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Disruptive Public Meetings and the First Amendment



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CONTENTS

MAY / JUNE 2022

DISRUPTIVE PUBLIC MEETINGS AND THE FIRST AMENDMENT

By: Tom Carr, County Counsel, Washington County, Oregon and Tonya Haas Davidson, City Attorney, City of Greenwood Village, Colorado

The First Amendment clearly protects the right of constituents to speak at public meetings, and on virtually any subject during "open comment" segments. But there are limits, particularly during subject-specific public hearings. Counsel need to distinguish between legitimate guardrails and viewpoint discrimination.

PAGE 6

GPS CHIPPING YOUR EMPLOYEES AND OTHER FOURTH AMENDMENT PITFALLS

By: Amanda Stanley, City Attorney, City of Topeka, Kansas

While local governments have a valid interest in ensuring that public employees conscientiously perform their duties, oversight that strays into the worker's reasonable expectation of privacy will result in constitutional challenges.

PAGE 10

SUCCESS ON APPEAL IN SECTION 1983 CASES

By: Timothy Coates and Ted Xanders, Greines, Martin, Stein & Richland LLP, Los Angeles, California

Section 1983 actions alleging violations by local government actors continue apace, resulting in prolonged litigation. Our authors present strategies and considerations that can help achieve victory on appeal.

PAGE 14

DEPARTMENTS

18 LISTSERV

How Long to a Cashless Society?

By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina and IMLA Board member

A reluctant farewell to the greenback.

20 AMICUS CORNER

***Masterpiece Cakeshop* 2.0 - Antidiscrimination Laws Under Challenge Again**

By: Amanda Karras, IMLA Executive Director and General Counsel

May a website designer refuse to serve same-sex weddings?

24 YOUNG LAWYERS

Ten Things Every Young Lawyer Should Know

By: Patrick Baker, City Attorney, Charlotte, North Carolina

Building a foundation for success in future years.

26 INSIDE CANADA

Overreaching Councillors, Roadway Obstacles, Undisclosed House Defects, and More

By: Monica Ciriello, Ontario 2015

Recent cases of interest.

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EDITOR'S NOTE



BY: ERICH EISELT
IMLA Assistant General Counsel
and Director of Affirmative Litigation

The Times They Are a Changin'

Bob Dylan's iconic lyric blanketed the airwaves 58 years ago, documenting what was already evident: change was afoot across America. The Vietnam War, the Civil Rights Act, Students for a Democratic Society, The Feminine Mystique—ferment and transformation were everywhere. But six decades ago the membership of our predecessor organization, the National Institute of Municipal Law Officers, did not yet reflect that evolution. Photos of NIMLO meetings in prior years depict gatherings overwhelmingly populated by one race and one gender.

Those days have been long gone at IMLA. Our membership continues to reflect an ever more diverse coalition—lawyers of widely differing backgrounds and values, aligned in a common mission to serve local government. That ongoing evolution seemed evident at our recent Mid-Year Seminar, particularly in a generational sense. On the very days that Ketanji Brown Jackson was smashing barriers in a building three miles from our Seminar, we increasingly saw a new cohort of professionals taking the podium, exhibiting competence, capacity--and youth. It is a tribute to their mentors, many of whom were in attendance, and portends good things for their communities and for IMLA.

Our *Young Lawyers* pages in this issue of *Municipal Lawyer* reflect a bit of advice from one such mentor. Patrick Baker, Charlotte City Attorney and former IMLA President, recounts valuable lessons learned and proffers some maxims to drive success even as environments change. Other *ML* content is grounded in more familiar legal matters where change is continually in play: Tom Carr, Washington County (Oregon) Counsel and Tanya Haas Davidson, Greenwood Village (Colorado) City Attorney, report in our cover feature on the state of discourse in public meetings. Amanda Stanley, Topeka City Attorney, provides a feature reviewing the increasing efforts to track government employees. And Amanda Karras, IMLA Executive Director and General Counsel, examines yet another Supreme Court debate over refusal to serve same sex couples, in *Amicus*.

We provide a third feature adapted from a paper presented at the Mid-Year—an incisive discussion of the tactics needed to win Section 1983 appeals, offered by Tim Coates and Ted Xanders of Greines, Martin, Stein & Richland LLP—a team now well-known to IMLA members. And Monica Ciriello continues to deliver a wide-ranging look at current legal matters across the provinces in *Inside Canada*.

Finally, our *ListServ* piece contributed by Brad Cunningham, Lexington (South Carolina) Municipal Attorney and IMLA Board member, comments on an entirely different form of transition, cloaked in a phenomenon almost imperceptibly overtaking us: the gradual extinction of paper currency.

IMLA appreciates the opportunity to be a part of positive change in your community, and we hope you enjoy this issue of *Municipal Lawyer*.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BARBARA A. ADAMS,
General Counsel, Illinois Local Government Lawyers Association and IMLA President

Of the Members, by the Members, for the Members

Attending the IMLA Mid-Year Seminar in Washington DC earlier this month reminded me once again why I enjoy practicing local government law as much as I do. The opportunity to be with so many other professionals who face the same types of issues and challenges in representing government clients is always inspiring. This year's presentations and learning opportunities were excellent, I thought. The questions from the attendees were insightful. The conversations with fellow attendees provided additional perspectives on the programming and the issues. Being in person again was terrific, particularly in such a wonderful venue during spring in the Nation's Capital. New elements like the "dine-around" allowed more of us than ever to meet at area restaurants in small groups and continue our discussions. And for those who took advantage of the hybrid model to attend virtually instead of being in person, the learning opportunities and exchanges of information were valuable to you as well.

Whether we meet face to face or on a screen, the connection is there: while we may practice in different regions, provinces, states, counties and municipalities, there is so much that we can learn from each other through IMLA. And there are so many ways that we can share and pass on to our colleagues what we have learned.

One very impressive part of the Mid-Year Seminar was the opportunity to learn about the great work done by IMLA's Legal Advocacy Program, and to thank all of the attorneys who volunteer their time and legal expertise to prepare *amicus* briefs in cases of importance to local government. A key benefit of IMLA membership is our *amicus* support, available only to IMLA members. Over the years, IMLA has filed hundreds of amicus briefs, educating courts on issues and factors of particular relevance to local government. One indication of IMLA's impact is that our briefs have been cited, occasionally, in United States Supreme Court decisions—as in Justice Breyer's concurrence in the Supreme Court's narrowing of *Reed* earlier this month in *City of Austin v. Reagan National Advertising*. While many of our Supreme Court *amicus* briefs support cases at the merits stage, we also file at the petition stage and are able to influence the Court to accept a case for consideration. The Court grants certiorari in less than one percent of cases submitted to it each year; in the last year it accepted for review three cases in which IMLA had filed amicus briefs, which is a testament to the caliber of our representation and our Legal Advocacy program overall. IMLA's advocacy is definitely not limited to the Supreme Court—we also file numerous *amicus* briefs in federal circuit courts and state appellate-level courts across the country. If you are interested in exploring this opportunity to advocate for local government, please contact Amanda Karras at *akarras@imla.org* to volunteer.

The *amicus* program is just one of many volunteer opportunities offered by IMLA. In a broader sense, our educational programs are so valuable and successful because of the volunteer services that so many members provide—making presentations at the Mid-Year Seminar and Annual Conference, on IMLA webinars and for other special IMLA programs. Upcoming 2022 programs include Canada Day, University Cities, International Comparative Law, and Employment Law.

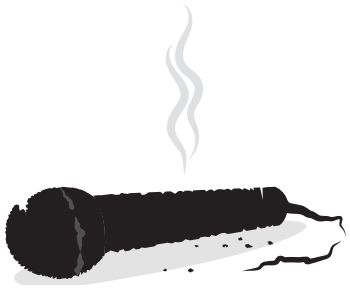
You can volunteer to be a speaker at an IMLA program. The Call for Proposals has been issued for the Annual Conference in Portland, Oregon on October 19-23, 2022. The Program Planning Committee is made up of a diverse group of practitioners who thoughtfully review all proposals in developing our conference programming.

Similarly, this publication– *Municipal Lawyer* – relies on your contribution of substantive articles that will contribute to the education and growth of IMLA local government attorneys. Please contact Erich Eiselt at *eeiselt@imla.org* to propose a topic or work of authorship. And IMLA's excellent webinar series relies on presentations by domain experts; please contact Deanna Shahnami at *dshahnami@imla.org* if you would like to present on a local government law subject.

Together, we can contribute to IMLA in ways that benefit ourselves, each other, and the broader membership. Passing on and sharing your knowledge and experience in one or more of these ways will support practitioners of local government law across the IMLA's membership, in the United States and in Canada. Please reach out and volunteer!

Disruptive Public Meetings and the First Amendment

TOM CARR, *County Counsel, Washington County, Oregon and*
TONYA HAAS DAVIDSON, *City Attorney, City of Greenwood Village, Colorado*



INTRODUCTION

The intent of this article is to provide the local government attorney with a better understanding of public comment policies and practices and the limitations imposed by the First and Fourteenth Amendments to the U.S. Constitution.

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The test of whether government has unconstitutionally "abridged the freedom of speech" depends on the forum where the speech occurred. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 679 n. 11, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885, 201 L.Ed.2d 201 (2018).

PUBLIC FORUMS

In determining whether a limitation on speech is permissible under the First Amendment, courts apply a forum analysis. *Knight v. Montgomery Cty.*, , 470 F. Supp. 3d 760 (M.D. Tenn. 2020). The U.S. Supreme Court has recognized four types of public forums for First Amendment purposes: nonpublic,[1] public, designated public, and limited public. *Hartman v. Thompson*, 931 F.3d 471, 478 (6th Cir. 2019) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009)).

A "quintessential public forum," is typically described as government controlled property such as public streets and parks, where members of the public retain strong free speech rights. Likewise, a government entity creates a designated public forum when it intentionally designates property that traditionally has not been regarded as a public forum for use as a public forum. *Southersby Dev. Corp. v. Borough of Jefferson Hills*, 852 F. Supp. 2d 616 (W.D. Pa. 2012). An example of a designated public forum is holding a public hearing where the public is invited to come and give comment and where comments can be limited to solely one topic. Holding a public meeting creates constitutional rights to attend and record under the First Amendment and recent caselaw.

If a regular meeting agenda includes an opportunity for the public to comment on items not on the agenda (e.g. a "Public Comment" section), a limited public forum is created. Limited public forums exist where the government "makes its property generally available to a certain class of speakers." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998). Content-based restrictions are permissible in a limited public forum, but viewpoint-based restrictions are not. That is, in a limited public forum a speaker can be limited to speaking about a particular topic but not limited to speaking in favor or against it.

Generally, public testimony at governing body meetings is given in limited public forums. Governing bodies are afforded greater freedom to restrict speech in limited public forums. *American Freedom Defense Initiative v. Suburban Mobility*, 978 F.3d 481, 491 (6th Cir. 2020), and may apply restrictions to the time, place, and manner of speech so long as those restrictions are content-neutral, are

narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Knight v. Montgomery Cty.,* 470 F. Supp. 3d 760 (M.D. Tenn. 2020). Access may be restricted by the government, without violating the First Amendment, by content-neutral conditions for the time, place, and manner of access, as long as these conditions are narrowly tailored to serve some significant government interest. *Harris v. City of Valdosta,* 616 F. Supp. 2d 1310 (M.D. Ga. 2009).

The furtherance of the government's purpose of conducting orderly, efficient, and productive meetings has been deemed a satisfactory governmental interest to justify curtailing certain free speech. See *Davis v. Colerain Twp.,* 119CV00455, 2021 WL 3271792 (S.D. Ohio July 30, 2021), and *Harris v. City of Valdosta.,* 616 F. Supp. 2d 1310 (M.D. Ga. 2009) (There is a "significant governmental interest," of a kind sufficient to support content-neutral time, place, and manner restrictions, in conducting orderly, efficient meetings of public bodies.)

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. Regulations that serve purposes unrelated to the content of the expression is deemed neutral, even if they have an incidental effect on some speakers or messages but not others. *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187 (D. Conn. 2005). Content restrictions are allowed in limited public forums even though directed at the content of the message. For example, comments may be restricted to items not already on the agenda. Similarly, policies on employee complaints can be invoked to keep people from addressing a governing body during public comment. *Id.* (First selectman of town board of selectman did not deprive citizen of constitutionally protected liberty interest at board meeting, for purpose of citizen's civil rights procedural due process claim, by preventing citizen from commenting on possible unethical conduct of high-level town employee during unrestricted "public comment" portion of regularly scheduled meeting. While not articulated well at the meeting, the reason the citizen was not allowed to make allegations against an employee at the board meeting was due to the rights of an employee covered by a collective bargaining agreement to challenge claims of employment misconduct before discipline could be applied to him).

Content restrictions in a *limited* public form, such a public hearing, are also allowed. *American Freedom Defense Initiative*, 978 F.3d at 491 (If the speech falls outside the purview of the topic, then a government can restrict speech if the restriction is "reasonable" and viewpoint neutral).

Once the government opens the debate, it may only "regulate features of speech unrelated to its content" through reasonable "time, place, or manner" only. *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014). Any restriction or exclusion must be reasonable in light of the purpose served by the forum and viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806 (1985).Viewpoint discrimination in limited public forums is wholly impermissible and never allowed. *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021). The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose. *Cornelius,* 473 U.S. at 811.

TIME, PLACE AND MANNER REGULATIONS

Time.

Allowing for "public comment" agenda items doesn't require a public board to allow every angry person to "comment," however. When government creates a designated or limited public forum, for First Amendment purposes, it is not required to indefinitely retain the open character of the facility. *McDonald v. City of Pompano Beach,* 20-60297-CIV, 2021 WL 3741646 (S.D. Fla. Aug. 24, 2021). Limiting the total time devoted for public comment as well as limiting the time of each speaker to three minutes has been deemed a reasonable time restriction. *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10th Cir. 2007).

Place (on the agenda).

Content-related restrictions on speech in public meetings have been upheld when the speaker is meant to speak only during a specific part of the agenda but wanders off topic into free expression. If you ask someone to lead the public body in the pledge of alle-

Continued on page 8



Tom Carr is the County Counsel for Washington County, Oregon. He previously served as City Attorney in Boulder, Colorado. He has twelve years of private practice experience in New York and Seattle. His prior government service includes eight years as the Seattle City Attorney and four years as an Assistant United States Attorney for the Eastern District of New York, specializing in organized crime civil RICO cases.



