyers may at their discretion refuse to defend arguably unconstitutional laws. He argued that:

> Any decisions—at any level—not to defend individual laws must be exceedingly rare. They must be reserved only for exceptional circumstances. And they must never stem merely from policy or political disagreements—hinging instead on firm constitutional grounds. But in general, I believe we must be suspicious of legal classifications based solely on sexual orientation.
> And we must endeavor—in all of our efforts—to uphold and advance the values that once led our forebears to declare unequivocally that all are created equal and entitled to equal opportunity. [39]

Accordingly, the attorney general declined to defend the Defense of Marriage Act before the Supreme Court in *Windsor*. In *Windsor,* Justice Kennedy, writing for the majority, noted the Court's discomfort that the "Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma." [40] While a narrow majority of the Court nevertheless reached the merits and declared the law invalid, three dissenting justices concluded the Court lacked jurisdiction to decide the case because no one from the executive branch was defending the law.[41] From a practical standpoint, Attorney General Holder's position nearly deprived the Supreme Court of the opportunity to declare DOMA unconstitutional once and for all.

The potential consequence of a government lawyer's refusal to defend a law was strikingly illustrated in the companion case involving a California state law enacted by referendum that prohibited gay marriage in that state. There the Supreme Court declined to review the lower court's finding of unconstitutionality because, although the proponents of the referendum had sought review, the relevant state officials with the responsibility of defending the validity of state laws agreed that the law was unconsti- tutional and did not appeal.[42] Thus, the lawyers for the State of California, by failing to appeal the lower court's constitutionality ruling, took it upon themselves to void a law, duly enacted by referendum, thereby preventing the courts from resolving the issue.[43]

In my opinion, the failure of Attorney General Holder and the California attorney general to defend the anti-gay marriage laws, and Mr. Holder's recent encouragement to state attorneys general to do the same,[44] was a mistake. Certainly government attorneys do not leave their legal or moral consciences behind when they take their oaths of office, and have the absolute right to disqualify themselves personally from a particular case. They might even have an ethical obligation to do so under Rule 1.7(a)(2), which recognizes a conflict of interest when a lawyer's personal interests (or sympathies and biases) "materially limit[]" the effectiveness of his or her representation and create a risk of punch-pulling. However, it is fundamentally important that government lawyers recognize their special duty to ensure that duly enacted and not clearly unconstitutional laws are adequately defended whenever challenged, so that the courts can review the issue. Such a defense can be accomplished either by the government lawyer's office, that office's hiring of special counsel, or, if the law permits, by another party.

To do otherwise means, as was the case in California, that the government lawyer effectively has the power to abrogate duly enacted legislation. In my view, that is wrong. Moreover, while the decision not to appeal in the California case achieved the immediate policy goal of invalidating the gay marriage law, it prevented the Supreme Court from achieving Attorney General Holder's objective of establishing once and for all "that all measures that distinguish among people based on their sexual orientation must be subjected to a heightened standard of scrutiny."[45] In a recent and related case, the Virginia attorney general took what I believe to be the proper approach when the constitutionality of Virginia's gay marriage ban was challenged in federal court. Although the state attorney general declined to defend the ban himself, two members of the executive branch responsible for granting or denying marriage licenses under the law were entrusted with the responsibility of providing a defense for the statute.[46] This approach is entirely consistent with the duties and responsibilities of the government lawyer and is far preferable to an unchecked policy of discretionary abandonment of duly enacted laws.[47] Moreover, following the rules in such cases creates a firmer foundation for definitive resolution and progress.

The duty to defend a duly enacted law is somewhat similar to the duty a criminal lawyer owes to the defendant he or she represents. While concededly the details of the rights and responsibilities at stake differ in each situation, on a macro level the adversarial system of justice demands unfailing advocacy on both sides of the courtroom. Just as the criminal defendant is entitled to a defense until his or her guilt is proven beyond a reasonable doubt and all appeals are exhausted, so, too, must the government lawyer provide a defense for a law until the highest court

declares it invalid. This analogy, while imperfect, does make clear the centrality of balance to the adversarial system, balance which the government lawyer has a duty to maintain. Maintaining this balance and defending potentially unconstitutional laws is not an obstacle to progress. Rather, it is a necessary component of the adversarial process. Paul E. Wilson, an assistant Kansas attorney general, who was a member of the losing defense team in *Brown v. Board of Education*,[48] has written:

> [T]o me it was clear that the state's position was supported by existing law. The doctrine of separate but equal still controlled . . . . If I had been . . . a member of the Topeka Board of Education, I should have been pleased to vote to repeal the segregation statute and repudiate the public school policy that it permitted. But I was not a legislator, . . . I was a lawyer committed to uphold the law and the adversary process. The appellants were represented by able counsel prepared to attack wherever they sensed vulnerability. As I saw it, the task of counsel for the state was to rebut that effort by bringing to the Court's attention all data and theories favorable to the state's position. . . . Justice Oliver Wendell Holmes is reported to have said that the job of the judge is not to do justice but to play the game according to the rules. The lawyer's task is to inform the court as to what his client believes the rules to be. Whatever the outcome, the lawyer who has been faithful to his responsibility will have made a useful contribution to the result.[49]

Wilson and his colleagues, by defending the "separate but equal" doctrine overruled in *Brown,* contributed to the adversarial process that enabled the Supreme Court to overrule *Plessy v. Ferguson* and the separate but equal doctrine it had created.[50] To have done otherwise might have prevented, as almost occurred in *Windsor,* and did occur in the companion California case, the Court from making a final decision on the law's unconstitutionality.

