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When Experts Construct a Blue Wall: Defending Police Against Code of Silence Claims



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CONTENTS

JULY / AUGUST 2022

WHEN EXPERTS CONSTRUCT A BLUE WALL: DEFENDING POLICE AGAINST CODE OF SILENCE CLAIMS
By: Robert W. Higgason, Senior Assistant City Attorney, Houston, Texas
Allegations that police are protecting one another by refusing to provide information can significantly prejudice a jury. Within the Federal Rules of Evidence are provisions that can be wielded to neutralize and rebut claims of a Blue Wall.
PAGE 6

JUST BECAUSE YOU CAN, DOESN'T MEAN YOU SHOULD: A NEW FRAMEWORK FOR LOCAL GOVERNMENT CENSURES
By: Alexandra Marshall, Class of 2022, George Washington University School of Law
A recent Supreme Court decision upholds the right of a Texas college to reprimand a teacher for incendiary speech and behavior. But in the legislative context, not all criticism or inappropriate comments should be grounds for public censure.
PAGE 10

HOW CAN YOUR CITY OR COUNTY BEGIN FILING AFFIRMATIVE SUITS?
By: Jill Habig, Founder, Public Rights Project; Christine Kwon, 2017-18 San Francisco Affirmative Litigation Project Fellow, Yale Law School; Joanna Pearl, Legal Director, Public Rights Project; Marissa Roy, 2017-18 Deputy City Attorney & Justice Catalyst Fellow, Los Angeles City Attorney's Office; and Palak Sheth, Former Managing Director, Affirmative Litigation Task Force, San Francisco City Attorney's Office.
Steps to building an affirmative litigation capability at the local government level, and doing even more to protect the rights of constituents.
PAGE 14



Cover and Page 6, illustrations by Jose Trujillo

DEPARTMENTS

18 PRACTICE TIPS
Municipal Attorneys as the Key to Successful Project Delivery
By: Steven A. Torres, West Group Law PLLC, White Plains, New York
Legal expertise for the avoidance of project glitches.

27 CASES
Charter Schools, Dress Codes, Section 1983, and *Chevron* Deference
By: Erich Eiselt, IMLA Assistant General Counsel
Chivalry and federal government oversight.

20 PROCUREMENT
Municipal Procurement Law in Canada: Everyone Sings Off the Same Song Sheet
By: Rahul Ranade, Lidstone & Company, Vancouver, British Columbia
Uniformity in provincial procurement regulations.

24 INSIDE CANADA
Windrows and Municipal Liability
By: David Boghosian and Christina Wang, Boghosian + Allen LLP, Toronto, Ontario
An Ontario Perspective on *Nelson (City) v. Marchi*, 2021 SCC 41.

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How Can Your City or County Begin Filing Affirmative Suits?

By: JILL HABIG, *Founder, Public Rights Project;* CHRISTINE KWON, *2017-18 San Francisco Affirmative Litigation Project Fellow, Yale Law School;* JOANNA PEARL, *Legal Director, Public Rights Project;* MARISSA ROY, *2017-18 Deputy City Attorney & Justice Catalyst Fellow, Los Angeles City Attorney's Office; and* PALAK SHETH, *Former Managing Director, Affirmative Litigation Task Force, San Francisco City Attorney's Office.*



INTRODUCTION

Once a public law office commits to assuming the role of lawyer for the community, local affirmative litigation starts with several straightforward steps. This article outlines recommended first steps toward launching an affirmative litigation practice in your city or county.

Editor's Note-This article is excerpted with permission from "Local Action, National Impact: A Practical Guide to Affirmative Litigation for Local Governments," published by Justice Catalyst, Public Rights Project, San Francisco Attorney's Office, and Yale Law School-San Francisco Affirmative Litigation Project. The complete Guide can be accessed at www.publicrightsproject.org.