Tonya Haas Davidson is the City Attorney for Greenwood Village, Colorado. Since 1993 she has been involved in municipal government as both a deputy city attorney/prosecutor and then assistant city/county manager for Broomfield, Colorado. During her 7 years in management, she kept her law degree active and dabbled (some might say interfered) in any legal issue that caught her interest. By 2010, Tonya realized that she ought not to be a city manager or anyone whose correspondence was subject to disclosure under Colorado's Open Records Act, for that matter. She returned to municipal law full time in 2010, becoming Greenwood Village's first in-house legal counsel where she candidly advises and counsels her clients on everything under the sun.

giance and they go off-script, the chair can cut them off. Only the "public comment" portion of the meeting provides a limited public forum for purposes of free speech.
In *Gundy v. City of Jacksonville*, 528 F. Supp. 3d 1257 (M.D. Fla. 2021), the council president appropriately interrupted a pastor and turned off the pastor's microphone during the prayer invocation at a council meeting when the pastor started to criticize the council and mayor. The action was not deemed to be viewpoint discrimination, as would support municipal liability under § 1983 for violating the pastor's right to free speech, because the action was sought to preserve the invocation's intended purpose of solemnizing the proceedings by inviting lawmakers to reflect upon shared ideals and common ends. Asking the pastor to "keep it spiritual," was consistent with the municipality's viewpoint-neutral policy on invocations.

Manner.
While restrictions on speech in a limited public forum necessary for the orderly conduct of business have been deemed reasonable, when the restrictions become viewpoint-based and/or are applied in a heavy handed or ham-fisted manner, courts tend to look unfavorably on the policy itself. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is ... blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

You can enforce time restrictions on speakers by turning off the microphone when their time has expired, but don't name the cut-off switch after a particular gadfly. In *Zinna v. Bd. of Cty. Comm'rs*, 05-CV-01016, 2008 WL, 2185907 (D. Colo. May 23, 2008), a County Commissioner who was the subject of "investigative journalism" by Mr. Zinna directed County resources toward research on Zinna's background and a private investigator to report on Zinna. Ssheriff's officers began following Zinna, and the County Commissioner muted Zinna's microphone at a public meeting, naming the kill switch after him. (Zinna also suspected that the website ColoradoWackoExposed.com "ColoradoWacko" was launched with the support of county officials. This website included a mugshot of Zinna, his criminal history, a list of civil judgments against him, a warning not to engage in business with him, and a note encouraging Zinna's girlfriend to "move on." Apparently to ensure that the information was received as intended, several of Zinna's friends and business associates were also sent anonymous packages containing paper copies of the materials posted on the ColoradoWacko website.) *Zinna v. Congrove*, 680 F.3d 1236, 1238 (10th Cir. 2012). Despite all of this, a jury only awarded Zinna $1709 in damages and $8000 in attorneys' fees, rebuffing his claim for $503,000 in fees and damages.

One of the most challenging aspects of this scenario from the local government attorney's perspective is that the rules are managed by the presiding officer. Cutting off a person when time is up is easier when the presiding officer disagrees with the person. It is human nature to allow people making positive or innocuous comments go on while muting those shouting at the board.



Limiting comments and discussion that may likely "wander from the subject in question and unduly prolong the meeting is a judgment call that a presiding officer and parliamentarian must make without the benefit of leisure relection."



SPECIFIC POLICIES AND REGULATIONS
Content-related Restrictions.
As previously stated, content-related restrictions are allowed during public hearings on a specific topic. That is, public comment can be confined to the matter being heard. Limiting comments and discussion that may likely "wander from the subject in question and unduly prolong the meeting is a judgment call that a presiding officer and parliamentarian must make without the benefit of leisure reflection." *Jones v. Heyman*, 888 F.2d 1328, 1334 (11th cir. 1989).

Prohibiting public comment about matters under current litigation is also okay, even if the rule is imposed after the litigation has begun. *Weinberg v. Vill. of Clayton,* 537 F. Supp. 3d 344 (N.D.N.Y. 2021) (Rule deemed viewpoint neutral and reasonable for a limited public forum as it did not selectively silence any particular view or message).

Likewise, prohibitions regarding allegation of employee misconduct are allowed where there is a policy addressing how employee complaints are handled. *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187 (D. Conn. 2005).

Subjective Restrictions.
Public participation rules for township meetings disallowing "profane," "disrespectful," or "threatening" language have been deemed view-

point-neutral and reasonable restrictions by a township where the speaker was merely asked to stop speaking disrespectfully; the policy invited residents to present critical comments so long as they were not done in a disruptive manner, and the policy furthered the government's purpose of conducting orderly, efficient, and productive meetings. *Davis v. Colerain Twp.,* 1-19-CV-00455, 2021 WL 3271792 (S.D. Ohio July 30, 2021).

But prohibitions of "abusive," "irrelevant," "offensive," "intolerant," or "inappropriate," or "personally-directed" comments" have not passed constitutional scrutiny. In *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021), the school board (*NOTE – a disproportionate amount of these First Amendment cases involve school boards…*) had a rule (Policy 903) that prohibited "abusive," "irrelevant," "offensive," "intolerant," or "inappropriate," or "personally-directed" comments from the public. Positive comments about the board were of course allowed. The school board's solicitor cut off certain speakers/plaintiffs solely because, in his opinion, their comments were "irrelevant" and "abusive." The Federal District Court hearing the motion for injunction against enforcement of Policy 903 stated that "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

Likewise, restrictions prohibiting speech that is "offensive," have been deemed unconstitutional. The Supreme Court has specifically held that prohibiting "offensive" speech is an unconstitutional restriction on protected speech. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–300, 204 L.Ed.2d 714 (2019); *see also Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") Similarly, the Supreme Court has also found the term "abusive" overly broad in other contexts, reaching conduct outside the "fighting words" category of unprotected speech. *Gooding v. Wilson*, 405 U.S. 518, 525, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The phrases "intolerant," "inappropriate" and "otherwise inappropriate" would appear to thwart even more protected speech than "abusive." *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020, at *7 (E.D. Pa. Nov. 17, 2021).

A somewhat contrary opinion came out of the Southern District of Ohio in *Davis v. Colerain Twp.,* 119CV00455, 2021 WL 3271792 (S.D. Ohio July 30, 2021) that same year when that court deemed a policy disallowing "inappropriate, offensive, hateful, or racist speech" and rules of public participation for township meetings disallowing disrespectful speech not to significantly compromise recognized First Amendment protections.

But consider the facts of *Davis* versus the facts of *Marshall.* How the speakers are treated seems to have something to do with the outcome of the case:

Marshall involved a school board, and worse, its attorney, prohibiting people from commenting for the fully allotted five minutes at public meetings if their comments were deemed to violate the school board's Policy 903 prohibiting "abusive," "irrelevant," "offensive," "intolerant," or "inappropriate" comments or comments "personally-directed" at board members. After being told by the board's attorney that they "were done" at one meeting, the plaintiffs were allowed to speak for their full five minutes at future meetings, but there was a police presence that the plaintiffs argued chilled their free speech. They sought an injunction from the court barring the school board from enforcing Policy 903.

The school board argued at trial that it had to continue enforcing its rule because "allowing such speech would undoubtedly lead to violence, etc., which does not occur now as a result of the limited application of [Policy 903] by the District." However, the District provided no evidence to support its assessment that the requested relief would "undoubtedly" cause "violence, etc." and the Court pointed out that the primary instances in which speakers became heated at the school board meetings involved yelling by board representatives over the disputed invocations of the Policy over "disruptive" or "abusive" or "offensive" speech when it was deemed critical of the board. It was the court's opinion that the requested injunctive relief could actually *decrease* the risk of violence at the meetings and granted the preliminary injunction enjoining the District from enforcing the specifically challenged Policy terms (not all of them, just the problematic ones). Terms that were not challenged were the prohibition of "obscene" comments, the "reasonable decorum" requirement, or the requirement to notify law enforcement of threats. *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020, at *10 (E.D. Pa. Nov. 17, 2021)

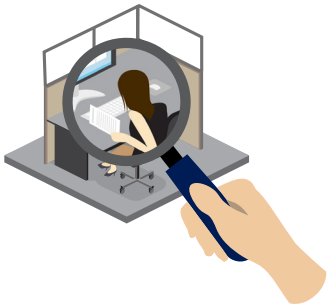
In *Davis* -–– not a school board case -- the Rules of Public Participation for public meetings stated that "[t]he use of profane, disrespectful, or threatening language or gestures will not be tolerated." If a citizen's comment is declared disruptive by a member of the Board, then a majority of the Board may consent to law enforcement escorting the citizen from the meeting. Ms. Davis was upset about a video she posted being removed by the Police Department's Facebook page, and from being told that she could not make "disrespectful" comments during a public meeting. Unlike the plaintiffs in *Marshall*, however, the Board in *Davis* did not use their policy to prevent Davis from speaking at the public portions of its meetings, but merely told her to stop speaking disrespectfully at several meetings. *Davis v. Colerain Twp.,* 119CV00455, 2021 WL 3271792, at *5 (S.D. Ohio July 30, 2021).

The *Davis* result also differed from the decision of the Sixth Circuit Court of Appeals in *Ison v. Madison Local Sch. Dist. Bd. of Educ.,* 3 F.4th 887, 891 (6th Cir. 2021). In *Ison* - yet another school

Continued on page 34

GPS Chipping Your Employees and Other Fourth Amendment Pitfalls

AMANDA STANLEY, *City Attorney for the City of Topeka, Kansas*



As a government employer, there are times I think we all shake our heads and wish we worked in the private sector. Things would be a lot easier if we didn't have to worry about pesky little considerations like the Constitution and how it interacts with §1983 claims. While this topic could be never ending, dealing with constitutional questions arising under the First Amendment, Second Amendment, Fourth Amendment, and so on, my article focuses on several different issues centering on the Fourth Amendment.

This discussion was actually inspired by a phone call I received from a city about six years ago while working at the League of Kansas Municipalities. I was asked if the city could GPS chip their employees in order to monitor their location during the workday. I flippantly answered without thinking that a Fitbit would be cheaper; however, the ability to easily track your employees has exploded over the last several years, making this question something governmental employers should not treat flippantly. How does a government employer carefully walk the line between being a good employer and steward of the taxpayers' money, on one hand, while respecting employees' constitutional protections on the other?

The Fourth Amendment to the U.S. Constitution declares "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Notwithstanding the Fourth Amendment, "[w]hen employers do search areas in which an employee has an expectation of privacy, courts do not apply the same analysis applied in the criminal context. Generally, government employers need neither a warrant nor probable cause to conduct a search that complies with the Fourth Amendment. Courts grant government employers wide latitude, requiring reasonableness under all the circumstances involved. (Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989).)" Tracy Glanton, "Constitutional Protections in Local Government Employment: Overview," Practical Law Practice Note w-003-7117.

The Supreme Court has outlined the factors governing public employer searches in areas where employees have a reasonable expectation of privacy:

> In determining the appropriate standard for a search conducted by a public employer in areas in which an employee has a reasonable expectation of privacy, what is a reasonable search depends on the context within which the search takes place, and requires balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace. Requiring an employer to obtain a warrant whenever the employer wishes to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unreasonable. Moreover, requiring a probable cause standard for searches of the type at issue here

would impose intolerable burdens on public employers. Their intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this standard, both the inception and the scope of the intrusion must be reasonable. *O'Connor v. Ortega*, 480 U.S. 709, 710, 107 S. Ct. 1492, 1494, 94 L. Ed. 2d 714 (1987).

To sum this up in plain language, courts assess the legality of a workplace search as follows:

(1) Did the plaintiff have a reasonable expectation of privacy? Under this first prong, the court looks at:
-whether there was an actual (subjective) expectation of privacy; and
-whether the expectation was reasonable.

If the court finds there was no reasonable expectation of privacy, and therefore the Fourth Amendment does not apply, the plaintiff's case fails, and the test stops.

(2) If the court finds that the plaintiff did have a reasonable expectation of privacy, was the search was reasonable? Under this prong, the court looks at:
-whether the search was justified when it began; and
-whether the scope of the search reasonably related to the reason for the search and was not excessively intrusive.

To find for the government employee, the court must find that the employee had a reasonable expectation of privacy and that the search was not reasonable.

Section 1983 creates a cause of action against any person depriving another of a federal constitutional or statutory right while using state government authority.

A Section 1983 claim requires the following elements:

1. Conduct of a person ("person" includes a municipality and municipal employees);
2. Action under color of state law;
3. The action deprives a right protected by the US Constitution or federal law; and
4. Causation.

(42 U.S.C. § 1983).

This article examines the role of the Fourth Amendment in several different employment contexts.

1. GPS Tracking of Cars.
In *United States v. Jones*, the United States Supreme Court held that the Government's attachment of a global positioning system (GPS) device to a vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 946, 181 L. Ed. 2d 911 (2012).

In light of the fact that the attachment of a GPS device to a vehicle is a search, when can a government employer track a vehicle? In *Cunningham v. New York State Dep't of Lab.*, 21 N.Y.3d 515, 518, 997 N.E.2d 468, 470 (2013), the State of New York, suspecting that one of its employees was submitting false time reports, attached a GPS device to the employee's car. The employee was not informed of the GPS device and the device monitored all of the car's movements for a month, including evenings, weekends and several days when the employee was on vacation. Ultimately the employee was terminated for multiple employment violations including approving his secretary's timecard for hours worked while he was visiting her apartment. The court held that the state's action was a search within the meaning of the state and federal constitutions; however, the search did not require a warrant as it fell under the workplace exception to the warrant requirement as recognized in *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L.Ed.2d 714 (1987). Despite not requiring a warrant, ultimately the court still found the search did not comply with the state or federal constitution because it was unreasonable:

> We cannot find, however, that this search was reasonable in its scope. It was, in the words of the *T.L.O.* Court quoted in *O'Connor,* "excessively intrusive." It examined much activity with which the State had no legitimate concern—i.e., it tracked petitioner on all evenings, on all weekends and on vacation. Perhaps it would be impossible, or unreasonably difficult, so to limit a GPS search of an employee's car as to eliminate all surveillance of private activity—especially when the employee chooses to go home in the middle of the day, and to conceal this from his employer. But surely it would have been possible to stop short of seven-day, 24–hour surveillance for a full month. The State managed

Continued on page 12



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to remove a GPS device from petitioner's car three times when it suited the State's convenience to do so—twice to replace it with a new device, and a third time after the surveillance ended. Why could it not also have removed the device when, for example, petitioner was about to start his annual vacation?