But this leads to another, related question: what if the elected official thinks that a law is illegal and wants the government lawyer to sue to have it declared invalid? This problem was highlighted when Mayor Bloomberg, late last year, represented by the corporation counsel, brought suit against the city council seeking to have the so-called racial profiling law invalidated.[51] But there was a further complication. In addition to the mayor's suit, two police unions brought a similar suit against New York City asserting the law's illegality.[52]

Given, as I stated, the government lawyers' obligation to defend duly enacted legislation, how could the corporation counsel decline to defend the law's validity in this latter suit? Leaving aside the obvious impossibility of the office arguing, on the one hand, the law's invalidity and on the other hand defending it, what should or could be done? The answer, as alluded to above, is that there was another government entity with a genuine stake in defending the law, here the city council, which could and did intervene in the case—to argue the law's validity and to ensure judicial review of the issue.

Conclusion

Serving as New York City Corporation Counsel is not only an honor but the greatest job any lawyer can ever have. The legal issues facing New York are vast and challenging. The lawyers in the office are terrific. And the opportunities to make a difference in your role as a government lawyer are enormous. But extraordinary pressures come with the job satisfaction. As another former high level government lawyer has observed, "[I]t is harder to be a government attorney than it is to be an attorney in private practice. It's more complicated, it's more challenging, the environment is far more rigorous. You live in a world, in a fish bowl-like world, where public scrutiny is intense."[53]

You cannot be afraid to call them as you see them. You have to be able to tell the policy makers your views, and not be afraid to say a proposed course of conduct may be illegal or in any event unwise. But in the end, I believe the ethical rules you need to observe are no different whether you are a private or public lawyer—at least outside the special context of criminal prosecution or for attorneys general in certain respects. At the same time, you must remember that you have a duty to ensure that the laws you have been sworn to obey are defended when challenged, and that you cannot unilaterally act to annul them.

The words of Judge Jack Weinstein, who before taking the bench served as the chief government attorney for Nassau County, offer a fitting coda to this article. "[W]hile the government's attorney is a political figure," Judge Weinstein observed, "he operates within a framework of professional and ethical responsibility that limits what he can and should do. *There is no inconsistency between sound ethics and good politics.*" [Emphasis added.] Indeed, Judge Weinstein concluded, "Government service, while it furnishes some of the hardest ethical problems, affords a lawyer many of the greatest opportunities for professional fulfillment."[54]

Notes

1. The author acknowledges with thanks Proskauer Rose Professional Responsibility Counsel Charles Mokriski, Proskauer Associate Jack Browning, and Assistant Corporation Counsel Andrew Fine for their assistance in preparing this article.

2. The New York City Charter provides that the Corporation Counsel "shall be attorney . . . for the city and every agency thereof... ." New York, N.Y., Charter ch. 17, § 394 (2012). *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f (2000) ("A lawyer for the government is required to act ... in a manner reasonably calculated to advance the governmental client's lawful objectives and with reasonable competence and diligence. Those objectives are normally defined by authorized officers of the governmental client acting within constitutional, statutory, and other legal limits."). See also Frederick A.O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y. L. SCH. L. REV. 375, 377 (2008) ("For all government lawyers, the [client] is always, it seems to me, the overall greater governmental entity that the lawyer serves: the United States, the state, or for Corporation Counsels, 'the city'"); Jeffrey D. Friedlander, *The Independence of the Law Department*, 53 N.Y. L. SCH. L. REV.479, 482, 487 (2008) ("It is the Law Department that determines the position of the city in litigation.... The ability of the Law Department both to defend the validity of local laws and at

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times to challenge them—indeed, maintaining the office's independence and authority in interpreting the Charter and advising our clients in the making of city policy—requires the office to demonstrate the qualities of competence, integrity, and what I call 'institutional loyalty.'").

3. *See also* N.Y. Rules of Prof'l Conduct R. 1.13(a) (2009).

4. "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority." Model Rules of Prof'l Conduct pmbl. 18 (2013).

5. *See generally* Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 Fed. B.J. 61 (1978); *see also* Michael J. Glennon, *Government Lawyering: Who's the Client? Legislative Lawyering Through the Rear-View Mirror*, 61 Law & Contemp. Probs. 21, 27 (1998) ("In one sense, I always viewed the client as the Chairman [of the Senate Foreign Relations Committee] ... I never undertook any activity at odds with what I knew to be the Chairman's position, or even what I thought might be the Chairman's position."); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293, 1298 (1987) ("[Q]uestions of intra-branch conflicts can be subtle and complex, but in principle their answer is easy: the attorney's duties run to the officer who has the power of decision over the issue."); Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Me. L. Rev. 155, 158 (1966) ("The chief government law officer must and should attempt to please some politicians: he is, by virtue of his position, a political or policy-making figure, a member of a government administration which achieved office by a political-governmental program.").

—Model Rules of Prof'l Conduct R. 1.2 (2013).

—*See, e.g.*, Model Rules of Prof'l Conduct R. 3.1 (2013).

8."[L]awyers under the supervision of [government law] officers may be authorized to represent several government agencies in intergovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." Model Rules of Prof'l Conduct pmbl. 18 (2013); *see also* N.Y. Rules of Prof'l Conduct pmbl. 10 (2009).

9. Cahn v. Town of Huntington, 29 N.Y.2d 451, 456 (1972) (holding that the Planning Board of the Town of Huntington could retain the services of outside council in litigation against the Town Board of Huntington because the town attorney could not represent both sides in the litigation and the "only possible recourse for the [Town] Planning Board was to employ special counsel.").

10. Eric H. Holder, Att'y General, Remarks as Prepared for Delivery at the National Association of Attorneys General Winter Meeting (Feb. 25, 2014), transcript *available at* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1402251.html

11. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 813-35, 844-45 (2000) ("Just as the public prosecutor under the 'do justice' maxim owes a duty to the defendant to work towards a substantively fair outcome to the proceedings, so too does the civil government litigator owe a duty of substantive fairness to the defendants ..."); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation*, 9 Widener J. Pub. L. 235, 280 (2000) ("[S]urely the question of whether government lawyers have a duty to 'seek justice' is sufficiently important for them to give the issue serious consideration, before they reflexively assume the mantle of the zealous advocate.").

