Religious Free Speech and the Public Employer

Kelvin Cochran v. City of Atlanta – A Case Study

Presented By:

Nina Hickson, Esq. – City Attorney for the City of Atlanta

David Gevertz, Esq. – Shareholder at Baker Donelson (Atlanta)

Hannah Jarrells, Esq. – Associate at Baker Donelson (Atlanta)

PART I – FACTUAL BACKGROUND

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Kelvin Cochran - Background

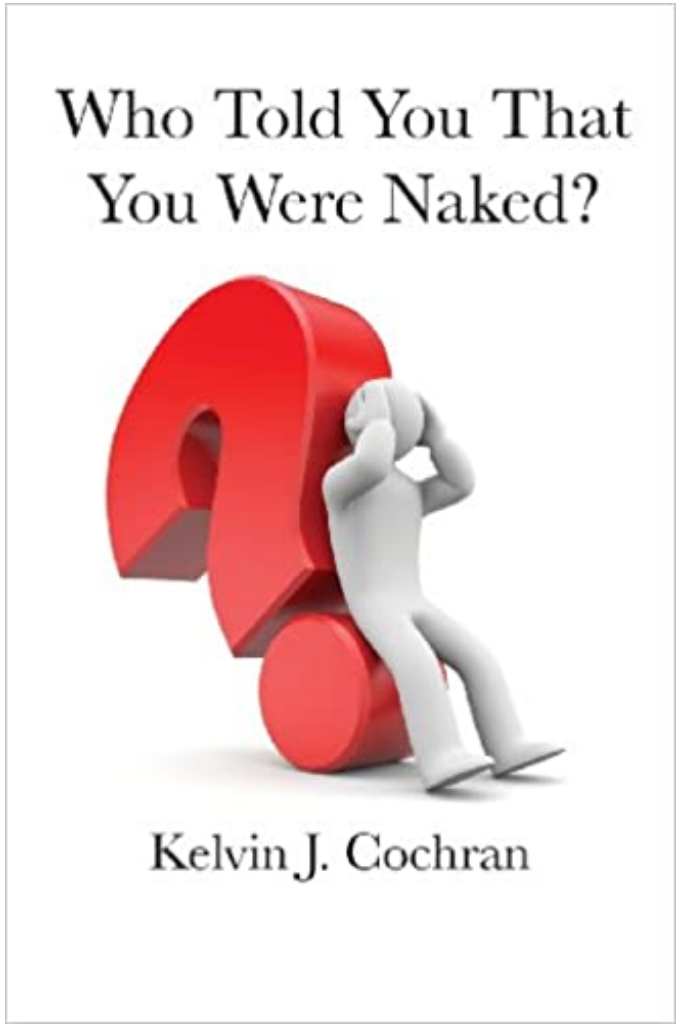
- 2008 – Mayor Shirley Franklin appoints Cochran as Fire Chief of Atlanta
- Briefly left the AFRD in 2009 to serve as Administrator of the United States Fire Administration, but returned ten months later
- Maintained high performance reviews throughout employment
- Remained Fire Chief until January 6, 2015
- Terminated by Mayor Kasim Reed
- Devout Evangelical Christian
- Member of a Baptist church in Atlanta