It is true that none of the evidence used against petitioner in this case resulted from surveillance outside of business hours. Ordinarily, when a search has exceeded its permissible scope, the suppression of items found during the permissible portion of the search is not required (*see United States v. Martell,* 654 F.2d 1356, 1361 [9th Cir.1981] [excessive length of detention did not taint search where nothing new was learned "during the unlawful portion" of the detention]; *United States v. Clark,* 891 F.2d 501, 505 [4th Cir.1989] [same]). But we hold that rule to be inapplicable to GPS searches like the present one, in light of the extraordinary capacity of a GPS device to permit "[c]onstant, relentless tracking of anything" (*Weaver,* 12 N.Y.3d at 441, 882 N.Y.S.2d 357, 909 N.E.2d 1195). Where an employer conducts a GPS search without making a reasonable effort to avoid tracking an employee outside of business hours, the search as a whole must be considered unreasonable. That conclusion concededly requires suppression of the GPS evidence here; the State has disclaimed any reliance on the balancing test that we use when deciding whether to invoke the suppression remedy in administrative proceedings (*see Matter of Boyd v. Constantine,* 81 N.Y.2d 189, 597 N.Y.S.2d 605, 613 N.E.2d 511 [1993]). *Cunningham v. New York State Dep't of Lab.*, 21 N.Y.3d 515, 522–23, 997 N.E.2d 468, 472 (2013).

If a city is going to GPS track its vehicles, here are some things that should be commonly be considered and/or performed:

1. Notify employees they are subject to monitoring if they use city-issued vehicles or other property installed with GPS.
2. Inform employees they have no expectation of privacy as to their location and whereabouts when using city property installed with GPS.
3. Obtain the written consent of employees to be monitored by GPS on city-issued devices.
4. Verify that the GPS surveillance programs comply with local legal requirements.
5. Limit the monitoring of employees to work time to avoid intruding on employees' personal lives outside of working hours.

See Thomas Wilson, "Privacy in the Employment Relationship," Practical Law Practice Note 6-517-3422 for more helpful tips.

Local Governments can learn valuable lessons from best practices used by companies deploying tracking technologies. Before utilizing GPS tracking, think through the following:

1. Do you truly understand how the tracking technology works, including what data it collects, where it sends data, and the parties that can see the collected data?
2. What privacy policies are you willing to implement to protect the data?
3. Have you ensured that your employee notifications regarding privacy accurately reflect the tracking technologies used?
4. Have you verified if any state or federal laws will affect your use of the technology?

For more information on best practices, check out: Michael Kasdan, "Tracking Technologies: Privacy and Data Security Issues," Practical Law Practice Note w-006-5583.

2. Cell Phones / IT.

Employees may have a reasonable expectation of privacy in personal communications such as emails and text messaging. An employer can reduce that expectation of privacy through the adoption of a policy outlining the areas subject to search, such as files on the city's network, files on a government phone, etc. Before beginning a search, make sure there is a legitimate justification for the search such as a non-investigatory work-related purpose (need to find a file to respond to an open records request) or a legitimate investigation of work-related misconduct. Make sure to evaluate the reasonableness of the scope of the search. In the City of Topeka, both the Human Resources Director and the City Attorney must sign off on the search of an employee's files.

There is no blanket caselaw rule drawing a distinction between an employer-owned device and a personal device. Follow the analysis. What matters is the reasonable expectation of privacy.

When crafting a good policy for employee use of government-provided email systems and phones, include statements that the employee has no expectation of privacy and that files may be searched in response to open records requests or in response to litigation. It is important to outline limits on personal use of government equipment and email at the beginning and be clear on what the city's policies are for encryption and password protections.

Wiretap Law Exceptions?

"The Wiretap Act allows an employer to intercept and use a communica-

tion when the interception is at least one of the following:

- Of a communication that is on the electronic communications system provided by the employer, when the interception is necessary to protect the rights or property of the employer (18 U.S.C. § 2511(2)(a)(i)).
- Consented to by at least one party to the communication (18 U.S.C. § 2511(2)(d)).
- Provided to a person authorized by law to intercept the communication, as defined in Section 101 of the Foreign Intelligence Surveillance Act of 1978 (18 U.S.C. § 2511(2)(a)(ii)).
- By way of an electronic communication system that is readily accessible to the public (18 U.S.C. § 2511(2)(g)).
- Made using "any telephone or telegraph instrument, equipment or facility, or any component thereof" furnished to the employer by a service provider in the ordinary course of its business and used by the employer in the ordinary course of its business (18 U.S.C. § 2510(5)(a)). This exception commonly applies to a telephone service provider's inadvertent interception of a telephone conversation during the provider's routine maintenance. More recently, the exception has been analyzed in the context of email or internet service providers that capture data about their account holders for marketing and advertising purposes. Some judges have adopted a narrow view of the exception (see, for example, *Kirch v. Embarq Mgmt. Co.*, 702 F.3d 1245, 1251 (10th Cir. 2012), *Hall v. Earthlink Network, Inc.*, 396 F.3d 500, 504-05 (2d Cir. 2005), and *In re Google, Inc.*, 2013 WL 5423918, at *8 (N.D. Cal. Sept. 26, 2013)). Other judges have taken a broader approach (see *In re Google Privacy Policy Litig.*, 2013 WL 6248499, at *10-11 (N.D. Cal. Dec. 3, 2013)).

Scott A. Faust, Dixie M. Morrison, and Claudia C. Khoury-Yacoub, "Electronic Workplace Monitoring and Surveillance," Practical Law Practice Note 1-506-8862.

What about Public Record Laws? In Kansas, a local government is required to provide records regardless of where they are stored. It is extremely important that personnel policies are clear that an employee must cooperate with an open record request. Policies should include requirements that any work done on a personal email or phone be forwarded to a government account, statements that substantive work should not be done on a personal account, and a statement that the employee understands and agrees to comply with the Open Records law. It is essential that you understand your state's record laws BEFORE receiving and responding to a request.

3. Drug Testing and the Fourth Amendment.

In *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624, 109 S. Ct. 1402, 1417, 103 L. Ed. 2d 639 (1989), the United States Supreme Court held that tests of an employee's blood, urine and breath were searches under the Fourth Amendment; however, the government could test for drugs without a warrant and without individualized suspicion of drug use when there is a special need outweighing the employee's privacy interest. Random testing is generally only allowed for safety sensitive positions. While I have always found it fascinating that in Kansas the governor has been deemed a safety sensitive position, see K.S.A. 75-4363, generally, safety sensitive positions are your truck drivers, holders of commercial driver's licenses, prison guards, and other similar types of positions. For non-safety sensitive positions, employers may ask any employee to submit to testing if there is reasonable individualized suspicion the employee is engaged in on-duty drug use or is suffering impairment. When drafting a policy to deal with random drug testing, the policy should be carefully implemented to ensure it is truly random and includes all employees of a particular class. When a policy is drafted to deal with individualized suspicion, the policy should be narrowly construed.

4. Biometrics.

What are biometrics? According to Homeland Security, biometrics are "unique physical characteristics, such as fingerprints, that can be used for automated recognition." The use of biometrics is greatly expanding. Just think about how far cell phones have come in the past ten years. First it was a fingerprint, and now, even your face that can unlock a screen. Local governments may be tempted to use biometrics for physical security and access to the worksite, to access technology devices, for covid screenings (temperature checks), and even attendance.

In addition to possible Fourth Amendment amendment concerns, there are multiple cause of actions that can result from use of biometrics as an employer. These include Genetic Information Nondiscrimination Act (GINA), Religious discrimination, Age discrimination, Stored Communications Act, Electronic Communications Privacy, and State law claims, including unlawful acquisition or retention of biometric identifiers or improper destruction. Think through the new implantation of biometrics methodically to ensure liability is minimized. ML

Success in Section 1983 Appeals—Litigation Tips and Strategies

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INTRODUCTION

If you litigate cases under 42 U.S.C section 1983, you will almost inevitably wind up on appeal at some point. Section 1983 cases fill the federal appellate courts. This is largely because the issue of qualified immunity can be raised at any point in the proceedings, and if it is denied, in most cases the defendant has the right to an immediate appeal. As one federal appellate judge has observed, "there are few days of oral argument in the life of an appellate judge that do not involve at least one qualified immunity interlocutory appeal." *Romo v. Largen*, 723 F.3d 670, 680 (6th Cir. 2013) (Sutton, J. concurring.)

In addition, section 1983 is the primary means by which plaintiffs can assert constitutional tort claims against municipalities, and the availability of attorney fees provides an incentive for plaintiff's attorneys to seek relief under the federal statute in addition to, or sometimes in lieu of, ordinary state tort claims. The result can be large damage and fee awards in cases involving significant constitutional issues, that are often subject to intense publicity.

The purpose of this article is to address several issues that come up frequently in appeals in section 1983 cases. Some are recurring or open legal issues, while others are tactical issues. The goal is to provide a quick refresher course for experienced practitioners, as well as an introduction to important appellate section 1983 issues for attorneys new to the field,

I. ISSUES CONCERNING THE TIME TO APPEAL.

A. Final Judgments.

As in any other federal civil case, a losing defendant in a section 1983 case has the right to appeal from a judgment following either a bench or jury trial. 28 U.S.C. section 1291.

B. Interlocutory Orders under 28 U.S.C. section 1292.

Orders granting, denying, or modifying an injunction are immediately appealable under 28 U.S.C section 1292 (a). It should be noted that an order that (1) has the practical effect of denying an injunction; (2) could cause serious or irreparable harm; and (3) can only be "effectually challenged" by immediate appeal, is also subject to immediate appeal. *Carson v. American Brands*, Inc., 450 U.S. 79, 84 (1981) A prime example that may arise in the context of section 1983 claims is an order granting a motion to dismiss a claim under F.R.C.P. 12(b)(6) where the claim contains a prayer for an injunction and the other *Carson* factors are met. *See*, *Natural Resources Defense Council v. County of Los Angeles*, 840 F.3d 1098, 1101-02 (9th Cir. 2016)

28 U.S.C. Section 1292(b) provides a mechanism for a party to request the appellate court to review a controlling question of law prior to entry of judgment. The district court, either on its own or upon application of a party, may certify an interlocutory order for review by making a finding that the order in question "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Once the district court enters such an order, the party seeking an appeal has 10 days in which to apply to the circuit court to permit the immediate appeal. Section 1292(b) certifications are particularly useful in civil rights cases, because the underlying issue of law is often one to which there is a substantial difference of opinion.

C. Interlocutory Denials of Qualified Immunity.

All section 1983 litigators are, or certainly should be familiar with

qualified immunity. The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982). It involves a two-prong inquiry: (1) whether the facts that a plaintiff has alleged (for a motion to dismiss) or shown (for summary judgment or trial) make out a violation of a constitutional right; and (2) whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). Where a defendant raises both grounds, a court is free to decide whether to address one or both prongs. *Id.* at 236.

The Supreme Court has held that qualified immunity is an immunity from suit, not just liability, and hence should be raised and decided at the earliest opportunity. Thus, it can be asserted on a motion to dismiss under FRCP 12(b)(6), and if the motion is denied, that order (unlike a typical order denying a motion to dismiss) is immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The same is generally true of an order denying a motion for summary judgment based on qualified immunity. *Id.*

In *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), the Court held that where a district court denies a motion for summary judgment on qualified immunity based upon its determination of what constituted clearly established law, the order is immediately appealable. The Court reasoned that such an order fell within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Id.* at 527. This is because determination of the legal question as to whether the law was clearly established, was independent of the merits of the underlying claim. *Id.* at 527-28. More significantly, interlocutory appellate review is required because, as noted, qualified immunity is an immunity not simply from liability, but from participation in litigation at all. Hence, the benefits of that protection would be lost if an officer was required to undergo a full trial, before being able to obtain review of a district court's failure to grant immunity. *Id.* at 525-27.

However, in *Johnson v. Jones*, 515 U.S. 304 (1995), the Supreme Court held that not all orders denying summary judgment based on qualified immunity are immediately appealable. In *Johnson* the plaintiff asserted that various defendants had either unlawfully beat him or failed to stop other officers from doing so. *Id.* at 307. The officers moved for summary judgment based on qualified immunity, arguing that there was no evidence they had participated in the beating. *Id.* at 307-08. The district court denied summary judgment, finding that there was evidence that defendants were, contrary to their statements, in or near the room where the beating occurred, and that this created a genuine issue of material fact barring summary judgment. *Id.* at 308. The defendants appealed, and the appellate court dismissed for lack of jurisdiction. *Id.*

The Supreme Court affirmed, noting that *Mitchell* held that an order denying summary judgment that was based upon the district court's application of law, i.e., assessing whether or not it was clearly established for purposes of qualified immunity, was subject to immediate review. *Johnson*, 515 U.S. 304. In *Johnson* however, the defendants were not contesting whether the district court properly applied the law, but rather, whether the district court was correct in assessing that there was sufficient evidence to support plaintiff's account of what transpired. As the Court observed, the question whether a factual dispute is "genuine" is the sort of task performed by trial courts, not appellate courts. *Id.* at 313, 316.

In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court reaffirmed the broad scope of appellate review afforded by *Mitchell*. There, the district court had denied defendants' summary judgment motion on qualified immunity, based on its determination that there was a genuine issue of material fact, but without specifying the particular conduct that was subject to the factual dispute. *Id.* at 312-13. The



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plaintiff argued that the order was not appealable under *Johnson*, but the Supreme Court rejected the contention, noting that "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, *see* Fed. Rule Civ. P. 56, and *Johnson* surely does not mean that every such denial of summary judgment is nonappealable." *Id*. The Court emphasized that "*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." *Id*. at 313. Instead, "summary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity" such as whether the law was clearly established with respect to the conduct at issue. *Id*.

Thus, the Court held that the order was appealable, and that in light of the district court's failure to specify precisely what conduct was disputed, the task for the appellate court was "'to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed'" and then apply the law to those facts. *Id*. (citing *Johnson*, 515 U.S. at 319).

At bottom, *Behrens*, stands for the proposition that just because a district court denies summary judgment based upon a genuine issue of material fact, that statement in and of itself does not foreclose appellate review. Under such circumstances it is incumbent upon the defendant to show that the alleged factual dispute is not *material* to resolving the qualified immunity issue. This is underscored by the Court's decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). In *Plumhoff* the district court had denied summary judgment, finding a triable issue of fact on whether the force used by defendants was excessive. However, the Supreme Court dismissed concerns about appealability, noting that no party was really disputing the factual record, but simply the legal significance of the facts:

> The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.
>
> *Id*. at 2019.