12. D'Amico v. Bd. Of Med. Exam'rs, 11 Cal. 3d 1, 14-15 (1974). The California constitution also requires the attorney general to assist district attorneys when "required by the public interest." Cal. Const. art. V, § 13. *See also* N.Y. Exec. Law § 63(8) ("Whenever in his judgment the public interest requires it, the attorney—general may ... inquire into matters concerning the public peace, public safety and public justice.").

13. This does not mean, however, that the state attorney general can neglect his or her responsibility to uphold the laws of the state he or she represents. Indeed, the California state constitution also states that "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." Cal. Const. art. V, § 13.

14. It is worth noting that the New York City Charter, in setting out the powers and duties of the corporation counsel, does not mention the public interest at all. New York, N.Y., Charter ch. 17, § 394 (2012). See also Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions,* 64 S. Cal. L. Rev. 951, 1013 (1991) ("The intrinsically different nature of the government client cannot alone justify a departure from the traditional duty of zealous advocacy. Indeed, the opposite may well be true."); Miller, *supra* note 5, at 1294 ("Despite its surface plausibility, the notion that government attorneys represent some transcendental 'public interest' is, I believe, incoherent."); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 Howard L.J. 539, 569 (1986) ("The public interest approach ... leads to a government of lawyers, not of laws, a result as objectionable as a government of people, not of law.").

15. Model Rules of Prof'l Conduct R. 1.13 cmt. 9 (2013); *see also* N.Y. Rules of Prof'l Conduct R. 1.13 cmt. 1 (2009) ("The duties defined in this Rule apply to governmental organizations.").

16. Model Rules of Prof'l Conduct pmbl. 2, R. 1.3 cmt. 1 (2013); *see also* N.Y. Rules of Prof'l Conduct R. 1.3 cmt. 1 (2009) ("A lawyer should pursue a matter on behalf of a client ... and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

17. Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2013); *see also* N.Y. Rules of Prof'l Conduct R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

18. Model Code of Prof'l Responsibility EC 7-14 (1980) ("A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair.... A government lawyer in a civil action... has the *responsibility to seek justice and to develop a full and fair record,* and he should not use his position or the economic power of the government to *harass parties or to bring about unjust settlements or results*.") (emphasis added). The New York Bar has recognized this issue, but has not weighed in one way or the other: "Whether a government lawyer may have an ethical obligation to identify and seek a substantively 'just' result in a particular case, even where that may be at odds with the agency's legally authorized litigation position, is beyond the scope of this opinion." N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2004-03 (2004).
19. J. David Goodman, *Bystanders Shot by the Police Face an Uphill Fight to Win Lawsuits*, N.Y. TIMES, Nov. 10, 2013, at A19.
20. *See In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006).
21. The Preamble to the Model Rules of Professional Conduct recognizes that a government lawyer may have more discretion than his private counterpart in making settlement decisions, noting that "[u] nder various legal provisions, including constitutional, statutory and common law, the responsibil-ities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide whether to agree to a settlement or to appeal from an adverse judgment." Model Rules of Prof'l Conduct pmbl. 18.
22. Weinstein, *supra* note 5, at 170. *See also* Lanctot, *supra* note 14, at 985 ("The central principle that purportedly underlies the adversary system is that 'justice' can best be achieved by the battle of two zealous advocates before a neutral decision maker. Allowing a government lawyer to sit in judgment of the justice of a client's cause would be inconsistent with the fundamental principles underlying the adversary system. If the adversary system is truly the best way to achieve fair results in court, a proposition that is dubious to many, then presumably the government lawyer should zealously advance the agency client's goals in court in the same way that a private practitioner would.").
23. Johnson v. City of New York, 15 N.Y.3d 676 (2010).
24. N.Y. Unconsol. Law SDEA § 9193 (McKinney 2006).
25. Lanctot, *supra* note 14, at 985 ("The ethical codes therefore do not impose a duty on the government lawyer to behave differently than a private lawyer."). As British Lord Chancellor Henry Brougham declared in 1820, "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client." 2 Trial of Queen Caroline 8 (1821).
26. *Greater N.Y. Taxi Ass'n v. New York*, 21 N.Y.3d 289, 301 (2013). *See* Richard Briffault, Closing Remarks at the Fordham Urban Law Journal Symposium: The Bloomberg's Legal Legacy (Dec. 4, 2012), *available at* http://urbanlawjournal.com/bloomberg-symposium-closing-remarks/ ("[A]s a teacher of local government law, and a believer in the importance of home rule, I find it a little unsettling when New York City's Mayor argues before the state courts that a state law preempts a City initiative. It is even more unsettling when, in order to win a policy dispute, the Mayor asks the state to turn what had long been a field of City regulation into a matter of state concern and a subject for state legislative determination. Once a state has taken over a subject, it may be hard for the City—and for future Mayors—to get it back. Perhaps naively, I think the Mayor ought to be fighting to expand City power, not seeking laws and court rulings that would limit it.").
27. *See, e.g.*, Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) (upholding consent decree pursuant to prison conditions).
28. *See* Schwarz, *supra* note 2, at 391-93.
29. *Id.* at 377-78 ("That a chief government lawyer represents the governmental entity and not the chief executive does not, of course, mean that the lawyer can wander off and make on his or her own all sorts of policy judgments").
30. *See, e.g.*, Floyd v. City of New York, 813 F. Supp. 2d 457 (S.D.N.Y. 2011). Although the De Blasio administration clearly had a right to advance its own litigation agenda, individual corporation counsel lawyers, as an ethical matter, might be precluded from switching position. Note, *Professional Ethics in Government Side-Switching*, 96 Harv. L. Rev. 1914 (1983).
31. *See* James C. McKinley Jr. & Benjamin Weiser, *In Final Weeks, a Push to Put Bloomberg's Stamp on Major Legal Cases,* N.Y. Times, Dec. 26, 2013, at A22.
32. *See* J. David Goodman, *De Blasio Drops Challenge to Law on Police Profiling*, N.Y. Times, Mar. 6, 2014, at A25.
33. Hernandez v. Robles, 7 Misc. 3d 459 (N.Y. Sup. Ct. 2005), *rev'd,* 26 A.D.3d 98 (1st Dep't 2005), *aff'd*, 7 N.Y.3d 338 (2006).
34. Kane v. Marsolais, 808 N.Y.S.2d 566 (N.Y App. Div. 2006), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006); Samuels v. N.Y. State Dep't of Health, 811 N.Y.S.2d 136 (N.Y App. Div. 2005), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006); Seymour v. Holcomb, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005), aff'd 811 N.Y.S.2d 134 (3rd Dep't 2006), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006). Shields v. Madigan, 5 Misc. 3d 901 (N.Y. Sup. Ct. 2004), aff'd, 2006 N.Y. App. Div. LEXIS 11425 (2d Dep't Sept. 26, 2006).
35. In fact, eight years earlier, as President of the City Bar Association, I had approved a report that argued the law's gay marriage ban was unconstitutional. *Same-Sex Marriage in New York*, 52 Record of The Association of The Bar of The City of New York 343 (1997).
36. In a somewhat related context, I had defended a law, which the city council had passed over the mayor's veto, that banned the use of metal baseball bats in high school games. *See* Ray Rivera, *Council Bans Metal Bats in High School*, N.Y. Times, Mar. 15, 2007, at B2, *available at* http://www.nytimes.com/ 2007/03/15/nyregion/15council.html?_r=0.
37. *Hernandez v. Robles*, 7 N.Y.3d 338 (2006).
38. It was my duty as Corporation Counsel of New York to uphold and defend the laws of New York City and of New York State. Therefore, it was not possible for me to decline to defend the gay marriage ban on the grounds that it was a state, rather than a city, statute.
39. Holder, *supra* note 10.
40. United States v. Windsor, 133 S. Ct. 2675, 2688 (U.S. 2013).
41. Justice Scalia wrote for three dissenting Justices: "The final sentence of the Solicitor General's brief on the merits