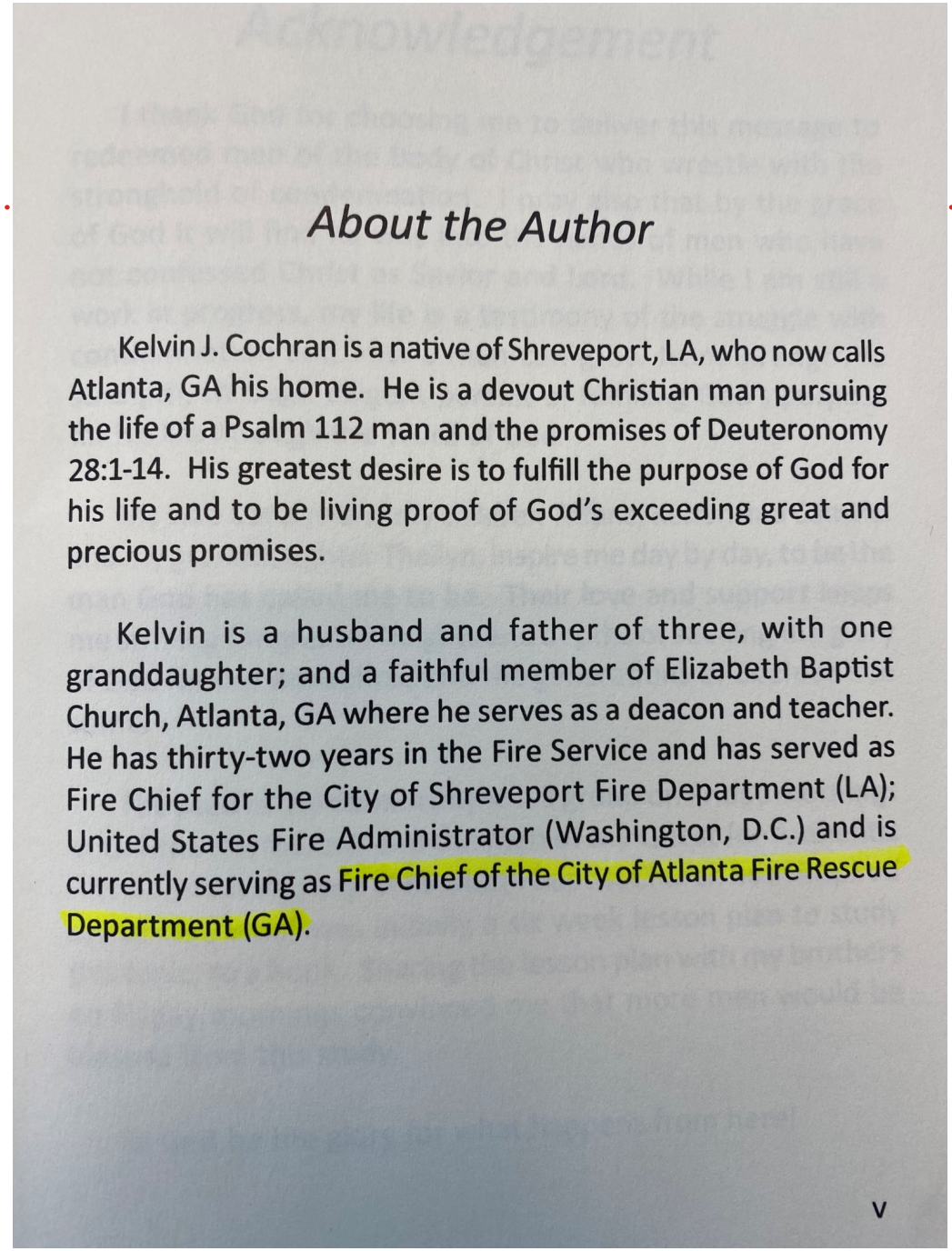
© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

“Who Told You That You Were Naked”

- In late 2013, Cochran wrote and self-published a book entitled “Who Told You That You Were Naked?: Overcoming the Stronghold of Condemnation”
- In the “About the Author” Section, Cochran identifies himself as the City of Atlanta’s Fire Chief
- Cochran wrote the book for a men’s bible study group and stated that one purpose of the book was to guide men to live faith-filled, virtuous lives



© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC



About the Author

Kelvin J. Cochran is a native of Shreveport, LA, who now calls Atlanta, GA his home. He is a devout Christian man pursuing the life of a Psalm 112 man and the promises of Deuteronomy 28:1-14. His greatest desire is to fulfill the purpose of God for his life and to be living proof of God's exceeding great and precious promises.

Kelvin is a husband and father of three, with one granddaughter; and a faithful member of Elizabeth Baptist Church, Atlanta, GA where he serves as a deacon and teacher. He has thirty-two years in the Fire Service and has served as Fire Chief for the City of Shreveport Fire Department (LA); United States Fire Administrator (Washington, D.C.) and is currently serving as Fire Chief of the City of Atlanta Fire Rescue Department (GA).

v

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

“Who Told You That You Were Naked?” (Cont.)