It is worth noting that there is currently a circuit split on whether an order denying summary judgment on qualified immunity based on conflicting inferences that might be drawn from otherwise undisputed evidence, forecloses immediate appellate review under *Johnson*. *See Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring and collecting cases). This issue is particularly significant given the increased use of video in support of motions for summary judgment, as the fact of the video itself may be undisputed, but conflicted inferences may be drawn from what is depicted. *See*, *e.g.*, *Raines v. Consulting Associates*, 883 F.3d 1071, 1074-75 (8th Cir. 2018) (district court denial of summary judgment based on conflicting inferences to be drawn from video forecloses appellate review under *Johnson*). Several federal appellate court judges have decried the lack of clarity in applying *Johnson* and expressly requested the Supreme Court to address the issue. *Tuuamalemalo v. Greene*, 946 F.3d 471, 480, 485 (9th Cir. 2019) (W. Fletcher, J., concurring) (*Johnson* has caused "analytic chaos," and the Supreme Court should "revisit the issue soon"); *Colston v. Barnhart*, 146 F.3d 282, 286 (5th Cir. 1998) (DeMoss, J., dissenting from denial of rehearing en banc) (writing in "hopes" of "attract[ing] the Supreme Court's attention to the increasingly complex panorama of doctrine and dissent" arising from *Johnson*).

The Supreme Court has made it clear that just because an officer may have the right to an immediate appeal of the denial of qualified immunity, this does not mean that the appellate court will have jurisdiction to review the denial of summary judgment on a *Monell* claim against the municipality that employs the officer. In *Swint v. Chambers County Comm'n*, 514 U.S. 35, 38, (1995) the Court held that where the district court denied qualified immunity to employees, the fact that the officers had the right to appeal did not allow the municipal defendant to appeal the denial of summary judgment premised on the issue that no policymaker had engaged in any conduct causing the alleged violation. The key to the Court's ruling was that resolution of the *Monell* issue was not inextricably intertwined with the qualified immunity issues that were properly before the appellate court.

However, where resolution of the qualified immunity issue effectively resolves any claim against the municipality, then an appellate court may exercise pendent appellate jurisdiction over the denial of summary judgment as to

the municipality. The best example of this is where the qualified immunity issue is premised on the fact that no constitutional violation occurred in the first place. *See*, *Huskey v. City of San Jose*, 204 F.3d 893, 904-905 (9h Cir. 2000); *Mattox v. City of Forest Park*, 183 F.3d 515, 523–24 (6th Cir.1999); *Moore v. City of Wynnewood*, 57 F.3d 924, 929–31 (10th Cir.1995).

One point to bear in mind is that just because you can take an immediate appeal from denial of qualified immunity, does not mean that it is always wise to do so. For example, although an order denying a motion to dismiss under FRCP 12(b)(6) based on qualified immunity is immediately appealable it is often a good idea to forego an immediate appeal and instead later raise the issue by way of motion for summary judgment where the facts of the case have largely been established. The standard of review in assessing the sufficiency of a complaint for purposes of a motion to dismiss is extremely favorable for plaintiffs and taking an appeal of a complaint with extremely broad allegations can result in an opinion denying qualified immunity that might have ramifications down the road in the same, or other cases.

II. ISSUE SELECTION AND THE MERITS PRONG OF QUALIFIED IMMUNITY.

Issue selection is critical in prosecuting any appeal, and particularly important in an appeal concerning qualified immunity. In evaluating a potential qualified immunity appeal, one of the initial decisions is whether to raise arguments on the merits prong as well as the clearly established law prong. Many defense attorneys almost reflexively raise both grounds on appeal. However, in many circumstances, determination of whether a constitutional violation actually occurred at all is highly fact dependent. The result is that in an appeal from denial of summary judgment, the appellate court must broadly construe the plaintiff's evidence, and in any appeal following trial the court will generally presume the jury found every fact sufficient to support the judgment. Often, the presence of "bad facts" with respect to the merits of whether a constitutional violation occurred, strongly suggest that any appeal should be limited to arguing that even assuming the plaintiff's version of the incident is correct, the propriety of the officer's conduct was not clearly established based upon existing case law.

Conversely, are there circumstances in which there may be a strong case for arguing only merits-based issues on appeal, without addressing whether the right was clearly established in light of governing case law? In our experience, such situations are few and far between. Almost inevitably, if you are appealing on the merits of a consti-

Continued on page 32



LISTSERV

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How Long Before a Cashless Society?

Recent travel to the International Municipal Lawyer's Association Mid-Year Seminar in Washington, DC, has brought the issue of a "cashless society" to the forefront of my mind. We will reserve space later for my story, but first the issues.

What is a cashless society? This is, of course, where physical currency becomes obsolete and is no longer negotiable. Evidence is everywhere of the trend in this direction, but who knows if or when some countries will ever get there. According to an article in *Bankless Times*, Canada is the most likely country to scrap physical money and go all electronic.

The article uses a "formula" if you will, to come up with a "Cashless Score" on a scale of 0 to 100. Canada checked in on the "Cashless Scale" with a score of 79.1. Rounding out the Top Ten in order are Hong Kong 76.8, Singapore 76.2, New Zealand 75, Japan 74.1, Australia 72.3, Norway 72.2, United Arab Emirates 72.1, Switzerland 70.9 and Finland 70.0. (The United States is not in the Top 20)

Bankless Times cites an article by Finance Writer James Andrews in setting forth the advantages and disadvantages of "going cashless:"

The advantages of a cashless society:

- Digital paper trails: Money laundering and tax fraud will be harder to hide as digital transactions will create a record of every payment made and received.
- Convenience abroad: Debit cards, credit cards and e-wallets allow for quick and easy payments when travelling.
- Time: Handling, storing, transporting and depositing paper money takes time and resources so less cash in circulation saves time and money.
- Reduced crime: Illegal drugs trade and modern-day slavery rely heavily on cash to facilitate and disguise payments. Although some will turn to the dark web, less cash in circultion could help reduce crime rates

The disadvantages of a cashless society:

- Tech-lag: For those who are unfamiliar with technology or unable to afford compatible mobile devices, there is a risk they will be left behind in a cashless world.
- Access: Vulnerable people and those unable to have access to credit and debit cards may have no way to pay for goods and services.
- Reliance: In a cashless society, everything will be online and glitches, outages, and innocent mistakes could cause problems.
- Cyberattacks: Hackers are the bank robbers of the electronic world. In a cashless society, you could be more exposed to cybercriminals.
- Overspending: When all transactions are completed by tapping, swiping or punching in a PIN number it may be harder for some individuals to keep track of day-to-day spending.
- Online Fraud: With more data online there is a higher risk of being victim to security leaks, Trojan horses, phishing scams, viruses, worms, fraud, data swapping

Here at the good old Town of Lexington, we take electronic payments and offer cashless alternatives via telephone and the internet. There are, as we have already said, advantages and disadvantages to the program in place here. I am sure my municipal colleagues can share in some of those. In theory, I can understand both the advantages and disadvantages as described above. I sometimes, feel, however that a few of the issues raised above should switch sides of the ledger.

As to my own story, I decided to use my recent trip to DC as a measuring stick of the issues herein. Let's start with the cab drive to the airport. I was met here with an option of cash or card. (For purposes of this article "card" means either debit or credit card). I chose cash, wisely, because I would later encounter quite a bit of difficulty spending the little bit of cash I had on hand. (As a side note, I remember the old travel adage "I have plenty of cash and a credit card in case of emergency." This adage has now flipped to "I have my card and some cash in case of an emergency.")

The airline refused to take cash for beverage service, so my cash remained in the wallet. I thought, "No problem – I'll use the cash at the connecting airport." Well, on my layover I was not only met with an airport-wide refusal to take cash, but also a refusal to accept cards. Every kiosk, restaurant or retail business required you to scan a QR code with your phone and order off a menu or select items for purchase using the app to which you were directed by the QR code. There was absolutely no cash in the

airport, and there were no card swipe terminals.

My initial thoughts were about folks that aren't carrying their phone, are technologically challenged, have old technology where all a phone did was make calls, or some folks that simply don't like and will not deal with hand-held computers. The elderly, visually challenged? I suppose they are out of luck. Can anyone spell ADA?

I sat in a restaurant trying to get their app to work with my phone, and it never would. I asked an attendant if all the restaurants were this way, and he said the entire airport worked off that app. We together concluded that I was simply out of luck for getting something to eat. So, I left, but not before hearing half a dozen other grumblers who left hungry because they could not take advantage of this so-called "improvement." I attempted one other dining location, and a very nice lady helped me with the app and showed me a "trick" to making it work. After choking down an over-priced burger, I couldn't help but shudder at the thought "So, now there is a "trick" to getting something to eat? Just downright scary, in my humble opinion. Oh, and as a parting thought I could not help but wonder why ATMs were placed in this cashless venue.

After the second leg of my cashless flight, I arrived in DC and summoned Uber for a ride to the hotel. No cash here either, which tuned out to be a true convenience for once. I still had cash in my pocket, however. Upon arrival at the hotel, of course I had to present a card for check-in, which has been the practice for some time.

After checking in and unpacking, I visited the hotel gift shop to buy and send some snail mail cards to my daughter in South Carolina. Hooray, they accepted cash… so I used some more. A trip to lunch was met with a tabletop QR Code if I wanted to know what was available to eat. Cash was accepted for payment, but tender resulted in some sideways looks. A couple of restaurants refused cash but couldn't do much about it if you left a cash gratuity, so I seized this opportunity to spend a little more of my cash whenever possible.

Later that evening, I attended a ball game which proved to be possibly the most intriguing portion of my card or cash travel investigation. At the ballpark, it was completely cashless just like the airport. Even the guys yelling "Hot dogs, get your hot dogs" refused to accept cash and were carrying around either a hand-held terminal or a cell phone attachment so they could take cards.

At the concession stand, lines were four times as long as usual because the cashless system was slow and, in some cases, non-responsive. It took several minutes for each customer to pay. So much for the "quicker and more convenient argument," I thought. At a point early in the evening, the "cashless system" crashed which resulted in the concession folks throwing in the towel and just giving away the food. That's right, giving it away for nothing. (Can anyone say "Free Beer?")

The cashless system had no backup plan - absolutely none - in case of technology failure. My mind wandered to hungry folks trying to buy what little groceries they could afford with their last dollar and being denied food because technology failed. Worse yet were some of those same folks who wouldn't have a card to use even if technology WAS working. How do the disadvantaged function in a potentially cashless society?

In a cashless society, are late payments "forgiven" in cases of technology failure? Not much help if your power has already been cut and the food spoiled. I admit to being a little bit of a reactionary and even a fogey if you want to use that term, but the thought of a cashless society totally dependent on technology scares me. What happens if you have already eaten in a restaurant and technology fails before you can pay the bill? (No cash to use in case of emergency) How long must you wait, or how does the business collect payment? You can't put the merchandise back like you could in a clothing store.

More each day I see this "cashless trend" continue. But I am not and may never be ready for it. Perhaps those younger than me can accept and embrace it, and it will likely improve with time. But will it be in my lifetime? Although some may differ, I am hoping not…

I'll revert back to trying to end my columns with a little humor. For that purpose, we remain on the recent IMLA trip to DC. I was the last to board a crowded elevator on the GROUND floor of a building, and as the door began to close a gentleman raced up to it and stopped it from shutting. He asked ""Going Up?" as he peered through the door and prepared to step in. I jokingly responded "No, we're not." To this, he responded "Oh, pardon me," and stepped back away from the elevator allowing the door to close. The crowded elevator burst out in laughter, and one refrain of "Man, you ain't right!"

Also, on the humor front I share the following true court / lawyer stories:

A deposition was being taken in a civil case. Attorney #1 was questioning the witness, and Attorney #2 was representing the witness. The two attorneys had clashed before and were known not to like each other. At one point, a short break was called for, and Attorney #2 spoke to the witness privately. Questions when deposition resumed… Attorney #1: "What were you just talking about with Attorney #2?" (No attorney-client privilege issues here, right?)…

Witness: "That you're an a******."

Overheard in a courtroom hallway as a lawyer spoke to her client in a domestic case: "Look, your ex and their lawyer politely said in their response that you're a piece of c***, and I'm not honestly confident they'd lose that argument."

The prosecution rests, your honor. ML

AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Masterpiece Cakeshop 2.0 – Anti-Discrimination Laws Challenged Again

The Supreme Court has granted certiorari in 303 *Creative v. Elenis*, to tackle an issue that it has twice deflected in recent Terms: whether someone purveying goods or services to the public can be exempted from a law prohibiting discrimination based on their claim of free speech.1 The case is a near carbon copy of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) and presents issues similar to those in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020). In both *Masterpiece Cakeshop* and *Fulton*, the Court failed to resolve the tension between the free speech/free exercise clauses and anti-discrimination laws, but as the saying goes, perhaps the third time's a charm. To understand the arguments in *303 Creative*, it is necessary to revisit *Masterpiece Cakeshop* and *Fulton*.

Masterpiece Cakeshop v. Colorado Civil Rights Commission

In July 2012, a same-sex couple visited Masterpiece Cakeshop, a Colorado bakery, and requested that the owner, Mr. Phillips, create a custom cake for their wedding. Phillips declined, telling them that he does not create cakes for same-sex weddings because of his religious beliefs.

The Colorado Anti-Discrimination Act (CADA) prohibits discrimination in places of public accommodation based on sexual orientation and other protected characteristics.[2] CADA defines "public accommodation" to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes."[3]

The couple filed a complaint alleging that the bakery had discriminated against them in a place of public accommodation because of their sexual orientation, violating CADA. The Colorado Civil Rights Commission (Commission) affirmed an Administrative Law Judge (ALJ) holding in favor of the couple, and Masterpiece appealed, arguing the First Amendment provided an exemption to CADA. The Colorado Court of Appeals affirmed, rejecting Masterpiece's free speech and free exercise arguments.

