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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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Success in Section 1983 Appeals—Litigation Tips and Strategies

TIMOTHY COATES and TED XANDERS,
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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



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

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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