- The book includes passages stating that sex outside of the confines of marriage between a man and woman—including fornication, homosexual acts, and all other non-marital sex—is contrary to God’s will

- It also categorizes the following as equally “unclean”—or “whatever is the opposite of purity”: “sodomy, homosexuality, lesbianism, pederasty, bestiality, and all other forms of sexual perversion”

- The book also contains a section called “You Need to Talk to My Husband,” which contends that Eve would not have eaten the forbidden fruit if she first told the serpent that he needed to talk to her husband

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

City of Atlanta's Pre-Clearance Policies

- The City maintained three pre-clearance rules which required a City of Atlanta employee at Cochran's level to seek permission from the Board of Ethics and his supervisor prior to undertaking any outside employment

- Cochran never sought or received permission from the Board of Ethics to sell his book, and he never discussed his plan to sell his book with either of his supervisors, Mayor Kasim Reed or Chief Operating Officer Michael Geisler

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Cochran Provides His Book to Subordinates & At Least One Complains

- In early 2014, Cochran provided books to between 9 and 12 of his Christian subordinates at the AFRD, all of whom were either: (1) close personal friends who asked for a copy before it was finished; (2) employees who asked about the book once they learned of its publication; or (3) men to whom Cochran gave an **unsolicited** copy

- At least one man who received an unsolicited copy complained

- After the complaint, the book made its way to HR and the Mayor

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

HR's Concerns & The Investigation

- The HR Commissioner concluded that, based upon the beliefs espoused in the book and Cochran's connection of the book to his position, a Title VII investigation needed to occur

- The HR Commissioner recommended termination, but the Mayor decided to suspend Cochran for 30 days without pay, investigate the matter, and send Cochran to sensitivity training

- Additionally, Cochran was instructed not to comment publicly about his suspension during the pending investigation

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

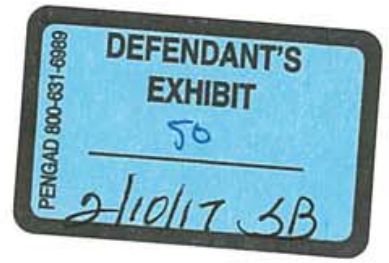
Cochran Speaks Out During His Suspension

- During his suspension, Cochran spoke at the Georgia Baptist Convention's ("GBC") Executive Committee meeting consisting of approximately 200 pastors and explicitly referenced his suspension
- Cochran also approved of GBC's public relations "battle plan" that consisted of:
  - The publication of a web-based editorial criticizing his suspension;
  - An online petition linked to a forum to purchase his book;
  - A social media campaign directed at pressuring the Mayor to reconsider Cochran's suspension and apologize to him; and
  - The posting of a recording of Cochran's GBC speech to the GBC website

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

From: Mike Griffin <MGriffin@gabaptist.org>
Date: December 12, 2014 at 12:23:22 PM EST
To: Jonathan C email <jcrumly@manercc.com>, Kelvin Cochran E <kelvin.cochran@yahoo.com>
Subject: Fwd: Plan: Cochran confidential ....Press Release, Index Article, etc.

Here is the battle plan. Your eyes only.



PL 001901

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Cochran's Termination

- As a result of Cochran's and the GBC's efforts, the Mayor received more than 17,000 angry emails, phone calls to his home, and even death threats
- Among other things, Cochran's supporters used racial slurs against the Mayor, call him a "terrorist", and the "anti-Christ"
- The City's investigation concluded that Cochran violated the City Code by not obtaining the Ethics Board's written authorization prior to selling his book
- The City's investigation also concluded that although there was **no** evidence that Cochran engaged in any unlawful discrimination, the contents of the book eroded trust and compromised Cochran's ability to effectively lead the Fire Department

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Cochran’s Termination (Cont.)

- After learning of Cochran’s speeches, suspecting his involvement in the orchestration of the PR campaign during his suspension, and upon reviewing the investigative findings, Mayor Reed terminated Cochran. The Mayor cited his lack of trust and confidence in Cochran and his belief that Cochran "could not continue with the support of the people that worked for him”

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

PART II – THE LEGAL BATTLE

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

The Causes of Action

- Cochran filed suit against the City of Atlanta and Mayor Reed alleging the following claims:
  - First Amendment Retaliation
  - Freedom of Association Retaliation
  - Viewpoint Discrimination
  - The City's preclearance rules were unconstitutional because they: (1) were a prior restraint; (2) gave unbridled discretion to the City; and (3) violated the First Amendment free exercise of religion clause and the no religious tests clause of Article VI, cl. 3 of the United States Constitution
  - His termination violated the procedural due process clause of the Fourteenth Amendment

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Cochran's Legal Team – Alliance Defending Freedom

- A nonprofit organization that has filed hundreds of cases claiming First Amendment violations, including cases that have made it to the Supreme Court
  - *Masterpiece Cakeshop v. Colorado Civil Rights Commission*
  - *Obergefell v. Hodges*
  - *United States v. Windsor*



© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Cochran's Legal Team – Alliance Defending Freedom (Cont.)