The Supreme Court granted certiorari to answer the following question: Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

In a narrow 7-2 ruling, authored by Justice Kennedy, the Court decided in favor of the baker, concluding that in adjudicating whether his religion "must yield to an otherwise valid exercise of state power," the Commission failed to consider the case "with the religious neutrality that the Constitution requires."[4] This case presented, as Justice Kennedy put it, "difficult questions as to the proper reconciliation of at least two principles," pitting the authority of a State and its governmental entities to protect the rights of gay couples who face discrimination when they seek goods or services against "the right of all persons to exercise fundamental freedoms under the First Amendment..."[5]

Justice Kennedy acknowledged that while the First Amendment protects religious and philosophical objections to gay marriage, as "a general rule … such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[6]

However, the Court went on to explain, instead of treating Mr. Phillips' claims with the "neutral and respectful consideration" to which they were entitled, the Commission evinced "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[7] Specifically, during a public hearing, one Commission member had stated: "Freedom of

religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust …And to me it is one of the most despicable pieces of rhetoric that people can use – to use their religion to hurt others."[8] The Court also found evidence that the Commission had declined to find illegal discrimination by other bakers who refused to bake cakes for same-sex weddings based on religious objections. In these other cases, the Commission took no action, which the Court saw as further evidence of individualized hostility toward Mr. Phillip's religion.[9]

The Court concluded by noting "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[10]

Fulton v. City of Philadelphia

The Court next attempted to resolve the tension between anti-discrimination laws and the free /free exercise clauses in *Fulton v. City of Philadelphia*. This case pertained to Philadelphia's practice of contracting with outside agencies like Catholic Social Services (CSS) to place children with foster families. In 2018, the City learned that CSS would not consider same-sex couples as prospective foster parents and informed CSS that such a refusal violated the nondiscrimination provision in the parties' contract as well as the City's Fair Practices Ordinance (FPO), which forbids discrimination because of sexual orientation in places of public accommodation.

Section 3.21 of the contract prohibited CSS from rejecting a child or family because of protected characteristics, including sexual orientation "unless an exception is granted by the Commissioner … in his/her sole discretion."

When the City ceased referring foster children to CSS because CSS refused to certify same-sex couples as foster parents, CSS sued, arguing that the City was violating CSS's free exercise and free speech rights. One of the important questions in this case was whether the Supreme Court should overrule *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990), which has long prevented religiously-based exemptions to neutral laws of general applicability.

The Supreme Court found in favor of CSS on its free exercise challenge, but declined to overrule *Employment Div. v. Smith*.[11] In a decision authored by Chief Justice Roberts, the Court held that Section 3.21 of the City's contract was not generally applicable under Smith because it allows for exemptions at the discretion of the Commission; meaning that the City needed to meet heightened scrutiny for the requirement to survive, which it could not.[12]

The Court therefore weighed whether the policy could survive strict scrutiny under *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993). Under this rubric, a governmental regulation or policy can only survive strict scrutiny if it advances "interests of the highest order and is narrowly tailored to achieve those interests."[13]

The City argued that its policy satisfied strict scrutiny because it serves three compelling interests: "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children."[14] The Court rejected the first two reasons outright. As to ensuring equal treatment for gay and lesbian foster parents, the Court agreed this is a "weighty" interest but "[t]he City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[15] Because the Court concluded that the City had violated CSS's free exercise rights, it did not rule on the free speech issues.

303 Creative v. Elenis

That brings us to the current dispute. Lorie Smith designs websites through her company, 303 Creative, which is based in Colorado. She would like to start creating wedding websites, but she does not want to design those that celebrate same-sex marriage, due to her sincerely held religious beliefs. Ms. Smith would also like to publish a statement on her website that she will not create wedding websites for same-sex couples, for religious reasons.

As described above, CADA's "accommodation clause" prohibits public accommodations from refusing to provide services based on a number of protected characteristics, including sexual orientation.[16] CADA's "communication clause" prevents public accommodations from communicating that someone's patronage is unwelcome because of sexual orientation.[17]

Ms. Smith sued Colorado, claiming that CADA violates her free speech and free exercise rights. The Tenth Circuit ruled that the statute does not violate the First Amendment,[18] although it rejected Colorado's arguments that CADA regulates conduct, not speech[19] and that the speech at issue is that of the third party (in this case, the same-sex couple).[20] The court concluded that despite compelling speech and imposing a content-based restriction, the accommodation clause is nevertheless constitutional and survives

Continued on page 22

Cakeshop *cont'd from page 21*

strict scrutiny.[21] It reasoned that the clause is "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'"[22]

Next, the Tenth Circuit concluded the "communication clause" did not violate Ms. Smith's free speech rights because the State could "prohibit speech that promotes unlawful activity, including discrimination,"[23] even though "compelled speech is deeply suspect in our jurisprudence … given the unique harms it presents."[24]

303 Creative petitioned the Supreme Court for certiorari on both the free speech and free exercise issues, but the Supreme Court only granted certiorari on the following question: whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

Implications for Anti-Discrimination Laws / Next Steps

Local governments have a strong interest in preventing discrimination against their constituents, both because of the harm to the individuals affected and the economic harms it can inflict on the locality itself. When IMLA filed our brief in *Masterpiece Cakeshop*, we noted that 21 states and more than 100 local governments had anti-discrimination provisions protecting citizens from discrimination based on sexual orientation and presumably more localities have these protections now. If the Court holds in favor of Smith, states and local governments will likely have to contend with challenges to public accommodation laws on First Amendment grounds. Such exceptions could easily be expanded to other protected classes and would be difficult to administer.

As was discussed at length during the oral argument in *Masterpiece Cakeshop*, if the Court were to allow exceptions from anti-discrimination laws based on religious objections to same sex marriage, it would open the door to discrimination against other protected statuses, such as sex, race, and religion. For example, Justice Kagan asked the attorney arguing for the baker:

JUSTICE KAGAN: … Same case or not the same case, if your client instead objected to an interracial marriage?
MS. WAGGONER: Very different case in that context.
JUSTICE KAGAN: Not the same. How about if he objected to an interreligious?
MS. WAGGONER: Similar case, assuming that the objection is to –
JUSTICE KAGAN: Similar to what?
MS. WAGGONER: Similar to Mr. Phillips [the baker]. That would be protected under the Compelled Speech doctrine if the objection is to the message being conveyed in that expression.
JUSTICE KAGAN: You are just saying race is different?[25]

Justice Ginsburg later asked the Solicitor General (arguing in support of the baker) about this same slippery slope issue:

JUSTICE GINSBURG: … So you -- you have already said that you put -- might put race in a different category, right?
GENERAL FRANCISCO: Yes, Your Honor.
JUSTICE GINSBURG: I have your answer on race. How about gender? How about national origin … and religion?
GENERAL FRANCISCO: I think pretty much everything but race would fall in the same category, but as this Court made clear in the Bob Jones case, the IRS could withdraw tax-exempt status from a school that discriminated on the basis of interracial marriage, but I'm not at all sure that it would reach the same result if it were dealing with a Catholic school that limited married student housing to opposite-sex couples only ….[26]

Thus, it seems clear that the advocates seeking exemptions from anti-discrimination laws would also advocate for exemptions beyond sexual orientation, including perhaps all categories except race. There is of course no guarantee that litigants would not also push for exemptions for race discrimination as well.

In terms of administrability of exemptions, the oral argument in *Masterpiece Cakeshop* gives a window into the difficulty local officials will face in determining whether an exception should apply. During a colloquy between Justice Ginsburg, Justice Kagan and counsel for the bakery about who is "speaking" at a wedding, counsel for the bakery indicated that in addition to the couple and officiant, the artist speaks at the wedding, including the baker, florist (if arrangements are custom designed), the person who designs the menu and invitation and perhaps the jeweler.[27] But counsel for the baker indicated that a hairstylist and makeup artist would not be engaging in protected speech at a wedding, despite, as Justice Kagan quipped, the fact that "artist" is in the makeup artists' professional designation.[28]

As the foregoing demonstrates, the lack of a workable standard is very troubling and further underscores the implications of this case. Creating exceptions to these laws will not only undermine important civil rights protections, but will lead to protracted litigation. If a

baker and florist are creating expression at a wedding, but a makeup artist and hairstylist are not, local officials will have a challenging time drawing appropriate lines in determining what speech would be protected and how to enforce their antidiscrimination ordinances.

IMLA will be joining an amicus brief being filed by the State and Local Legal Center in support of Colorado. The case will be briefed this summer, argued sometime in the fall, and then we can expect a decision sometime before the end of June 2023. ML

Notes

1. The petition also had a free exercise claim, but the Supreme Court did not grant certiorari on that question.
2. Colo. Rev. Stat. § 24-34-301 et seq.
3. Colo. Rev. Stat.. §24–34–601(1).
4. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).
5. *Id*. at 1723.
6. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.
7. *Id*. at 1729.
8. *Id*.
9. *Id*. at 1730.
10. *Id*. at 1732.
11. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77, 210 L. Ed. 2d 137 (2021). Justice Alito, who was joined by Justices Thomas and Gorsuch, issued a vociferous (and lengthy) concurrence in the judgment only, indicating they would overrule Smith given its "severe holding" and that its interpretation can result in "startling consequences." *Fulton*, 141 S. Ct. at 1883-84.
12. *Id*. at 1878.
13. *Id*. at 1881 (internal quotations omitted).
14. *Id*.
15. *Id*. at 1882.
16. Colo. Rev. Stat. § 24-34-601(2)(a)
17. *Id*.
18. Because the Supreme Court is only reviewing the speech issue, this article does not discuss the Tenth Circuit's Free Exercise analysis.
19. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1177 (10th Cir. 2021), cert. granted in part, 142 S. Ct. 1106 (2022).
20. *Id*.
21. *Id*. at 1178-80.
22. *Id*. at 1179.
23. *Id*. at 1182-83.
24. Id. at 1181.
25. *Masterpiece Cakeshop*, Oral Argument Transcript, p. 22.
26. *Id*. at 32.
27. *Id*. at 10-12.
28. *Id*.



YOUNG LAWYERS

PATRICK BAKER, *City Attorney, Charlotte, North Carolina*

Ten Things Every Young Lawyer Should Know

February 11, 1997 was a Tuesday. Beyond an afternoon meeting with one of the four partners in the firm, I couldn't tell you much about that day or how I was feeling about my career which at that point had spanned three and one-half years. I had participated in individual meetings with each of the partners before and there was nothing about the timing of this meeting that concerned me. Little did I know this meeting would be one of the two or three most important meetings in my professional career.

The memo I received in that meeting was titled "Performance Concerns": Six and one-half single sided and double-spaced pages in length but figuratively weighing as heavy as a whole ream of paper. The first page and one-half of the memo consisted of three introductory paragraphs to set the tone for the remainder of the memo. The four partners used the final introductory paragraph to make clear that they all believed I had a great deal of potential and that if I had faith in myself, the identified problems would improve within the to be established timetable set out in the end of the memo. The "What Are The Problems?" section comprised the next three and one-half pages of the memo and fell into four main categories: planning and organizational deficiencies, perceived unreliability, lack of assertiveness and self-confidence and lack of financial productivity/billable hour deficiencies. The "Where Do We Go From Here?" section of the memo made up the final page and one-half. The suggestions included closer supervision by one of the partners to improve workflow management, improved billing techniques and participation in Toastmasters or a Dale Carnegie confidence course. The memo ends with an acknowledgement that these problems affect my future with the firm and that I was being allowed twelve months to turn things around.

Long story short, I didn't need the full twelve months to turn things around. I left the firm four months later to become an Assistant City Attorney in the Durham North Carolina City Attorney's Office. My career progression from that point forward includes being named Durham City Manager in 2004; Durham City Attorney in 2008; Charlotte City Attorney in 2019 and IMLA President in 2020. Despite the professional success I have enjoyed since February of 1997, I have not forgotten about the memo. It has been beside me literally and figuratively every step of that 25-year journey having been tucked inside the front drawer of every office desk I have worked behind during that time. Just a reminder of how far I have traveled on this professional journey to keep me focused on continued improvement.

Based on a now almost 30-year career of a few lows followed mostly by highs, below is a list of ten of the most important things (in no particular order) I have learned over this journey that I think every young lawyer should know.

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1. **Be relevant and present –** Assuming you are with a firm or legal office, you should appreciate the fact that somebody thought enough of you to hire you in your current position. From your first day on the job, you should be thinking about the impact you have on the office. While your initial assignments may not be particularly impactful or exciting, you are building now for your future assignments and opportunities. Take these early assignments as an opportunity to show that your work matters and that you matter in your workplace. Get noticed in a positive light.

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2. **Do really good work –** You spent three grueling years in law school and you passed the bar exam. Now is not the time to let off the gas. These first three to five years in practice will be the foundation for the level of success you will have for the remainder of your career. Though you are in your least competent stage of your career, it is critically important for you to get your career off to a good start. No matter how small or seemingly unimportant your initial assignments are, they are the most important assignments you have ever had in your career thus far. Treat them as such.

3. **Set reasonable expectations for yourself –** Pick your business cliches and drop them in here: Rome wasn't built in a day. Your career is a marathon, not a sprint. Bottom line is if your 30-year career peaks in years one through five, then you will probably not have a successful career. Give some thought to what you want to accomplish in your first few years in the profession. What would reasonable success look like from your perspective? What does success look like from your supervisor's perspective? Make sure they are aligned if at all possible.

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4. **Do not be afraid to ask for help –** If I was ranking these suggestions based solely on my early career, this would be at the top of my list. Your supervisors were not born in their mid-40's with 15 or so years of legal experience. They all started off just like you. They know you don't know everything and may need some additional guidance or assistance in completing your assignments. Understand that you don't get extra points for trying to do it all by yourself, particularly if the result does not meet expectations. To be clear, your supervisors are not expecting you to sit in their office and essentially pepper them with so many questions that they effectively are completing your assignment for you. But if you show that you are putting in the work on your own, the occasional questions and check ins will likely be well received and will certainly increase the chances that the final product will hit the mark.

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5. **Be aware of your reputation and accept constructive criticism –** The biggest problem with the memo is that I did not see it coming after a little more than three years with the firm. Sure, this should have come up in my previous evaluations and my supervisors acknowledged they could have done a better job identifying and addressing these issues earlier in my career. The cold reality though is that the memo was ultimately a reflection on me and not them. Take full advantage of opportunities to get honest feedback and don't feel like you have to wait for your annual performance review to get this information. This leads me to the second part of the recommendation which is to seek out and accept constructive criticism. There will ALWAYS be something in your performance that can be improved, and you must be willing to constructively receive and accept this information. I am not suggesting that you have to enjoy hearing negative comments on your performance. But if your clients or your supervisors have an issue with your work performance, you need to know it and address it as soon as possible. Otherwise, the issue becomes a permanent part of your reputation which could have a negative impact on your career path and progression.

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6. **Pay attention to your LQ (Likeability Quotient) –** The best thing I had going for me professionally on February 11, 1997 was that all four of the managing partners genuinely liked me. Interestingly enough, I have always felt that their personal feelings for me prevented them from sharing their professional concerns with me earlier in my career. It is easy for lawyers to discount subjective interpersonal skills in favor of more objective measures such as work output, billings and results. But make no mistake about it; a disagreeable co-worker can kill overall office productivity and morale regardless of their level of individual productivity or experience. Whether they know it or not, difficult employees have lower career ceilings. I am not suggesting that you have to be the office social director or Mr./Ms. Fun. I am suggesting that you not be seen as the office cancer. If you get negative feedback regarding your interpersonal skills and affect, address it as quickly as possible.

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7. **Don't assume time will always be on your side –** I get it. You are in your late 20's or early 30's. You are 25 or so years younger than me and you have plenty of time to figure things out. The perception of time moves a lot faster than you think and there will be plenty of distractions heading your way that will deceive you into putting things off and dealing with them later. Resist that urge and pay close attention to your career now. Set some one, three, and five year goals and keep track of them as you go. If adjustments need to be made, make them sooner rather than later. Just trust me on this one!!

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8. **Cherish your family, friends and your health –** The sooner you can find your work-life balance, the better it will be for you and those you love. All of the professional accomplishments and accolades in the world will not be nearly as impactful if you don't have anybody to share them with … or you are not around to fully appreciate them. Take vacation days when you can. Develop healthy eating, sleeping and exercise habits. When you are with family and friends, be present and in the moment with them. The work will be on your desk waiting for you when you are in the office.

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9. **It's never too early to think about your legacy –** None of us are promised tomorrow. Each day is an opportunity to add a brick or two to your legacy. How do you want to be thought of today and remembered tomorrow? What is the legacy you want to leave in the profession? In your community? In your family? And what are you doing about it now?

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10. **Say thank you to those along your path and always remember the Golden Rule –** This one is self- explanatory but so incredibly important. Over the course of your career, there will be dozens of people that will make an impact on you. Some obviously more than others. Show your appreciation for them when you can. It's the right thing to do. ML

INSIDE CANADA

MONICA CIRIELLO
Ontario 2015

Overreaching Councillors, Roadway Obstacles, Undisclosed House Defects, and More

City Councillor Used Authority to Influence By-law Investigation
Investigation Report IC – 14166-0621, Integrity Commissioner Office for the City of Kawartha Lakes, March 4, 2022

Kawartha-Lakes---IC-14166-0621---Investigation-Report.pdf (kawarthalakes.ca)

A By-law Officer (Officer) with the City of Kawartha Lakes (City) received a complaint about signage at a local business and attended to undertake an investigation. When on site the Officer was greeted by an employee who provided information about the signage. During the investigation, a City Councillor (Councillor) got out of his vehicle and intervened in the discussion. The Councillor told the Officer to investigate other signs in the City and gave both parties his business card advising the employee to call him if he needed anything as he sits on the By-law Appeals Committee. The Officer filed a complaint with the Integrity Commissioner, alleging that the Councillor interfered with an investigation in contravention of the City's Code of Conduct and Ethics for Members of Council and Local Boards (Code).

HELD: Councillor violated Code.

DISCUSSION: The Councillor acknowledged that the Code applied when a Council Member is acting in his or her public capacity but suggested that he was merely acting as a private citizen when he arrived at the local business. The Integrity Commissioner disagreed, finding that there would be no reason for a private citizen to intervene in a discussion between an employee and an Officer. The Councillor provided his business cards to both parties to ensure they everyone knew who he was and advised the employee to call him if he needed anything, which could be viewed as an odd statement but for the Councillor acting in his public capacity. *Greatrix v. Williams*, 2018 ONMIC 6 provides clarity on Councillor involvement in by-law matters; a Councillor must refrain from influencing a specific by-law investigation at a "micro" level, however a Councillor at a "macro" level is entitled to engage in policy, accountability, and the process of making the by-law to be enforced. The Integrity Commissioner found that the Councillor was acting at a "micro" level by inserting himself into by-law enforcement. By attempting to exert authority and/or influence over the Officer during the investigation, the Councillor violated the Code. The Integrity Commissioner recommended that the Councillor's remuneration from the City be suspended for one month.

Damages and Maintenance Standards for Municipal Roadways
Singh v. City of Langford, 2022 BCCRT 422 https://canlii.ca/t/jnn5c
The Applicant was driving on a single lane municipal roadway in the City of Langford (City) when he hit a rock damaging his vehicle. The Applicant filed an application seeking damages, claiming that the City failed to keep the roadway clear of debris. The City denied liability, claiming it is unreasonable to be held responsible for damage caused by debris.

HELD: Application dismissed.

DISCUSSION: The Tribunal reviewed dash camera footage from the Applicant's vehicle, showing undisputed evidence that there was a single rock in the Applicant's lane; it was not a part of a larger pile nor were there any other rocks on the road. The Applicant submitted photos of the roadway where the accident occurred on various days which shows that the roadway was clear of debris and rocks. The Tribunal noted that this evidence did not assist the Applicant's application, as it only demonstrated that the City maintained the roadway. The Applicant failed to provide additional evidence as to the rock's origin or how long it was on the roadway. No evidence was submitted that the City received and ignored any reports about the rock prior to the accident. The issue for the Tribunal was whether the City

breached its obligation to maintain the road, free and clear of debris, and if so whether the Applicant is entitled to damages. The City has a duty to use reasonable care to keep its roadways in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety, *Craigie v. Lehigh Hanson Materials Limited,* 2020 BCSC 12. Furthermore, case law prescribes that policy decisions, opposed to operational decisions are generally immune from tort liability. The Applicant failed to prove the City's negligence caused the accident. Application dismissed.

Jordan Does Not Apply as Delay Preceded SCC Decision

York (Regional Municipality) v. 1085638 Ontario Limited, 2022 ONCA 263 https://canlii.ca/t/jnf54

The Appellants were charged and convicted under the *Building Code Act, 1992,* S.O. 1992 and *Planning Act,* R.S.O. 1990, c. P.13 for operating a garden centre in the City of Vaughan (City), a municipality within York Region. The Appellants sought leave to appeal the convictions, which was granted by the Appeal Judge and restricted to two issues.

HELD: Appeal dismissed.

DISCUSSION: The Appeal Judge granted the Appellant's appeal restricting it to two issues that the Justice of the Peace (JP) addressed: the issue of a legal non-conforming use and the issue of delay under s. 11(b) of the *Canadian Charter of Rights and Freedoms* providing the right to a trial within a reasonable time. The JP held that the Appellant could not rely on a legal non-conforming use argument as the garden centre building was built after the zoning bylaw was passed. The Court of Appeal assessed whether the *Planning Act* requires that the non-conforming use be in active operation on the day that the zoning by-law comes into force, as there was evidence to suggest that the garden centre did not operate until several years later. The Appellants submitted that the finding the business must be in operation on the day when the zoning by-law comes into effect was inconsistent with the wording of the *Planning Act*. The Court of Appeal disagreed, finding that the language in s. 34(9) of the *Planning Act* was quite clear and not open for any other interpretation.

As for the argument of delay under s. 11(b) of the *Charter*, the JP held that the Appellants failed to demonstrate any prejudice due to the delay. The City conceded to the Appellant's argument that the JP and the Appeal Judge erred by not applying the test in *R v. Jordan,* 2016 SCC 27. The *Jordan* framework provides timelines for when matters are to be heard, as well as a temporary exceptional circumstance to excuse delay in cases that were still in the system when the decision in *Jordan* was released. The Court of Appeal held that all of the delays in this matter preceded the decision in *Jordan* by more than 4 years, meaning that the error conceded by the City was of no issue and the 11(b) challenge for delay was properly dismissed by the JP.

No Recovery where Homeowners Fail to Disclose Defects to Municipality

Wilde et al v. The Rural Municipality of Taché et al, 2022 MBCA 31 https://canlii.ca/t/jnlrz

In 2007, the Applicants worked with a Contractor to design and construct a home, and the plans were prepared and approved by the Rural Municipality of Taché (Municipality). During excavation, the Contractor advised the Applicants that the foundation materials were modified, and upon final inspection the Municipality's inspector failed to notice that the foundation was not built in compliance with the plans that were originally provided. The Municipality approved the construction and issued an occupancy permit. In 2018, the Applicants observed cracks in the home's foundation and hired a third-party inspector who confirmed construction damage. The Applicants brought forward an application for damages against the Contractor and the Municipality (collectively, the Respondents) which was dismissed for delay under the *Limitation of Actions Act,* CCSM c L150 (*Act*). The Applicants appealed, arguing that the application judge misapprehended the evidence and misapplied the test under the *Act*.

HELD: Appeal dismissed.

DISCUSSION: The Appeal Court referenced *Olford et al v. Springwood Homes Inc,* 2019 MBCA which provides that a decision by an application judge to extend time under the *Act* "is discretionary and is afforded a high degree of deference unless there is an error of law, a palpable and overriding error of fact or mixed fact and law or the decision is so clearly wrong to amount to an injustice." The Applicants argued that the evidence in the application was misapprehended and should be provided additional time. The Court of Appeal disagreed and was not persuaded that the application judge committed an error in focusing on the defects in the design and construction by the Respondents, as well as determining when the Applicants were aware of the problems with the foundation. The application judge accurately referenced *Johnson v. Johnson,* 2001 MBCA 203, which provides that "the applicable standard is whether the applicant

Continued on page 28

knew or ought to have known that there *could be* a link sufficient to establish a cause of action and not that there actually *is* such a link" The Appeal Court was satisfied the Applicants knew that the materials in the foundation were changed in 2007 and that the home was not built in compliance with the Municipality's approved plans as such the Applicant should have been aware to investigate the construction defects earlier. The application judge correctly stated the law and made no error in factual findings. The Appeal Court dismissed the application and awarded costs in favour of the Respondents.

Solicitor not Needed to Go In-Camera Under Exception to *Municipal Act, 2001*

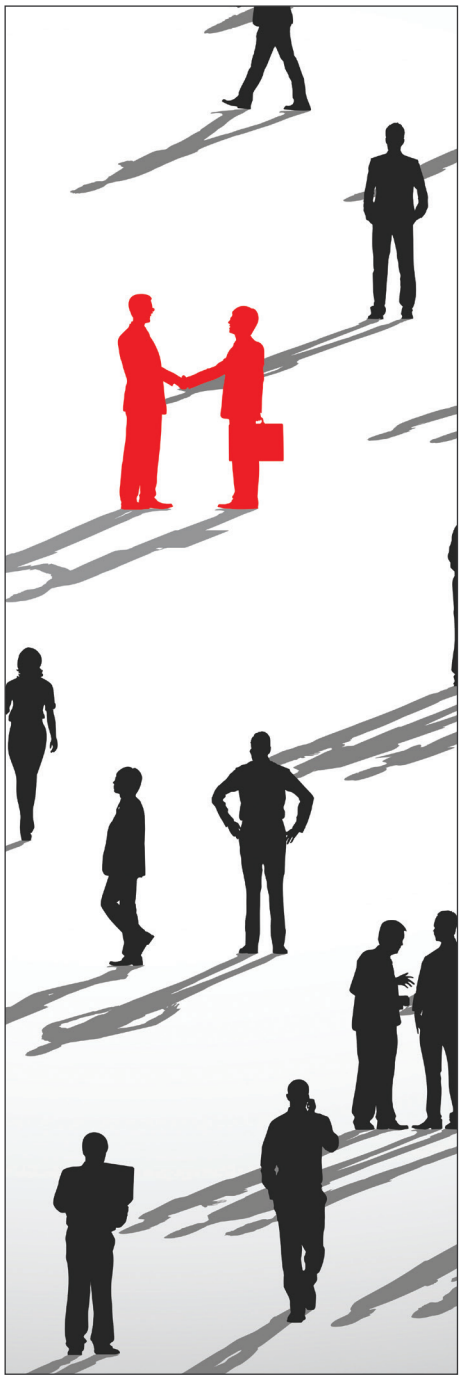
Collingwood (Town of) (Re), 2022 ONOMBUD 1 https://canlii.ca/t/jlvk1

The Ontario Ombudsman (Ombudsman) received a complaint that the Town of Collingwood (Town) Council went into in-camera meetings in February and June 2018 without falling into a closed meeting exception under the *Municipal Act, 2001*.

HELD: In-camera meetings fit within the closed meeting exception.

DISCUSSION: The *Municipal Act, 2001* requires all meetings of council, local boards and committees be open to the public unless there is a prescribed exception. In February 2018, Town Council voted to establish a judicial inquiry to examine the relationship between elected officials and a private corporation which purchased a 50% stake in the Town's municipal power utility. Town Council went in-camera under the open meeting exception for solicitor client privilege permitted under s. 239(2)(f) of the *Municipal Act, 2001* to receive legal advice pertaining to the judicial inquiry. In reviewing the minutes, the Ombudsman was satisfied that the in-camera portion fit within the solicitor-client exception under the *Municipal Act, 2001*.

In June 2018, Town Council proceeded in-camera under the same solicitor-client exception as they did in February, to receive an overview of the judicial inquiry process. During this meeting, no solicitor was present, and the information was provided by the Town CAO, which also included details on three different quotes to retain a new solicitor. When Town Council returned to open session, Council passed a motion to appoint a new solicitor to the judicial inquiry process. The complaint to the Ombudsman provided that it was inappropriate for Town Council to go in-camera under the exception for solicitor-client privilege without a solicitor present. The Ombudsman relied on an earlier decision, *Greater Sudbury (City of) (Re)*, 2017 ONOMBUD 2, which provides that the exception can apply to certain circumstances where another person, including a CAO, conveys information or advice from a solicitor to a Council. The Ombudsman was satisfied that the three solicitor quotes presented by the CAO during the June meeting were subject to solicitor-client privilege even though no solicitors were present. The Ombudsman distinguished between a solicitor's generic hourly rate and a solicitor quote, concluding that the latter contains specific information based on each firm's suggested strategy for representing the Town on the judicial inquiry. Furthermore, the quotes were provided in confidence. The Ombudsman was satisfied that the in-camera council discussion about quotes from prospective solicitors fell within the scope of seeking and receiving legal advice under s. 239(2)(f) of the *Act*. The Town did not contravene the *Municipal Act, 2001* when it went in-camera in February or June 2018. ML



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tutional claim, it is worthwhile to also appeal based upon the clearly established law prong. Indeed, a significant debate about whether an underlying constitutional violation occurred at all, invariably strengthens any argument that the officer's conduct should not be held to violate clearly established law.

The paradigm case concerning a merits-based qualified immunity argument is *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, the Court held that the undisputed evidence in the form of video of the police pursuit and resulting use of force established that the force was reasonable as a matter of law and hence the plaintiff had no Fourth Amendment claim. In *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014), citing *Scott*, the Court similarly found that the officers were entitled to judgment because the undisputed evidence established that the force used to terminate a pursuit was reasonable as a matter of law. With the increased availability of video evidence, it is anticipated that there will be more opportunities to assert merits-based motions for summary judgment in use of force cases.

The Supreme Court's decision in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) provides strong authority in support for merits-based arguments in wrongful arrest cases. The case has very helpful language concerning the broad discretion given to officers in evaluating the totality of circumstances relevant to probable cause to arrest, and in assessing the credibility of witnesses. *See id.* at 588-89.

In some circumstances the reasonableness of a search may be established as a matter of law. For example, in *City of Ontario v. Quon*, 560 U.S. 746 (2009), the Court found that the plaintiff police officer did not have a reasonable expectation of privacy with respect to a department issued text pager, and hence there was no violation of the Fourth Amendment based upon monitoring text messages on the device.

Moreover, the existence of a genuine issue of fact need not defeat an appeal from a merits-based motion for summary judgment or judgment after jury trial, depending upon the nature of the constitutional right at issue. In the Fourth Amendment context, it is all too easy to forget that the applicable standard of reasonableness *encompasses reasonable mistakes of fact*. In sum, an officer need not be correct, just reasonable. This is underscored by the Court's enunciation of the excessive force standard in in *Graham v. Connor*, 490 U.S. 386 (1989), where the Court observed that just as "[t]he Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises," so too "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." 490 U.S. at 396 (citations omitted). An officer need only believe that there is probable cause to believe the force is necessary, and as the Court has observed, "the probable-cause requirement: . . . '[D]oes not deal with hard certainties, but with probabilities.'" *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality); *Hill v. California*, 401 U.S. 797, 804 (1971) ("[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . .").

III. AVOIDING FRCP 50 WAIVERS. In *Ortiz v. Jordan*, 562 U.S. 180 (2011) the Supreme Court held that a denial of correctional officers' motion for summary judgment based on qualified immunity was unreviewable on appeal from a final judgment in the case following trial. The Court noted that the petitioners had not sought immediate, interlocutory review of the summary judgment denial and had not renewed their argument by way of a motion for judgment under Rule 50. The Court emphasized that any challenge based on sufficiency of the evidence can only be preserved where a party moves for judgment under Rule 50(a), and then renews the motion post-trial under Rule 50(b).

The Court declined to address the argument that a Rule 50 motion was not required because qualified immunity presented a pure legal issue, finding that the immunity issue actually turned on disputed issues of fact and that their appeal was really a sufficiency of the evidence claim which could be preserved by filing proper Rule 50 motions.

It should be noted that there is a Circuit split on whether a Rule 50 motion is required in order to preserve a purely legal issue for appellate review. The First, Fourth and Eighth Circuits require Rule 50 motions to be filed in order to preserve even a purely legal argument for further review. *Ji v. Bose Corp.*, 626 F.3d 116, 127-128 (1st Cir. 2010); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995); *Lopez v. Tyson Foods Inc.*, 690 F.3d 869, 875 (8th Cir. 2012). However, a majority of the federal circuits, will review a denial of summary judgment that was based on a "purely legal" argument even if that argument was not renewed under Rule 50. See, e.g., *Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012); *Revolution Eyewear Inc. v. Aspex Eyewear Inc.*, 563 F.3d 1358, 1366 n.2 (Fed. Cir. 2009); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Bar-*

ber v. Louisville & Jefferson Co. Metro. Sewer Dist., 295 F. App'x 786, 789 (6th Cir. 2008); *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Banuelos v. Construction Laborers' Trust Funds for So. Calif.*, 382 F.3d 897, 902 (9th Cir. 2004); *Wolfgang v. Mid-America Motorsports*, 111 F.3d 1515, 1521 (10th Cir. 1997)

Because the line between an issue of law and a mixed question of fact and law is often blurry, even if you practice in a jurisdiction that does not require Rule 50 motions to preserve legal issues, the best policy is to make certain that a qualified immunity argument is made at the close of evidence under Rule 50(a), and then renewed in a post-trial motion under Rule 50(b).

III. EVALUATING THE DOWNSIDES OF APPEAL.

Putting aside the relative strength of arguments on appeal, there are many factors to consider in making a decision whether to appeal.

A. Financial Costs.

1. Interest on the Judgment.

For most public entities, the cost of paying interest on a judgment pending disposition of an appeal is a relatively minor consideration. This is because many states limit the rate of interest running on a judgment against a public entity (for example, in California judgments against a public entity bear a 7% rate of interest, as opposed to 10% against private parties), or the general rate of interest on a judgment is minuscule. The latter is true of federal judgments, where the interest rate is set by the T-bill auction rate at the time the judgment is entered. (28 U.S.C. §1961.) Given current interest rates over the last several years, judgments in federal cases have been accruing interest at less than 2% a year.

2. Bond Expenses.

The expense of posting a bond pending appeal is also rarely a consideration for public entities in deciding whether or not to appeal. This is because many states exempt public entities from having to post a bond to secure a judgment. And, where the judgment constitutes a lien on the property of the judgment creditor, federal courts will follow state law in terms of posting a bond to secure a stay pending appeal. (FRCP 62(f).) Where the judgment does not create a lien, the federal court must set an amount of bond, but courts can often be convinced to effectively waive the bond, or set it at an extremely low amount, given the fact that most public entities have little difficulty in establishing that they will be able to pay any judgment. Unlike private companies, public entities rarely go out of business. Moreover, if a bond is required, public entities can often obtain one at very low rates, given the fact that they are unlikely to default on any obligation.

In addition, given the minuscule federal interest rate on judgments, many federal judges are willing to set a very low bond amount—only slightly more than the amount of the judgment—to reflect the fact that so little interest will accrue during the pendency of an appeal.

3. The Record on Appeal.

The record on appeal generally consists of two components, the written documents filed in the trial court—often referred to as the clerk's transcript or clerk's record—and a transcript of the oral proceedings before the trial court, generally referred to as a reporter's transcript. In some states, the clerk's record is essentially the entire lower court file, which may be transmitted to the appellate court for purposes of the appeal. In other states, the parties may designate which documents from the trial court they want collected and submitted to the appellate court, with the appellant paying the initial charge to prepare the documents, although some states exempt public entities from such costs. In other states, and some of the federal circuits, the parties themselves submit an excerpt of record or appendix containing the documents they believe are necessary for proper review of the issues on appeal.

The expense of preparing the written record can vary widely depending upon how large the lower court record is. In cases where the party prepares an excerpt of record or an appendix, there is also the added cost of attorney or paralegal time incurred in preparing the documents for submission to the appellate court.

Preparation of a reporter's transcript for an appeal can be costly. A trial lasting several weeks may result in a reporter's transcript cost of several thousand dollars, depending upon local court reporter rates.

4. Attorneys' Fees.

As with any litigation, the largest potential expense on appeal is attorneys' fees. In many respects, it may be easier to provide an estimate of potential attorneys' fees incurred in prosecuting or defending an appeal than it would be for trial proceedings, because, as noted, the appellate record is fixed. You know how long the trial was, as well as how many documents were submitted to the court, and most experienced appellate attorneys should be able to estimate how much time it will take to review a transcript of a particular length, or go through the necessary documents in preparing arguments for appeal. Similarly, an experienced appellate attorney should be able to estimate how much legal research will need to be done and how long it will take to draft a brief.

Continued on page 37

board case - the policy authorized the presiding officer to:

> 1. prohibit public comments that are frivolous, repetitive, and/or harassing;
> 2. interrupt, warn, or terminate a participant's statement when the statement is too lengthy, personally directed, abusive, off-topic, antagonistic, obscene, or irrelevant;
> 3. request any individual to leave the meeting when that person does not observe reasonable decorum; [and]
> 4. request the assistance of law enforcement officers in the removal of a disorderly person when that person's conduct interferes with the orderly progress of the meeting.

The Sixth Circuit held that the school board's restrictions on "abusive," "personally directed," and "antagonist" statements were unconstitutionally viewpoint based in accordance with two recent Supreme Court cases, *Matal v. Tam,* 137 S. Ct. 1744, 198 L.Ed.2d 366 (2017) and *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–300, 204 L.Ed.2d 714 (2019), involving trademark restrictions that "impermissibly distinguished between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation." In short, the Sixth Circuit held that *Matal* and *Iancu* stand for the proposition that the government may not censor speech merely because it is "offensive to some." *Matal*, 137 S. Ct. at 1763 (quoting *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)).

Signs.
Signs, so long as they don't block anyone's view, should be welcomed. They are most certainly free speech, and holding a sign enables a speaker to express their view without the need to take up precious time at the podium.

Not surprisingly, the school board in *Marshall* prohibited signs, placards, or banners that were "offensive, obscene or otherwise inappropriate… or that contain personal attacks" *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020, at *1 (E.D. Pa. Nov. 17, 2021).

Powerpoints and Video Broadcasts.
If within time limits and not obscene or otherwise violative of any reasonable rule or regulation, it better off allowing powerpoints and video instead of litigating the issue. If a jurisdiction allows video broadcast, there is the risk of "zoom bombing." See, e.g., *Profanity-laced Zoom bombing disrupts Granite Shoals City Council meeting,* DailyTrib, October 29, 2021, (available at https://www.dailytrib.com/2.021/10/29/profanity-laced-zoom-bombing-disrupts-granite-shoals-city-council-meeting/); *Pornographic 'Zoom bomb' disrupts West Springfield Town Council meeting,* MassLive, May 5, 2021 (available at https://www.masslive.com/news/2021/05/pornographic-zoom-bomb-disrupts-west-springfield-city-council-meeting.html); *'Zoombombing' attack interrupts a live Spartanburg city council meeting,* WYFF4, September 15, 2021 (available at https://www.wyff4.com/article/zoombombing-attack-interrupts-spartanburg-city-council-meeting/37608559#). While it is possible for a jurisdiction to cut off the broadcast of inappropriate material, this would place a government employee in the position of judging what is or is not appropriate. This raises the risk of First Amendment liability.

Video Recording.
Prohibitions of recording meetings and livestreaming (ostensibly for safety reasons) could be both a pre-emption of the right of access (recording) and the right of expression (livestreaming with contemporaneous comments). *Knight v. Montgomery Cty.,* 470 F. Supp. 3d 760, 762 (M.D. Tenn. 2020) (remanded); *Zink v. City of Mesa*, 17 Wash. App. 2d 701, 710, 487 P.3d 902, 907, reconsideration granted in part (July 15, 2021), review denied, 198 Wash. 2d 1029, 498 P.3d 961 (2021)(prohibition on video recording violated state open meetings law).

Requiring Speakers to Provide Home Address.
Requiring speakers to state their name and address has been held impermissible. *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021). In *Marshall,* the school board policy which required attendees of board meetings to publicly state their home address before speaking during period for public comment was found to be facially invalid under Free Speech Clause, since being forced to announce to all present attendee's actual home address before speaking on hotly contested issue had chilling effect on protected speech. The court went as far as to say that "The right to free speech encompasses the right to refrain from speaking," and that "compelled speech is subject to same analysis as prohibitions from speaking."

DUE PROCESS - POLICY AND ITS APPLICATION

Due Process.
The Due Process Clause states, "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. An alleged violation of the procedural due process required by this clause prompts a two-step inquiry: (1) whether the plaintiff has shown the deprivation of an interest in "life, liberty, or property" and (2) whether the procedures followed by the government in depriving the plaintiff of that interest comported with "due process of law." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

Violating anyone's rights under the

state or federal constitution is also a violation of substantive due process under the Fourteenth Amendment. Substantive due process claims brought under the Fourteenth Amendment, however, survive only where no other specific constitutional amendment explicitly protects against the conduct alleged. *Graham v. Connor*, 490 U.S. 386, 395 (1989). *Bralley v. Albuquerque Pub. Sch. Bd. of Educ.,* 13-CV-0768 JB/SMV, 2015 WL 13650553, at *1 (D.N.M. Oct. 7, 2015), report and recommendation adopted, CIV 13-0768 JB/SMV, 2016 WL 10590454 (D.N.M. Mar. 15, 2016) (Claims for alleged violation of Plaintiff's substantive due process right under the Fourteenth Amendment should be dismissed because they already have been or should be analyzed under the applicable, specific constitutional amendments and not under the Fourteenth Amendment.)

Substantive due process does not protect against government action that is incorrect or ill-advised; rather, *the protections of substantive due process are available only against egregious conduct which goes beyond merely offending some fastidious squeamishness or private sentimentalism and can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience. Piscottano v. Town of Somers,* 396 F. Supp. 2d 187 (D. Conn. 2005)(emphasis added).

Prohibitions on disruptive, disrespectful speech and conduct are reasonable restrictions meant to further the government's significant interest in conducting orderly, efficient, and productive meetings. But before you adopt such language in a policy, counsel your elected board well on implementation, starting with the fact that the First Amendment protects offensive speakers. The Policy terms invoked to terminate the offensive comments ("abusive" and "personally directed") "prohibit speech purely because it disparages or offends." *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 894 (6th Cir. 2021); *see also Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Applying a policy prohibiting "disrespectful" speech with a heavy hand can land a public body in court. Courts acknowledge that it is impossible to conduct a meeting when people are shouting at each other or when someone won't leave the podium so that the next item on the agenda can be addressed. However, if the microphone is cut off or someone told to leave or is removed solely because of what is being said (or expressed) versus how it is being said or how many times it is being said, trouble can arise. See *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020, at *6 (E.D. Pa. Nov. 17, 2021). The meeting in *Marshall* that gave partial rise to the lawsuit against the school board clearly shows that the plaintiff, Mr. Marshall, was not being disruptive, but was speaking in a normal tone of voice and the only person doing the interrupting was the board's solicitor who cut him off and told him that he "was done" and that he was being "disruptive" or "irrelevant" solely because he called the "equity survey" by the wrong name. Because the evidence showed that the School Board applied the term "disruptive" to disruptive *ideas* rather than disruptive *conduct*, viewpoint discrimination was found to have occurred.