STEP ONE: Set Your Affirmative Litigation Goals

We believe it is important to be deliberate as you embark upon an affirmative litigation program. The following four goals should animate any local affirmative litigation effort:

Pursue cases that have a nexus to your residents. At heart, the mission of your office is local: Whether you are investigating a national corporation or a local company, you should confront entities that cause harm to your residents. Thus, a key first step to establishing an affirmative litigation program is to generate cases by examining what issues cause harm both to the locality directly and also to the public—your constituency—more broadly. This will show your community that their local public law office is advocating on its behalf, building trust and a foundation for dialogue. Grounding litigation in local harm will also justify the affirmative litigation work that your office does. For example, in 2016, San Francisco used its affirmative litigation power to sue a for-profit university that was unlawfully skirting zoning laws and depriving San Franciscans of hundreds of rent-controlled dwellings.[1]

Fill gaps in the private and public interest law markets. Your office will not be the only one filing lawsuits on behalf of members of your community: legal aid clinics, nonprofits, and private plaintiffs' firms all file litigation to curtail practices that harm communities. Yet, as a public office, you can take advantage of tools that are not available to private plaintiffs. For example, many companies include binding arbitration clauses in their contracts that force employees and consumers to arbitration should a conflict arise. These arbitration clauses heavily favor defendants and can give companies impunity to violate the law knowing that conflicts will be resolved through arbitration rather than in open court.[2] Further, courts have restricted the abilities of private plaintiffs to bring class actions to challenge consumer contracts rendering many cases cost-prohibitive and ineffective.[3]

These restrictions often do not constrain public enforcement. Thus, by using affirmative litigation to take cases that consumers cannot bring themselves, you can put your office's unique position to its best use.

Protect your community's most vulnerable residents. Although legal clinics and nonprofits serve some of our most vulnerable communities, these

organizations rarely have enough resources to sufficiently protect communities of color, low-income communities, immigrant communities, children, LGBT residents, and elderly persons. Your office can become a resource for communities that might not ordinarily have easy access to the legal system.

Tailor your cases to the scope of your authority and your tools. Every city and county public law office has different tools available for affirmative litigation. In some situations, a public law office may realize that litigation is not the right tool to redress unlawful activity. Often sending a letter or initiating an investigation will be sufficient to encourage the business to comply with the law.[4] Alternatively, if your city or county has a contract with a company that is engaging in unlawful conduct, you can leverage that relationship to encourage the company to change its practices.

STEP TWO: Use the Full Scope of Your Local Authority

With your office's overarching goals in mind, evaluate the scope of your authority to ensure you undertake litigation consistent with that authority and that makes the best use of your available legal tools.

As the examples discussed earlier demonstrate, localities rely on a variety of legal authorities in affirmative litigation. For example, San Francisco and Los Angeles have relied primarily on their consumer protection authority to bring litigation—redressing a variety of unlawful, unfair, or fraudulent business practices using California's Unfair Competition Law.[5] New York City relies on aggressive enforcement of its municipal code and other tax laws to promote public health, safety, and welfare. Localities may also be able to proceed under federal law when they can demonstrate sufficient harm from the unlawful conduct to satisfy Article III standing requirements. This section highlights some of the most common sources of authority for local affirmative litigation.

Consumer Protection Authority

Consumer protection laws give public law offices authority to stop predatory business practices. While all states have adopted their own consumer protection laws, most state statutes take their cues from the Federal Trade Commission Act.[6] The FTC Act broadly prohibits unfair and deceptive business practices.[7]

-Unfair business practices are those that cause or are likely to cause substantial harm to the consumer, that the consumer cannot reasonably avoid, and that are not outweighed by countervailing benefits to competition.[8]

-Deceptive business practices are those that are misleading in a material respect, either by making a suggestion or omission that would deceive consumers.[9]

Many states have not only adopted the FTC Act's prohibitions in their own consumer protection statutes, but have also expanded on federal protections. Many, for example, prohibit unconscionable business practices, generally defined as practices that are substantially one-sided and take advantage of the consumer's disadvantages in commercial transactions.[10]

California has additionally classified any business practice that violates other federal, state, or local laws as an act of unfair competition—making any unlawful business act a consumer protection violation.[11]

What makes consumer protection law especially valuable for impact litigation is its breadth and versatility. When local law offices take full advantage of consumer protection law, they can engage in a wide range of public interest litigation. They may engage in prototypical consumer protection cases—combatting deceptive sales tactics, false advertising, or unfair banking and lending practices.[12] But local law offices can also use consumer protection laws to protect residents from business practices that cause other types of widespread harm or threaten residents' well-being.