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[filed on behalf of the government appellants] reads: 'For the foregoing reasons, the judgment of the court of appeals *should be affirmed*.' That will not cure the Government's injury, but carve it into stone. One could spend many fruitless afternoons ransacking our library for any other petitioner's brief seeking an affirmance of the judgment against it. What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct ... Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there ... We have never before agreed to speak—to 'say what the law is'—where there is no controversy before us." *Windsor*, 133 S. Ct. at 2699-700 (emphasis in the original) (citations and footnotes omitted).

42. Hollingsworth v. Perry, 133 S. Ct. 2652 (U.S. 2013).

43. This approach seems to conflict with California law. Specifically, the California constitution states that "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." CAL. CONST. art. V, § 13. In addition, the California Supreme Court had previously ruled that the attorney general "has the duty to defend all cases in which the state or one of its officers is a party." *D'Amico*, 11 Cal. 3d at 15. That court had also held that in "the exceptional case the Attorney General, recognizing that his paramount duty to represent the public interest cannot be discharged without conflict, may consent to the employment of special counsel by a state agency or officer." *Id.* at 14. No such special counsel was appointed in the California gay marriage case.

44. Holder, *supra* note 10.

45. *Id.*

46. Bostic v. Rainey, 970 F. Supp. 2d 456, 468 (E.D. Va. 2014) ("Defendant Schaefer is a proper defendant here because he is a city official responsible for issuing and denying marriage licenses and recording marriages .... Defendant Rainey is a proper defendant because she is a city official responsible for providing forms for marriage certificates.").

47. As other challenges to various state laws barring gay marriage work their way through district courts, a variety of approaches to their defense have emerged. In Indiana, Utah, Oklahoma and Texas, government officers are defending the laws themselves. The Governor of Kentucky hired a private firm to defend its law after the state attorney general refused to do so. Brett Barrouquere, *Kentucky Gay Marriage Appeal Will be Handled by Ashland Firm Under $100K Contract*, THE COURIER-JOURNAL (Mar. 13, 2014),http://www.courier-journal.com/story/news/local/2014/03/13/Kentucky-gay-marriage-appealwill-be-handled-Ashland-firm-under-100K-contract/6388039. Outside the context of gay marriage, the Ohio Attorney General advanced a novel approach: file briefs on both sides. The Attorney General's office filed one brief to defend an Ohio law that makes it a crime to knowingly lie during an election campaign and another brief arguing that the law violates the First Amendment. The Attorney General argued that his dual constitutional obligations—to uphold the laws of Ohio and to protect the rights of its citizens—compelled his decision. Adam Liptak, *In Ohio, a Law Bans Lying in Elections. Justices and Jesters Alike Get a Say*, N.Y. TIMES, Mar. 25, 2014, at A16.

48. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

49. PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN BROWN V. BOARD OF EDUCATION 100-01 (Univ. Press of Kan. ed. 1995).

50. Plessy v. Ferguson, 163 U.S. 537 (1896).

51. Mayor of New York v. City Council of New York, 451543/2013 (N.Y. Sup. Ct. 2013).

52. Patrolmen's Benevolent Ass'n of N.Y. v. City Council of New York, 654550/2013 (N.Y. Sup. Ct. 2013). Mayor De Blasio subsequently reversed Mayor Bloomberg's position and withdrew the office's challenge to the racial profiling law. J. David Goodman, *De Blasio Drops Challenge to Law on Police Profiling*, N.Y. TIMES, Mar. 6, 2014, at A25.

53. Henry M. Greenberg, *A Principled Discussion of Professionalism: Lawyer Independence in Practice*, 6 N.Y. JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW 21 (2013).

54. Weinstein, *supra* note 5, at 172 (emphasis added). ML

Eminent Domain *Cont'd from page 17*

revealed no concrete development plans. Two months after its opinion in *Valsamaki,* the Maryland Court of Appeals issued, *Sapero v. Mayor and City Council of Baltimore*, 398 Md. 317 (2007), emphasizing that the CODE OF PUBLIC LOCAL LAWS OF BALTIMORE CITY, §21-16 requires that, in order to use quick-take condemnation, the City of Baltimore must demonstrate why, because of some exigency or emergency, it is necessary and in the public interest for the City to take immediate possession of a particular property. *Sapero* also went on to emphasize the need to make certain that the quick take process did not abridge a property owners' fundamental rights and that the due process requirements of the Maryland Real Property Article had to be followed. *Sapero, supra.*

A & E North, LLC vs. Mayor & City Council of Baltimore City (2013)

Last year, the *A & E North, LLC* case arose from a regular condemnation action filed in the Circuit Court for Baltimore City to acquire the former Parkway Theatre. The theatre is an historically and architecturally significant structure. At the time of the lower court proceedings, the A & E North, LLC ("Owner") stored a significant amount of personal property in the theatre. Prior to trial, the Owner requested the lower court to postpone the scheduled trial date and to order the City to pay the Owner's expenses to move the personal property from the theatre to another location. The lower court denied both requests.

At trial, the jury took a view of the property, heard testimony from the City's sole witness (an appraiser), and awarded damages in an amount consistent with the City's evidence as to value. The Owner appealed initially to the Court of Special Appeals (the intermediate appellate court) and subsequently to the Court of Appeals. Both courts sustained the lower court's ruling, holding that an owner challenging the right to take is not entitled to relocation benefits, and that he was not a displaced person under the statute.

A&E North, LLC v. Mayor and City Council of Baltimore, 427 Md. 605 (2013).

Makowski vs. Mayor and City Council of Baltimore (2014)

In a case decided in June of this year, the property involved was one of 150 properties in a square block that the City of Baltimore set out to acquire either through negotiated sales or regular condemnation for a redevelopment project as part of the East Baltimore Development Initiative (EBDI). To acquire the property, the City of Baltimore initially filed a regular condemnation case. The commercial property had been rented as a church. A year had passed, and all of the other properties had been acquired. The church tenant had been relocated and the city continued to pay rent to the owner. The City converted the regular condemnation case to a quick take because of the time that had elapsed since the filing of the case and the urgency to proceed with the project.

The owner challenged the quick take action. At a hearing on the challenge, the Circuit Court for Baltimore City granted the City's petition for immediate possession and title. Upon direct appeal to the Court of Appeals,[12] the Court unanimously concluded that the evidence was sufficient to support the trial court's finding that the property owner was a "hold out" and that the City's quick take action was warranted. *Edward J. Makowski v. Mayor and City Council of Baltimore*, 2014 WL 2853818 (June 24, 2014).

Conclusions:

What the Future Holds-Practice Pointers and Policy Considerations

Focusing on Maryland law with reference to trends in other states, this paper merely scratches the surface regarding the issues involved in an eminent domain practice representing governmental clients/agencies. Basic constitutional standards require that no property be taken without just compensation for a "public purpose," through a fair process which requires notice and opportunity to be heard. Even the most supportive court system requires a legislative process providing authority, a well thought-out plan and a clear process when subdivisions seek to acquire property through eminent domain. While we have raised several issues, our advice to overcome the charges of eminent domain abuse, and to facilitate government's redevelopment of blighted and/or undeveloped areas, is to make certain that:

1. Legislative authorization, which by its very nature includes notice and opportunity to be heard, should be current.
2. Property should be acquired pursuant to a well-reasoned plan that is supported by a legitimate legislative process.
3. Public purpose should be grounded in public benefit, if not public use.
4. Relocation should assist in making the property owner whole.
5. Valuation of the property is best achieved through a mediated process. It is always better to have the parties decide the valuation instead of a disinterested person.

1. *See generally* "50 State Report Card Tracking Eminent Domain Reform Legislation since Kelo," Castle Coalition, August 2007; "The Condemnation Landscape Across the Country Post Kelo—A Maryland Perspective," Maryland State Bar Association, Real Property Section, Ground Rules, Winter 2007, James L. Thompson and Joseph P. Suntum, Miller, Miller & Canby, Chtd.; "Eminent Domain," John C. Murphy, Maryland Bar Journal, November/December 2008.
2. *See* "Public Power, Private Gain—A Five-Year, State by State Report Examining the Abuse of Eminent Domain," by Dana Berliner, Castle Coalition—Citizens Fighting Eminent Domain Abuse, April 2003.
3. *See* "The Legitimacy and (Un)Fairness of Public Land Banking, The Unarticulated Issues of Eminent Domain, "Jonathan Cheng, Maryland Legal History Publications, August 2007.
4. See on line document at msa.maryland.gov/msa/mdmanual.
5. *See* on line document at msa.maryland.gov/msa/mdmanual.
6. *Id.*
7. Thompson and Castle Coalition publications, *supra*.
8. *Id.*
9. *See* Maryland State Bar and Castle Coalition publications, *supra.*
10. *See* "Eminent Domain Bill Passed in Maryland Senate," *Sunpapers*, Baltimore, Maryland, April 3, 2007.
11. *See* Chapter 305 (Senate Bill 3), "Real Property—Condemnation—Procedures and Compensation," Approved by the Governor, May 8, 2007 (by adding to Article—Real Property Section 12-105.1 and 12-205.1, Annotated Code of Maryland (2003 Replacement Volume and 2006 Supplement); By repealing and reenacting with amendments, Article—Real Property, Section 12-202, 12-204 and 12-205 Annotated Code of Maryland (2003 Replacement Volume and 2006 Supplement).
12. The *Code of Public Local Laws of Baltimore City*, §21-16 provides for an immediate right of appeal to the Court of Appeal of Maryland from the decision of the trial court in a quick take condemnation case. **M.**

Code Enforcement *Cont'd from page 19*

at the end of rainbows by having as many establishments and machines as possible. Could you imagine your downtown storefronts all taken up by video gaming cafes? Unfortunately for my community, our downtown has many vacant storefronts where this could be a reality if these types of businesses are allowed to open. Additionally, if a significant number of these types of businesses were to open, fraternal and veterans' organizations could see the result they were trying to avoid with the gaming revenue, namely closing their doors. And, we could also realistically see a decline in locally-owned taverns due to loss of customers and revenue.

One aspect of the State statute – a provision entitled "undue economic concentration" – could impact these possibilities. The State would look at whether this type of requested operation (video gaming cafes) would impede or suppress competition, adversely impact the economic stability of the video gaming industry, and/or would negatively impact the purposes of the State video gaming act. The potential problem with this posture is that it relies on the State to follow through on this examination prior to issuing licenses for these sorts of gaming businesses. Given the State's hesitancy to expand casinos, I would hope they would involve themselves in discussions about these types of businesses. At a minimum, municipalities should discuss the potential impact video gaming cafes would have and determine the need for additional licensing, regulations or other ordinances that could impede

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Code Enforcement *Cont'd from page 35*

their proliferation or minimize their potential negative effects. I think this could be one of those circumstances where unrestrained competition, if allowed to be the driving force, may have a negative impact on existing local businesses.

So, for us the question is: once the door to video gaming is open, how far should it get pushed? ML

Ordinances *Cont'd from page 26*

The Michigan Supreme Court acknowledged that the Bonners had "a significant property interest within the protection of the Due Process Clause." However, the court's substantive due process analysis turned on the proposition that *property owners do not have a fundamental right to repair a structure that has been declared unsafe by a municipality.* Accordingly, governmental intrusion into that (non-fundamental) right only needs to be reasonably related to a legitimate governmental interest. Under this standard, the Brighton ordinance was not facially deficient; the "unreasonable-to-repair" presumption was reasonably related to the City's legitimate governmental interest in preserving the health and welfare of Brighton residents, reducing crime and maintaining property values. Demolition of an unsafe nuisance was not an arbitrary act; it was a legitimate exercise of the City's police power.

The Michigan Supreme Court also found adequate procedural due process in the Brighton ordinance scheme. While the Bonners had argued that BCO § 18-59 failed to give property owners the procedural protection of a repair option before demolition, the court stated that due process merely requires impartial "adjudication . . . preceded by notice and an opportunity to be heard . . . granted at a meaningful time and in a meaningful manner" before the deprivation of a property interest. The court held that procedural due process "was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court."

Bonner v. City of Brighton, no. 146520 (Mich. Apr. 24, 2014). ML

Inside Canada *Cont'd from page 20*

Implications-

Together, *Wainfleet Wind Energy Inc. v Wainfleet (Township)*, 2013 ONSC 2194, *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 and *East Durham Wind Inc.*, are strong judicial authority for the proposition that provincially approved renewable energy projects may be constructed despite municipal opposition.

City of Burnaby- Kinder Morgan At Odds Over Pipeline.

The Supreme Court of British Columbia has rejected the City of Burnaby's bid for a temporary injunction to stop survey work for an oil pipeline expansion project proposed by Kinder Morgan.

Kinder Morgan is proposing a $5.4 billion project to triple the capacity of its Trans Mountain pipeline, which currently carries oil products to a terminal in Burnaby from Alberta. The City of Burnaby has expressed its opposition with such expansion, and has attempted to block Kinder Morgan's survey work on Burnaby Mountain. The City of Burnaby alleges that Kinder Morgan violated municipal bylaws that protect trees and parkland, when Kinder Morgan workers toppled 13 trees, although Kinder Morgan indicated it was only seven trees. The City of Burnaby filed with the British Columbia Supreme Court to issue an injunction on the survey.

The City of Burnaby's action follows a previously upheld decision by the National Energy Board of Canada last month, allowing Kinder Morgan to access the Burnaby Mountain land under federal law. The National Energy Board Act stipulates that a company may enter into the land of any person that lies on the intended route to survey or otherwise ascertain whether the land is suitable. There is no requirement for companies to reach agreement with landowners, the Crown, or otherwise, before exercising the right to access land. Therefore, the National Energy Board held that Kinder Morgan does not need the City of Burnaby's permission to access Burnaby Mountain and can proceed with necessary studies of its preferred pipeline route through the mountain without the City's consent. In response to this holding, Kinder Morgan has filed a motion asking the National Energy Board to forbid the City of Burnaby from obstructing its crew. This decision is imminent.

On September 17, the British Columbia Supreme Court judge dismissed the application for an injunction against the Kinder Morgan survey crews on Burnaby Mountain. At the time of this publication, Judge Brenda Brown had not yet given her reasons for dismissing the injunction. ML

Federal *Cont'd from page 21*

employees was not required under the PDA even though it was offered to employees injured on the job.[15] The court reasoned that it was not Congress' intent to provide pregnant employees with greater rights than non-pregnant employees, which would be the result if the court adopted the employee's rationale.[16]

The employee in *Young* appealed to the Supreme Court and certiorari was granted on July 1, 2014. Oral arguments will be heard in December.