Discretion in applying public speaking policies "must be guided by objective, workable standards" to avoid the moderator's own beliefs shaping his or her "views on what counts" as a policy violation. *Marshall,* citing *Minnesota Voters All. v. Mansky,* 138 S. Ct. 1876, 1888, 201 L.Ed.2d 201 (2018). Despite the policy in *Marshall* expressly requiring the development of "administrative guidelines implementing this policy" including "examples of conduct/behavior that is in violation of this policy," the School Board had not developed any such guidelines.

As important as knowing what the policy is and conducting training or providing examples is following it. In *Marshall,* the school board solicitor didn't follow the board's own policy, which says in essence that [only] "The Board's presiding officer may interrupt or terminate public comments deemed 'too lengthy, personally directed, abusive, obscene, or irrelevant...' and that the presiding officer may also "[r]equest any individual to leave the meeting when that person does not observe reasonable decorum." Instead, it was the School Board's attorney who appointed himself presiding officer and enforcer of the rule on public speakers and cut the plaintiffs off, telling them they "were done."

Arrest.

Under the Fourth Amendment, an arrest must be supported by probable cause. *Manuel v. City of Joliet,* 137 S. Ct. 911, 918, 197 L. Ed. 2d 312 (2017). Generally, council rules of procedure do not have the force of law. If a person is arrested for violating a rule, there must be a clearly articulable criminal violation. *See, e.g., Norse v. City of Santa Cruz,* 629 F.3d 966 (9th Cir. 2010)(en banc)(Probable cause for arrest of an individual who gave a Nazi salute at a council meeting existed under California Penal Code § 903 prohibiting disturbance of a public meeting); *Jones v. Heyman*, 888 F.2d 1328, 1329 (11th Cir. 1989)(probable cause existed for violation of a municipal ordinance prohibiting disruption of city commission meetings); *Commonwealth. v. Franklin*, 2013 Pa. Super 153, 69 A.3d 719, 724 (2013)(probable cause existed to arrest for disorderly conduct). The existence of probable cause will not a preclude a claim for first amendment retaliation if there was an actual conspiracy to suppress a person's speech. *Lozman v. City of Riviera Beach.*, 138 S. Ct. 1945, 1955, 201 L. Ed. 2d 342 (2018).

Continued on page 36

Disruptive Meetings *cont'd from page 35*

Curtailing First Amendment Rights of Other Board Members or Employees. Municipal employees and elected official do not relinquish their citizenship when they take on those roles, so they cannot be denied their constitutional right to speak. *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175 (1976). "Speech by citizen on matters of public concern lies at the heart of the First Amendment, and public employees do not renounce their citizenship when they accept employment." *Knopf v. Williams*, 884 F.3d 939, 952 (10th Cir. 2018).

But there are rules for how much an elected official gets to pontificate: Article VII, Rule 42 of Roberts Rules of Order provides that unless the assembly has a special rule providing otherwise, no member can speak more than twice to the same question on the same day, although merely asking a question or making a brief suggestion is not counted as speaking in debate.

Consider this exchange:

> **Council President Tarlini**: Excuse me, Mr. Mobley. In the Robert's Rules of Order, each Council person is allowed to speak twice on the same subject.
>
> **Board Member Mobley**: That's not true.
>
> **Council President Tarlini:** It is true.
>
> **Board Member Mobley:** (looking to solicitor) Russ, can you give me an opinion on that, please?
>
> **Council President Tarlini:** Mr. Mobley. Mr. Mobley, I have the floor at the moment. I'll tell you what it says.
>
> **Board Member Mobley:** Dictatorship all over again. [applause in the background]
>
> **Council President Tarlini:** Mr. Mobley, I'm reading from the Robert's Rules of Order.
>
> **Board Member Mobley:** It's amazing, Linda. When you want to speak, you always had your opportunity to speak ...

Council President Tarlini then turned off Mobley's microphone "solely because he attempted to speak for a third time regarding the same motion," in violation of Robert's Rules, and not because of any personal animosity or because of the content of his speech, and certainly not because they were running for election against each other.

After a *unanimous* vote approving the motion, plaintiff filed a complaint three weeks later, alleging that the Council President's action in turning off his microphone violated plaintiff's right to free speech under the First Amendment, his right to petition under the First Amendment, constituted official oppression and intimidation, denied him equal treatment in violation of the Fourteenth Amendment, and violated his state constitutional right of free speech under Article I, Section 7 of the Pennsylvania Constitution. *Mobley v. Tarlini*, 641 F. Supp. 2d 430 (E.D. Pa. 2009).

The U.S. District Court for the Eastern District of Pennsylvania ruled that his claims that switching off his microphone amounted to intimidation, oppression, and retaliation for exercising his free speech rights was sufficient to state a claim for First Amendment retaliation. *Mobley v. Tarlini*, 641 F. Supp. 2d 430 (E.D. Pa. 2009). However, the Court also held that the Council President's restriction on the councilman's ability to speak during the portion of the council meeting dedicated to council discussion, pursuant to the rule limiting members to speaking no more than twice on the same issue in the same day, was a content-neutral and permissible restriction on the councilman's ability to speak in a limited public forum. *Id.*

What about a board member speaking about a "matter of public concern"? A reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490 (5th Cir. 2020), *cert. granted*, 141 S. Ct. 2564 (2021). Supreme Court heard argument on this November of last year. The case involves a member of board of trustees for public community college district, alleging that board publicly censured him for criticizing other board members for taking positions that differed from his own concerning an overseas campus, including criticism in robocalls, local press interviews, and a website, and for filing a suit alleging that board was violating its bylaws.

LIABILITY

Government officials performing discretionary functions are generally immune from liability for civil damages so long as their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harris v. City of Valdosta,* 616 F. Supp. 2d 1310 (M.D. Ga. 2009).

A municipality may be held liable under § 1983 if the plaintiff shows that a "custom" or "policy" of the municipality was the moving force behind the constitutional deprivation. but a municipality may not be held liable under § 1983 on the basis of respondeat superior. 42 U.S.C.A. § 1983. *Id.* Official municipal policy, as required for § 1983 liability, includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. 42 U.S.C.A. § 1983. *Knight v. Montgomery Cty.*, 470 F. Supp. 3d 760 (M.D. Tenn. 2020). Punitive damages are not available in § 1983 actions against municipalities and other government entities.

42 U.S.C.A. § 1983. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490 (5th Cir. 2020), *cert. granted*. 141 S. Ct. 2564 (2021).

The burden of proof is on the public body, as opposed to the plaintiff. A speech regulation's defender, not the challenger, bears the burden on the issue of narrow tailoring of regulation to serve a significant government interest, as required by the First Amendment. *Knight v. Montgomery Cty.*, 470 F. Supp. 3d 760 (M.D. Tenn. 2020).

CONCLUSION

Some parting thoughts:

-There is a liberty interest in attending public meetings, and both designated and limited public forums are created at them, allowing for free speech.
-Free speech at public meetings can be abridged by a governmental body so long as any regulations placed on speech are within the constitutional power of the governmental body, and further an important governmental interest in conducting business in an orderly fashion. Reasonable time (limit) place (podium/agenda) and manner (no disruption of the meeting) restrictions are allowed.
-A governmental body should have a policy and should follow it. The body can ignore it if it wishes, but only in favor of free speech.
-Don't adopt policies that prohibit "abusive" or "offensive" speech. Prohibiting "disruptive" speech is okay, though, because it gets at the legitimate governmental interest in not having the orderly conduct of business disrupted.
-Any restrictions that are not directed at disruptive conduct or the orderly administration of the meeting are subject to challenge, and depending on the case and how it is applied, can be shot down.
-Counsel your board members and presiding officers on how--and how NOT--to implement the policy during a meeting.
-Don't forcibly remove anyone from a meeting without probable cause to arrest them. The conduct, as opposed to the speech, must be really disruptive or threatening, not just obnoxious, annoying, or even disrespectful. Thick skins save taxpayer money.
-If someone is kicked out of a meeting, don't ban them from future meetings unless there is probable cause for a restraining order.

NOTES

1. Non-public fora, for First Amendment purposes, encompass government-owned property that hasn't been opened to the public for expressive activity; non-public fora include, but are not limited to, airport terminals, military bases, and jails. McDonald v. City of Pompano Beach, 20-60297-CIV, 2021 WL 3741646 (S.D. Fla. Aug. 24, 2021). ML

Section 1983 *cont'd from page 33*

There may be somewhat more uncertainty with respect to accurately estimating the attorneys' fees that will be incurred in responding to an appeal. This is because those costs are dependent on the size and effectiveness of the appellant's opening brief. An extensive, thorough brief, will obviously require the expenditure of more time in preparing a response, than a cursory brief that raises a few arguments.

In section 1983 cases a public entity must consider not simply what it will pay its attorneys for prosecuting or defending an appeal, but the possibility that it might end up having to pay an opponent's fees on appeal as well. It is not uncommon in some cases to have the liability for attorneys' fees outstrip the actual damage award. See, e.g., *Bravo v. City of Santa Maria*, 810 F. 3d 659 (9th Cir. 2016) (affirming $1 million fee award based on $5,002 judgment).

B. Political Cost/Benefit.

1. Concern About Reinforcing Failure.

Since appeals often come at the end of a case, after a very unhappy result, a common question before pursuing an appeal is whether the public entity is simply throwing good money after bad. Having spent hundreds of thousands, and even in some cases, millions of dollars to prosecute or defend the case through trial, there is always a serious question about whether it is worth continuing to fight.

2. Keeping a Controversial Case in the Spotlight.

Many appeals follow years of litigation between the parties, and often involve highly contentious, political issues. Since very few appeals are resolved within a short timeframe, the reality is that a case may remain pending for many months, even years after judgment in the trial court. Moreover, when the appellate court renders a decision, the case may become "news" again, and depending upon the result, start a cycle of controversy all over again.

3. Maintaining a Reputation for Strong Defense.

Many a weak, if not frivolous appeal, has been pursued in the name of maintaining a reputation for strongly defending or prosecuting a public entity's position. "We don't rollover," or "we stand behind our officers," are phrases that often accompany the filing of an insubstantial, albeit not entirely meritless appeal. Although few opportunistic plaintiffs appear to be deterred from filing questionable suits based upon a reputation for strong defense, nonetheless, there are certainly circumstances in which a public entity must appeal an improper judgment even where the amount at issue may be relatively small. This generally occurs where the case involves an issue of law that is likely to recur, and presents a particularly good vehicle for having an appellate court resolve the issue.

Continued on page 38

4. Could We End Up Worse?
Although it is always difficult to accept an adverse judgment, nonetheless, even in the face of defeat, sometimes you just have to "declare victory and go home." For example, a public entity might have been hit with a rather meager judgment in a case where liability was questionable, and there is a solid basis, at least from a legal standpoint, for seeking a new trial on appeal. In such circumstances, it is important that the public entity evaluate its potential exposure to a larger damage award on remand in the event of a reversal on appeal.

In addition, it is important to remember the axiom "bad cases make bad law." A public entity always needs to assess the risk that it might make bad law by appealing a marginal value case on a problematic record that will adversely affect future cases.

C. Can The Case Settle on Appeal?
1. Settlement Dynamics on Appeal.
It is extremely difficult to settle a case on appeal. In the trial court, the highly uncertain nature of trial drives settlement because neither party can be confident in the ultimate result. Once judgment has been entered, and one party has won and the other lost, that uncertainty evaporates. On appeal, the parties have vastly disparate bargaining power. Even if an appellant has a strong argument to present on appeal, as noted, given the institutional bias of appellate courts in favor of affirmance, few parties responding to an appeal are willing to compromise much in order to resolve the case short of disposition by the appellate court.

Generally, a case will not settle on appeal unless both sides perceive some jeopardy in the case being resolved by the appellate court. For example, a successful plaintiff facing an immunity argument on appeal may agree to a lower amount, in order to avoid being out of court entirely. On the other hand, a plaintiff with a substantial judgment facing an argument on appeal that would result in nothing more than a new trial, may well elect to "roll the dice," figuring that there will always be a chance to engage in settlement negotiations again if the matter ends up returning to the trial court. In addition, the long delay in many appellate courts may prompt a plaintiff to accept a compromise amount simply in order to assure immediate payment of some sort.

2. Appellate Mediation.
The backlog in many appellate courts has prompted some courts to create mediation programs. Sometimes the mediators are local attorneys, other times they may even be appellate court justices, and some federal circuits employ full-time trained mediators in an effort to resolve cases on appeal. As in the trial court, a strong mediator may be very helpful in resolving a case before the parties incur the substantial cost of further prosecuting or defending the action. An appellate mediator who understands the rules and standards governing appeals, may be able to more strongly present reasons why, for example, a responding party should feel some jeopardy on appeal, or why an appellant might be overly optimistic about the chances of success on appeal.

CONCLUSION.
Lawyers who represent local government are very likely to be called upon to defend section 1983 actions, a large percentage of which will result in appeal. The authors offer the above observations and suggestions to assist you in achieving success in those efforts. ML



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IMLA Nominating Committee for 2022 Elections

As required by our By-Laws, IMLA is announcing our 2022 Nominating Committee. In addition to filling vacancies on IMLA's Board of Directors, the Nominating Committee is charged with nominating IMLA officers, including the Treasurer and President-elect. The Committee encourages all those interested in being nominated for vacant positions on the IMLA Board of Directors or for IMLA Regional Vice Presidents to make their interest known to the Committee. It is IMLA's goal to have a Board of Directors that represents IMLA's diversity of gender, race, age, ethnicity, and region. Unlike some other non-profits, IMLA does not require Board members to contribute financially, but does seek persons who are interested in advancing IMLA's mission and in increasing IMLA membership and attendance at IMLA programs.

The Nominating Committee will be conducting phone interviews of interested candidates prior to IMLA's Annual Conference and will introduce its slate of nominees during or prior to the IMLA business meeting. It is important to hear of your interest as soon as possible to conduct phone interviews; the Nominating Committee hopes that you will offer an explanation about how you can advance the mission of IMLA and increase its membership and attendance as well as describe any innovative ideas you may have for advancing the interests of IMLA members.

Please Contact The Nominating Committee Members For Consideration:

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The current copy of IMLA's amended By-Laws, which describe the qualifications for service on IMLA's Board of Directors or other IMLA office, can be found at www.imla.org.

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