From ADF's website:

As secular forces chip away at our nation's Judeo-Christian roots, religious freedom is increasingly threatened. Yet the First Amendment continues to reflect the Founders' belief that "[t]he Religion...of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise [religion] as [conviction and conscience] dictate."

Alliance Defending Freedom defends religious freedom and opposes all attempts to compel people to compromise their beliefs or retreat from civil and political life as the price for following their faith.

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Free Speech Retaliation

- Summary Judgment Order – December 20, 2017
- Free Speech Retaliation
  - Balancing test set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)
- Employee must establish: (1) the speech involved a matter of public concern; (2) the employee's free speech interests outweighed the employer's interest in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in the adverse employment action
- Then, burden shifts to employer to show that it would have reached the same decision absent the protected speech

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Free Speech Retaliation

- **City wins!** Cochran's speech "caused such an actual and possible disruption that it [did] not warrant First Amendment protection in the workplace."
- Decisive factors:
  - Cochran gave at least three unsolicited copies of the book to subordinates
  - Title VII implications for City were serious
  - Investigation revealed his book eroded the Fire Department's trust in Cochran
  - Reasonable for City to think that public trust (especially in the LGBTQ community) would be eroded
  - Difficult to recruit LGBTQ firefighters, undermining City's inclusive mission
  - Public relations campaign against Mayor Reed

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Freedom of Association

- *Pickering* balance test
- **City wins!**
- Cochran's "interest in associating with his church through his publication was outweighed by the City's countervailing interests"

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Viewpoint Discrimination

- *Pickering* balance test applied again, so **the City wins!**



© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Prior Restraint

- Cochran argued that the City's preclearance rules operated as an unconstitutional prior restraint on speech
- Standard for judicial evaluation is set forth in *U.S. v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995)
  - Balance between interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees
  - When a ban "chills potential speech before it happens" the State must show "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government"

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Prior Restraint

- **Cochran wins!**
- Court places great weight on the interests of the prospective speaker and prospective audience
- Those interests outweighed the City's efficiency interests in ensuring that its employees do not have conflicts of interests
- Pre-clearance rules were underinclusive, in that high-level employees were not required to obtain permission to engage in single speaking engagements which could create more of a conflict for the City that full-time employment.
- Pre-clearance rules were also overinclusive, in that they applied to all outside employment even if the outside employment was plainly unrelated to the employee's City employment

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Unbridled Discretion

- Cochran argued that the City's pre-clearance rules were unconstitutional as content-based restrictions, in that they granted unbridled discretion to the City to approve or deny outside employment requests

- 11th Cir. Standard = (1) look to the purpose behind the regulation; (2) regulation should be narrowly drawn and contain reasonable and definite standards; (3) look to actual manner in which the regulation is being implemented

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Unbridled Discretion

- **<u>Cochran wins!</u>**
- Pre-clearance rules did not set forth any standards the City's Ethics Board to apply in making its decision
- Ethics rules did not set forth any objective standards for supervisors to apply in granting or denying permission for outside employment
- Rules did not define what constituted a conflict of interest



© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Free Exercise

- Cochran contended that by suspending him for thirty days without pay for violating the pre-clearance rules, the City violated his right to freely exercise his religion because the City targeted his expression of sincerely held religious beliefs regarding marriage and sexuality.
- Standard is set forth in *Church of the Lukumi Babalu Aye v. Cty. of Hialeah*, 508 U.S. 520, 531 (1993)
- A law that is neutral and of general applicability need not be justified by a compelling government even if the law has the incidental effect of burdening a particular religious practice

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Free Exercise

- **City wins!**

- Pre-clearance rules were neutral and generally applicable in that they applied to all City of Atlanta employees and all outside employment

- Pre-clearance rules did not address religion and were not passed because of religious motivations

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment – Procedural Due Process