Protecting Minors

In 2014, the San Francisco City Attorney's Office sued the mobile phone application MeetMe, alleging that the app's distribution of minors' locations to strangers, including sexual predators, was an unfair and deceptive business practice.[13] MeetMe eventually settled with the City Attorney's Office, agreeing to make "groundbreaking" changes to its business model that would better protect children's safety and privacy rights, in addition to paying damages, attorneys' fees, and other costs.[14] Though consumer protection law had not previously been used in this context, it could readily fit this situation, and the case illustrates how consumer protection laws can be leveraged to protect communities even as illegal practices vary and evolve.[15]

To determine whether your office can use consumer protection law for affirmative litigation, evaluate whether your office has standing to enforce the relevant state statutes. Every state consumer protection statute empowers the state's attorney general to enforce its provisions, and some states allow municipal or county authorities to enforce these provisions as well, independently or in cooperation with the attorney general.[16]

Without an affirmative grant of authority by the state's consumer protection statute, it is less likely that a city or county could directly enforce state consumer protection laws without demonstrating a direct harm to the city itself.[17]

Continued on page 16

Affirmative Suits *cont'd from page 15*

After evaluating your standing to proceed under a consumer protection theory, examine your state's consumer protection statute to weigh whether it is the best vehicle for affirmative litigation. Many states have adopted statutes that are purposefully broad and meant to be construed liberally.[18] In a few states, the consumer protection statute limits unlawful conduct to an enumerated list of business practices or includes an intent requirement.[19] Thus, offices should evaluate whether the statute provides the best vehicle for affirmative litigation compared to other tools, including by assessing the facts of any particular potential law violation.

Nuisance Authority

Public nuisance authority gives cities and counties the opportunity to address activities that threaten the health, safety, or welfare of their communities. Unlike consumer protection law, public nuisance abatement has its origins in common law, making it a more widely available cause of action. While the definition of a public nuisance varies by jurisdiction, the term is generally understood as "an unreasonable interference with a right common to the general public" such as "the public health, the public safety, the public peace, the public comfort or the public convenience."[20]

The main advantages of public nuisance law are its long history, broad availability, and flexible application. Public nuisance is a well-established cause of action that has been recognized by courts for over a century.[21] The U.S. Supreme Court has recognized that the right to abate public nuisances is inherent in the notion of territorial sovereignty.[22] Thus, the standing problems that municipalities may face when enforcing consumer protection laws do not typically apply in the public nuisance context.

As a result of this broad authority, states and cities have been able to use the law of public nuisance to combat a variety of harms, from air pollution to the sale of diseased meats to the dangerous storage of combustible materials.[23]

For example, a coalition of ten cities and counties in California used their public nuisance authority to sue three major paint manufacturers for using toxic amounts of lead in their paint and endangering residents' (particularly childrens') health.[24] In this way, cities and counties can use public nuisance law similarly to consumer protection law as a tool to combat a wide range of practices that harm members of their communities.

Cities can also use public nuisance law in ways beyond the scope of consumer protection law. For example, in 1997, the Los Angeles City Attorney's office established the nation's first Citywide Nuisance Abatement Program (CNAP) to use civil nuisance abatement as a tool for public safety in collaboration with other municipal agencies like the Los Angeles Police Department and Los Angeles Department of Building and Safety.[25] In 2016, CNAP was responsible for shutting down a property used by a white supremacist gang for drug trafficking.[26] Through public nuisance affirmative litigation, the Los Angeles City Attorney's Office has combatted illegal drug, weapon, and human trafficking, as well as other violent activity.[27]

Public nuisance law can continue to evolve to meet local needs as cities and counties define its scope. All states have adopted their own statutes defining public nuisance,[28] but many states allow municipalities to define public nuisances as well.[29] If your city or county has the ability to expand the definition of public nuisance, you can also consider working with local legislators so that public nuisance doctrine can be tailored to fit your affirmative goals and the needs of your community—noting, of course, that the scope of your public nuisance authority will be limited by state and federal preemption norms.

Code Enforcement Authority

All city and county offices have the authority to enforce local ordinances within their jurisdiction. While local ordinances may not prohibit as broad a range of harmful conduct as state statutes or common law, local law offices can equitably enforce these ordinances to combat harms that businesses may inflict on the community. For example, as previously mentioned, New York City has effectively enforced its municipal code provisions to protect residents by, for example, aggressively enforcing its tax provisions against tobacco companies.[30] Oakland has successfully enforced its minimum wage ordinance to protect workers' rights to receive overtime pay and sick leave.[31] Additionally, as your office sets the goals for its affirmative litigation to address the greatest harms to your community, you can work with local legislators to enact ordinances targeting the misconduct you hope to combat—again keeping in mind state and federal preemption limitations.

Federal Law Authority

Cities may also have the ability to enforce certain federal laws. For example, as discussed above, in Bank of America Corp. v. City of Miami, the U.S. Supreme Court held that the city of Miami had standing to enforce the Fair Housing Act as a standalone plaintiff against banks discriminating against people of color throughout the city.[32] Baltimore, San Francisco, and Oakland sued fossil fuel companies seeking to enforce the application of federal common law

in a state public nuisance action.[33] The claims brought by San Francisco and Oakland were dismissed by the federal district court and appeal is pending before the Ninth Circuit.[34] While it is uncommon for localities to enforce federal law, municipalities have been able to do so in some cases where there is concrete harm to the city. Enforcing federal law through local affirmative litigation is in most cases a novel—and thus inherently uncertain—strategy, but it could also greatly benefit local residents.

Remedies

The final issue to consider in evaluating the various potential bases of legal authority for your affirmative litigation are the remedies available under each approach. As discussed above, the key goal of a local affirmative litigation practice is to benefit the community and the local jurisdiction. Remedies to achieve that goal would include both injunctive relief to protect future victims and restitution to make past and current victims whole. Civil penalties or attorney's fees can also help make an affirmative litigation practice sustainable for a local office. Evaluating available relief under each potential statute or common law theory, along with the factors discussed in this section, will help your office determine the best approach in each case.

STEP THREE: Find Your First Cases

Once you have set your affirmative litigation goals and determined the scope of your enforcement authority, you can put them into action on behalf of your community. There are myriad ways to find cases and no universal set of instructions. At the most basic level, this exercise involves identifying problems that exist in your community and applying the available laws to solve them. This section offers some places to start, but your office should think creatively and strategically as it identifies cases.

Take advantage of the data you already have. Cities and counties keep data on a variety of local phenomena. Especially useful is data on resident complaints or grievances filed with other city departments, including the city council and the mayor's office. For example, if workers complain of minimum wage violations, those complaints may provide clues for your office to begin investigating broader business violations. In addition to local data that your city collects, other sources like the Better Business Bureau and federal agencies make available information that can be useful to your case planning efforts. The Consumer Financial Protection Bureau currently keeps a public log of all consumer complaints that can be filtered by location, allowing your office to learn about complaints from your residents.[35] The Federal Trade Commission also maintains a free database of millions of consumer complaints related to a variety of potential law violations, including identity theft, telemarketing scams, advance-fee loans and credit scams, immigration services, and debt collec-

Continued on page 28



Affirmative Suits *cont'd from page 17*

tion.[36] The FTC database is available to local law enforcement agencies who become members of its network.

Partner with local advocates. Community-based organizations and other government entities likely know of issues or case ideas that you could address. Legal clinics see clients victimized by repeat bad actors. Community-based nonprofits and organizers that work with marginalized communities can shed light into the recurring difficulties they face as a result of unlawful and predatory conduct. Labor unions track employer abuses in different industries. State attorneys general and federal agencies possess numerous complaints and case ideas but often have insufficient resources to address or pursue them. And, of course, other cities that have already started affirmative litigation practices would be a great resource. Building partnerships with these local community-based organizations and coalitions will give you additional ideas on how to get started and help you establish your office as a trustworthy channel for advocating on behalf of the community. This visibility will also make it more likely that residents may reach out directly to your office with tips and complaints that might yield a case.

Follow the reporting. As simple as it may sound, news reports often provide ideas for new cases. Local reporters often have relationships in the community and scout for new stories, so their coverage can provide insight into unlawful conduct affecting residents. National news outlets—especially those that specialize in investigative reporting like Vox, ProPublica, or Mother Jones—may identify widespread practices that your office can investigate locally. In addition to scouring national and local news sources and following Twitter and other social media outlets, topical reports published by groups like the National Consumer Law Center can also alert your office to potentially unlawful conduct. Sign up for alerts from organizations and think tanks focused on the problems you have identified in your locality as a way to stay informed.[37]

Encourage your staff to generate proactive work. A key aspect of a successful affirmative litigation function is an entrepreneurial staff. Encourage the staff working in your office to take ownership of identifying local problems—or national problems existing at the local level—that your office can seek to address. Everyone in the office—lawyers and non-lawyers alike—should be encouraged to seek out problems requiring public protection and to suggest them for consideration. In addition to the sources outlined above, ideas can come from existing investigations, partner agencies, or conversations your employees have in their communities. They can also come from cases your office is defending that illuminate third-party misconduct the city could confront in a plaintiff capacity.

STEP FOUR: Sustain and Grow the Capacity for Affirmative Litigation
After your office has begun to investigate and file cases, it is important to establish the infrastructure to sustain a steady stream of impactful matters. Designate sufficient resources and personnel who focus solely on affirmative litigation. If possible, devote a portion of any civil penalties or other monetary recovery to future affirmative litigation so that successful cases can generate reinvestment in the public good. Finally, as the office works on active affirmative cases, be mindful of brainstorming ideas for litigation, so that a new case is ready to file when an old one concludes. Keep in mind that not every new idea results in litigation, so a pipeline of ideas and investigations is important for sustained impact. Particularly helpful to keeping a steady stream of litigation is maintaining partnerships with community groups, including local law schools.

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Cases *cont'd from page 27*

which they wear their unisex physical education uniforms.

Decision Below:
The district court concluded that CDS, in imposing and implementing the skirts requirement, was a state actor for purposes of the Equal Protection claim brought under Section 1983. That court found that CDS' provision of a free, public education is a function historically and exclusively performed by the state and that, therefore, CDS' conduct fairly was attributable to the state of North Carolina. However, the lower court concluded that RBA did not have a sufficiently close tie to the state to qualify as a state actor.

On the Equal Protection claim, the court held that the skirt requirement violates the Equal Protection Clause and granted summary judgment to the plaintiffs. But it reached a different conclusion regarding the Title IX claim, holding that dress codes categorically are exempt from Title IX's prohibition against gender discrimination. The court reasoned that when the United States Department of Education rescinded a prior regulation governing dress codes, the Department reasonably had concluded that Congress did not intend for such policies to be subject to Title IX. The defendants were granted summary judgment on the Title IX claim.

A panel of the Fourth Circuit reversed the district court's judgment on both the Equal Protection and the Title IX claims. That decision was in turn vacated by a vote of the full Circuit Court, which then considered the appeal en banc.

Appeal - State Action:
The Supreme Court has identified various circumstances in which a private actor may be found to have

Continued on page 37