The EEOC's Guidance Conflicts with Fourth Circuit's Holding and Creates Controversy

As noted above, the timing of the Guidance is controversial given the impending Supreme Court decision on the subject, and in addition to that, some of the substance of the Guidance has garnered criticism. In fact, two EEOC Commissioners provided separate written dissents to the Guidance.[17] One point of contention is that according to the Guidance, Title VII requires that employers treat pregnant workers the same for all employment related purposes as other non-pregnant individuals who are similar in their ability or inability to work.[18] The Guidance therefore reasons that if an employer provides an accommodation to an employee with a disability, a pregnant employee who has similar limitations would be entitled to the same accommodation, regardless of whether the pregnant employee is actually disabled for ADA purposes.[19] This conclusion was one of the central points of criticism by Commissioner Victoria Lipnic in her dissent:

> The Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to "reasonable accommodation" as that term is defined by the Americans with Disabilities Act ("ADA"). No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it. Moreover, the Pregnancy Guidance

states that non-pregnant workers receiving such reasonable accommodations are the appropriate comparators for purposes of PDA compliance. This, too, is a position rejected by the majority of courts which have considered it. These positions represent a dramatic departure from the Commission's prior position, and perhaps more important, contravene the statutory language of the PDA.[20]

Although acknowledging that the amendments to the ADA broadened the ADA's coverage, Commissioner Lipnic continues her criticism of the Guidance's position that the PDA requires employers to provide the same accommodations for pregnant and non-pregnant employees, stating she is "hard-pressed to conclude that the ADAAA somehow 'back-doored' reasonable accommodation into the PDA."[21] On this point, she notes:

> In fact, the Commission's position for years has been consistent: a routine pregnancy is not a covered disability under the ADA (or ADAAA). While acknowledging that the ADAAA extends the ADA to cover a broader range of pregnancy-related impairments, the Commission has never in regulations or sub-regulatory guidance suggested that a routine pregnancy which is *not* a disability somehow entitles a pregnant worker to rights identical to those who have covered disabilities under the ADA. In light of this clear and consistent precedent, and the potential for confusion if contradicted, the Commission is ill-advised to take this position now.[22]

Another issue critics point to is the Guidance's position regarding light duty for pregnant workers. The Guidance specifically notes that a policy that only provides light duty for employees injured on the job would run afoul of the PDA as it would discriminate against pregnant workers who are similar in their ability or inability to work as the injured worker.[23] This point is contrary to the Fourth Circuit's holding in *Young* and may be mooted by the Supreme Court's decision this fall.

Suggestions for Employers

Until the Supreme Court's decision in *Young,* employers are left with conflicting information from the courts and the EEOC as to how to handle certain situations involving pregnant workers. While the EEOC guidance does not carry with it the force of law, employers should note that any pregnancy discrimination actions brought between now and when *Young* is decided would be subject to that Guidance at the Commission. However, for lawsuits brought in court, the EEOC Guidance is merely that, guidance. That being said, until *Young* provides the definitive rule on this issue, employers would be wise to review their policies and consider offering pregnant employees light duty as an accommodation if it is offered to other employees who are similar in their ability and inability to work.

Notes

1. Young v. United Parcel Service, Inc., 707 F.3d 437 (4th Cir. 2013).
2. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014). This was the EEOC's first guidance on pregnancy discrimination in over thirty years. See EEOC Press Release, available at: http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm (last accessed on September 26, 2014). The EEOC also issued a Question and Answer document and Fact Sheet, available at: http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm (last accessed on September 25, 2014); http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm (last accessed on September 25, 2014).
3. *See* EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014).
4. *Id.*
5. *Young, Supra.*
6. *Id.* at 439.
7. *Id.* at 439-40.
8. *Id.* at 440.
9. *Id.*
10. *Id* at 440-41.
11. *Id.*
12. *Id.* at 442.
13. *Id.* at 442-43.
14. *Id.* at 445. The PDA provides:
    > The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, ore related medical conditions: and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work. 42 U.S.C. §2000e(k).
15. *Id* at 446-49.
16. *Id.* at 448. For example, the court noted that an employee who injures himself off the job as a volunteer firefighter would not be entitled to the light duty accommodation under the company's policy. Id.
17. *See* Commissioner Constance Barker, Public Statement of Commissioner Constance S. Barker (July 14, 2014), available at: http://op.bna.com/dlrcases.nsf/id/kmgn-9lznp5/$File/barkerdissent.pdf; Commissioner Victoria Lipnic, Statement Of The Honorable Victoria A. Lipnic Commissioner, U.S. Equal Employment Opportunity Commission "Enforcement Guidance On Pregnancy Discrimination And Related Issues," (July 14, 2014) (hereinafter, "Lipnic Dissent"), available at: http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/$File/lipnic.pdf.
18. *Id.* On this point, the Guidance states:
    > ...consistent with the statutory language, a pregnant worker with a work restriction who challenges a denial of light duty should be able to establish a prima facie case of discrimination...by identifying any other employee who is similar in his or her ability or inability to work and who was treated more favorably, including employees injured on the job and/or covered by the ADA. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014) (emphasis added).
19. *See* EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014).
20. *See* Lipnic Dissent
21. *Id.*
22. *Id.*
23. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014). ML

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The ordinance at issue in the First Circuit was meant to "combat the ill effects of aggressive solicitation and prohibits continuing to solicit from a person *after the person has given a negative response to such solicitation . . .* or soliciting someone in a manner . . . likely to cause a reasonable person to fear immediate bodily harm." (emphasis in original) (internal citations omitted). Thus, the majority got it wrong because "what was criminal in the City of Springfield is legal in the First Circuit."

In Springfield's situation, the dissent noted, a police officer enforcing this ordinance must listen and determine what the speaker says in order to determine a violation: was it a request for money or other gratuity? Was it a request for immediate money or future donations? Was it a request for a personal donation or a commercial one? For the dissent an "officer must listen to and understand the speech to determine if the ordinance has been violated [and that] means that the ordinance is content-based, unlike those laws which can be imposed based merely on the volume, location, or conduct accompanying the speech." Such a content-based law would not survive strict scrutiny.

***Don Norton v. City of Springfield*, No. 13-3581 (7th Cir. Sept. 25, 2014)**

Qualified Immunity: Absence of Specific Precedent in State-Created Danger Case does not prevent "Clearly Established" Finding

Where law enforcement officers allegedly revealed the identity of a confidential informant to organized crime, resulting in the informant's murder, they cannot avoid a finding that their behavior violated a "clearly established" constitutional right merely because the specific fact pattern had not yet been the subject of a judicial determination.

Frank Lagano became the subject of an organized crime investigation in Bergen County, New Jersey and in 2004 the Bergen County Prosecutor's Office ("BCPO") executed a search warrant for his home. Thereafter, the BCPO charged Lagano with several crimes including racketeering, promoting gambling, criminal usury and conspiracy. Chief of Detectives Michael Mordaga allegedly met with Lagano and instructed him on two occasions to hire a specific attorney, which he promised would make his "legal problems go away." Lagano refused the offers and instead became a confidential informant for the state Attorney General's Office. In 2007 Lagano was shot and killed. His estate claimed the sometime after Lagano became an informant and refused Mordaga's offers the BCPO and Mordaga disclosed his confidential informant status to organized crime figures, resulting in his murder. The estate filed suit against BCPO and Mordaga alleging a due process claim under the state-created danger theory.

The District Court rejected the theories and dismissed the case. The estate appealed.

HELD: The Third Circuit vacated the lower court holding and remanded to the District Court with instructions to apply the standard articulated by the by the Circuit.

DISCUSSION: The Third Circuit addressed the lower court's dismissal on the grounds that neither BCPO nor Mordaga were "persons" under §§ 1983 and 1985. The District Court found BCPO was an arm of the state and Mordaga, as BCPO Chief of Detectives, was a state official – neither of which conferred personhood to them as that term is understood under the applicable federal statutes. The Circuit noted however that local governmental bodies and their officials are "persons" under the statutes when the prosecutors perform administrative functions "unrelated to the duties involved in criminal prosecution." Taking the allegation in the light most favorable to the plaintiff-estate, the Circuit Court noted the complaint showed Mordaga and others within BCPO were not operating as criminal investigators because Mordaga met Logano in his home, advised him to hire a specific attorney, and advised that doing so would eliminate his legal problems. In short, his relationship with Lagano extended beyond that of his official role as the Chief of Detectives, thus making him and BCPO "persons" under §§ 1983 and 1985. Moreover, Mordaga had been sued personally, as well as in his official capacity. The Circuit reversed the lower court on this issue.

As for the novel claim that the defendants violated Logano's due process rights under the state-created danger theory, the Court vacated the lower court holding. To prove a state-created danger claim the plaintiff must show "(1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all." (internal citation omitted). Mordaga responded to this claim by asserting qualified immunity, with which the lower court had agreed since "[t]here are no published cases that extend the state created danger right to confidential informants in the Third Circuit[,] . . . it would be unfair to hold that a constitutional right was 'clearly established.'"

The Third Circuit rejected this reasoning. It noted that for nearly two decades the Circuit had established that a state-created danger violates due process and the simple fact that it had not yet been applied "in the context of a confidential informant is not dispositive on the qualified immunity defense." The issue was whether the facts proffered by the estate fell within the theory and whether "it would be clear to a reasonable officer that the alleged disclosure was unlawful under the circumstances." (internal citations omitted). The court declined to provide an opinion the qualified immunity issue, but given the lower court's failure to apply the proper standard, vacated the holding and remanded with the proper standard set forth.

***Estate of Frank P. Lagano v. Bergen County Prosecutor's Office*, No. 13-3232 (3d Cir. Oct. 15, 2014)** ML

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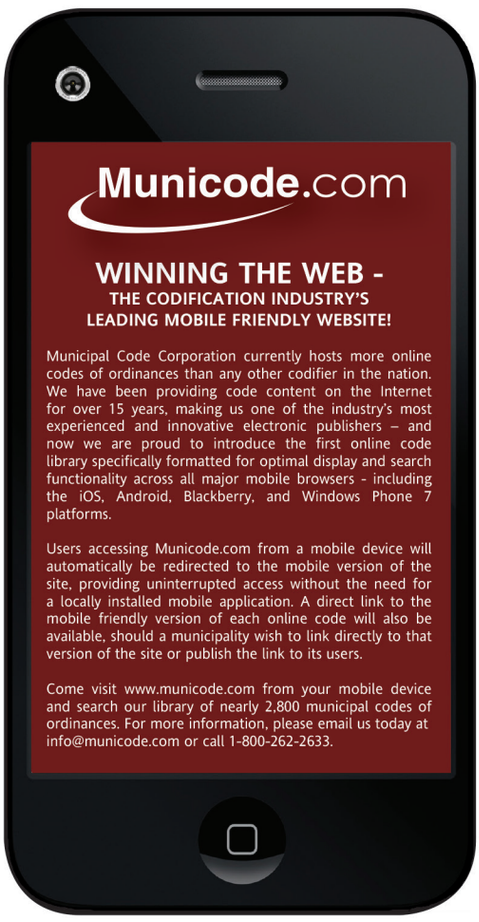

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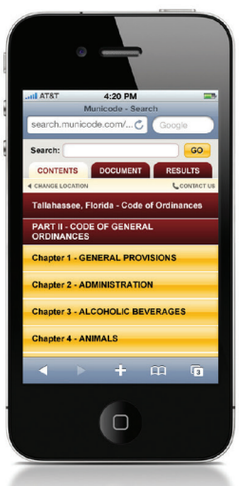

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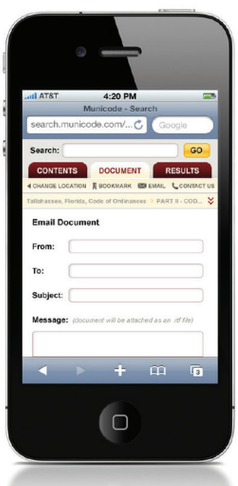

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