- Cochran claimed that the City and Mayor Reed violated his right to procedural due process by suspending and terminating him without providing him advance notice or giving him a meaningful opportunity to respond
- **City wins!**
- Under Georgia law, “a public employee has a property interest in employment when that employee can be fired only for cause”
- Because Cochran could be removed with or without cause, he did not have a property interest in his employment

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Summary Judgment Scoreboard

The City of Atlanta/Mayor Reed	Cochran
Did NOT engage in free speech retaliation	The City's preclearance rules operated as an unconstitutional prior restraint on speech
Did NOT engage in freedom of association retaliation	The City's preclearance rules were unconstitutional because they granted unbridled discretion to the City to approve or deny outside employment requests
Did NOT engage in viewpoint discrimination	
Did NOT violate Cochran's right to exercise his religion	
Did NOT violate Cochran's right to procedural due process by suspending and termination him	

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Trial Issues

- Only issue for trial was to determine what damages, if any, Cochran suffered from the application of the pre-clearance rules
- Cochran claimed he was entitled to back pay, front pay, and compensation for the loss of his reputation and his emotional distress for his suspension and termination
- However, Cochran had since changed careers and was no longer seeking work as a fire chief
  - Ministry role with church
  - Promoting book
  - Public appearances and speaking engagements

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Trial Issues – The City's Position

- The City **suspended** Cochran based on his failure to abide by the pre-clearance rules and in order to conduct an investigation without him present
- The City **terminated** Cochran because:
  - Cochran failed to abide by the terms of his suspension
  - The Mayor believed Cochran was supporting and/or participating in the public relations campaign against him and the City
  - After-acquired evidence – the City now had evidence that Cochran actively participated in the public relations campaign to undermine the Mayor
  - The City's investigation concluded that Cochran posed a Title VII risk
  - The City's investigation concluded that the Fire Department had lost trust in Cochran
  - The City reasonably believed that the public (especially the LGBTQ community) had lost trust in Cochran -- unacceptable for a public safety chief

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

What happened next?

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

PART III – THE PUBLIC RELATIONS BATTLE & DECISION TO SETTLE

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Change in City Leadership

- At the inception of Cochran's lawsuit, Kasim Reed was the City's Mayor and Cathy Hampton was the City Attorney
- By the time the parties were preparing for trial, the City elected new leadership – Mayor Keisha Lance Bottoms (sworn in Jan. 2018)
- Mayor Bottoms appointed Nina Hickson as City Attorney in July 2018

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Trial v. Settlement Considerations

- Stakeholders to consider
  - Citizens of Atlanta
    - 51.8% African American
    - LGBTQ Community
    - Evangelical Community
  - City of Atlanta Employees
- Atlanta's mission of inclusivity
- Summary Judgment viewed as significant victory for the City and former Mayor – no retaliation or discrimination
- Significant media considerations
- Settlement required City Council approval, which meant that the terms could not be kept confidential from the public
- ADF and Cochran would market settlement as a win to promote ADF's mission

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Litigation-Related Press From Inception through Summary Judgment

- ADF created and published over 65 articles, blogs, interviews, and videos relating to Cochran's case against the City and Mayor Reed on its website

- National Media: NBC, Wall Street Journal, NPR, New York Times, Washington Post, Fox News, LA Times

- Local Media: Atlanta Journal Constitution (50+ articles) and multiple local news stations (multiple press briefings, statements, interviews, etc.)

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Trial v. Settlement Considerations (Cont.)

- If the City went to trial, it would face a new round of local and national media coverage
- Media has a finite bandwidth for covering the administration, crowding out other positive news
- Jury considerations in light of ongoing DOJ investigation into prior administration
- Business decision to settle so that new administration could move forward
- Limited “true” press coverage of settlement

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Lessons Learned

- Review preclearance policies
  - Define conflict of interest
  - Policy should be narrowly tailored to only reach true conflict of interests
  - Set clear standards for Ethics/Compliance personnel to evaluate
- Reevaluate a case's pros and cons as time passes
  - If the cons outweigh the pros, revaluate strategy
- A win is a win
  - Judge found that City did not engage in discrimination/retaliation
  - Settlement allowed City to conserve resources and have media focus attention on successes of new administration
- Strong pre-existing outreach to affected communities can blunt bad news

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Questions?

© 2020 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC